Life Goes On: Curing defaults at the end of the case and the current state of the case law.

Table of Contents and Discussion Points

A. Pre-Confirmation Issues impacting the Length

1. *In re Kinne*, 2020 WL 5505912 (Bankr. E.D. Mi. 2020) (Case No. 19-49692)
2. In re Batoha 2022 WL 1310943 (Bankr. E.D. Mi. 2022) (21-31487).

B. Post-Confirmation Issues Impacting Plan Length

1. Shortening the Length of the Plan

   a. 11 U.S.C. §1329(a)2
   b. *In re Ellison* 620 B.R. 594 (E.D. Mich. 2020)
   c. In re Luman 2017 WL 521518 (Bankr. E.D. Mi. 2017) (15-54207)

C. Hardship Discharge or Plan Modification to reduce plan term?

1. 11 U.S.C. §1329(b) and In re McGaughy (15-54779, bench op. (Bankr. E.D. Mich. Apr. 24, 2020)

D. 60 months may mean the rest of your life, or longer

1. Bankruptcy Rule 1016

E. Plan Expiration Issues

1. *In re Escoe* (16-52895, Bank. E.D. Mich. June 3, 2022)
2. Touroo v. Terry (In re Touroo), No. 18-13365, 2019 WL 2590751 (E.D. Mich. June 25, 2019)
3. *In re Lee* (16-53256, Sept. 6, 2022 E.D. Mi.)

Plan Length Issues

Pre-Confirmation Issues impacting the Length

Plan payments are required to commence within 30 days of filing pursuant to 11 U.S.C.§1326(a)(1). Our model plan provides that the plan length is calculated from the date of entry of the Order Confirming Plan, making a 60-month plan require at least 62 months of payments, and more in the event of any adjournments.

It is possible to change the model plan to provide that the Plan commences on the date the first payment is due, as discussed and approved by Judge Randon in *In re Kinne*, 2020 WL 5505912 (Bankr. E.D. Mi. 2020) (Case No. 19-49692). In this case, it made a meaningful difference for the Debtors because the case was confirmed approximately 14 months after filing. The wage-earning Debtor was 62 years old, held a physically demanding job as a Chrysler Machine Operator, and the change in the commencement date, proposed in an amended plan after multiple adjournments, meant that Debtors would only have to make 46 more monthly payments.

However, most Debtors benefit from the additional time and funding of pre-confirmation payments under our model plan for various reasons, including not having to increase their payments when secured or priority claims are higher than scheduled, long term (mortgage) payment increases post-confirmation, or missed payments that can be excused with a plan modification.

The additional time and funding did not provide a benefit to the Kinnes, whose plan provided for direct payments on all secured claims, had no priority claims, and the original plan estimated over $17,000.00 would be paid to unsecured claims.

The Court explained that "applicable commitment period" and the "effective date of the Plan" are separate concepts not bound by one another and concluded that the applicable commitment commences with the date the first payment under the Plan is due under 11 U.S.C. §1326(a)(1). The Court also acknowledged that it cannot vacate Administrative Order 17-04 adopting our current model plan which provides that the applicable commitment period commences the date of confirmation.

Debtor's attorneys should note that to make this change, the Plan language should be changed in two places: Paragraph II.A. of the Plan and Section V.J. in the cloud provisions.

In another case in our District, the Debtor changed Section V.J. of the plan, not to change the effective date of the Plan, but to provide that "all amounts remitted pre-confirmation shall be credited and applied to amounts coming due after the date of entry of the Order Confirming Plan". *In re Batoha* 2022 WL 1310943 (Bankr. E.D. Mi. 2022) (21-31487).

In this case, Judge Applebaum read this provision as an attempt by the Debtor to have it both ways: the benefit of the longer term provided by the model plan's commencement date and the benefit of the additional payments made pre-confirmation, without any of the detriments. The Court stated that the Debtor could have changed the date of commencement of the Plan to the date the first payment was due, as done in *Kinne*, but could not make this proposed change because, under the Court's reading of the provision, the Plan could complete in less than 60 months from confirmation if Debtor made 100% payments both pre- and post- confirmation totaling 60 months, but have additional time afforded by the commencement date at confirmation if Debtor missed plan payments after confirmation. The Debtor must pick their commitment period.

Post-Confirmation Issues Impacting Plan Length

Shortening the Length of the Plan

11 U.S.C. §1329(a)2 provides that the plan may be modified to "extend or reduce the time for such payments", which should allow a plan to be modified, when the applicable commitment period is only 36 months but confirmed for a longer term, to reduce the term of a confirmed plan. At the same time, 11 U.S.C. §1327 "precludes modification of a plan to address issues that were or could have been decided at the time the plan was originally confirmed." *In re Ellison* 620 B.R. 594 (E.D. Mich. 2020) (19-50407) citing *In re Storey* 392 B.R. 266 at 272 (B.A.P. 6th Cir. 2008).

In *Ellison*, Judge Shefferly did not find any justification that persuaded him to exercise his discretion when the Debtor conceded that the only reason for reducing the Plan from 60 months to 36 months was that the attorney had erroneously proposed a 60-month plan when only a 36-month plan was required. Therefore, this issue was res judicata and could not be relitigated in a plan modification post-confirmation.

The Court also held that a change in circumstances was not required under 11 U.S.C. §1329, but is at the discretion of the Court. In practice, a change of circumstances is often necessary to persuade the Court to exercise its discretion and perhaps to show that the modification is not contrary to the binding effect of confirmation pursuant to 11 U.S.C. §1327.

In a similar case where a 60-month plan was proposed erroneously and confirmed when a 36-month Plan would have been feasible, Judge Randon granted the modification to reduce the term of the plan. *In re Luman* 2017 WL 521518 (Bankr. E.D. Mi. 2017) (15-54207). In this case, the Debtor's health issues, which were present at the time of confirmation, had deteriorated significantly causing Debtor to struggle to go to work each day. The expectation was that he would cease working as soon as he was no longer required to make plan payments.

Hardship Discharge or Plan Modification to reduce plan term?

While a loss of income such that it reduces Debtor's disposable income to zero (or a deminimus amount) may appear to justify shortening the term of the plan, it may instead qualify the Debtor for a hardship discharge under 11 U.S.C. §1329(b). In a bench opinion, Judge Shefferly denied a plan modification seeking to reduce the term of the plan when Debtor's amended Schedules I and J showed disposable income of one penny. *In re McGaughy* (15-54779, bench op. (Bankr. E.D. Mich. Apr. 24, 2020).

11 U.S.C. §1328(b) provides that a Debtor may be granted a limited discharge despite not completing payments under the terms of a confirmed plan if:

"1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;
(2)the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and
(3)modification of the plan under section 1329 of this title is not practicable."

The Trustee argued that by requesting a reduction in the term of the Plan, the Debtor in *McGaughy* was really asking for a hardship discharge. The Trustee posited that Debtor could continue plan payments at $1.00 per month and possibly become entitled to tax refunds that are required to be paid into the plan, or even possibly find employment that would allow Debtor to increase plan payments. The court agreed and denied the proposed Plan Modification. But the

Court also agreed that Debtor had met the requirement of a hardship discharge and granted an oral motion by Debtor's counsel at the hearing.

In that case, the Debtor was able to obtain the needed relief, but it leaves the question of what makes a plan modification to reduce the Plan length "not practicable". Trustee argued that Debtor qualified for a hardship discharge as a reason to deny the proposed Plan Modification to reduce the plan length by arguing that Debtor could get a Plan Modification approved that would reduce plan payments to $1.00 per month instead of reducing the Plan length. But this proposal must have actually been "not practicable" since Trustee argued that Debtor should be entitled to a hardship discharge.

When 60 months becomes the rest of Debtor's life, or longer

The death of a Debtor is not uncommon during a 60-month plan, which often results in dismissal of the case. But, in some cases, opening a probate estate to continue the Plan or seek a hardship discharge may be appropriate. Bankruptcy Rule 1016 provides that in the event of the death of a Debtor in a Chapter 11, 12, or 13:

"….the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred."

In practice, when a Debtor's estate intends to continue payments to complete the Plan and obtain a standard discharge it is important to be prepared to file a Motion to excuse the requirement of Certificate Regarding Domestic Support Obligations under L.B.R. 4004-1 and, if not filed prior to death, the financial management course under 11 U.S.C. 1328(g)(1). In a Motion for a hardship discharge, the court will not enter an Order until the financial management course is filed, so it may be appropriate to combine a Motion to excuse this requirement with the Motion for Hardship Discharge.

Plan Expiration Issues

A common issue is a plan that expires without having met all of the plan terms, resulting in a Motion to Dismiss and/or the need for a Plan Modification after the term of the Plan expires. 11 U.S.C. §1329 allows a plan to be modified any time after confirmation, but "before completion of payments under such Plan".

In these circumstances, payments and disbursements may need to be made after the 60-month term of the Plan has expired to make the Debtor eligible for discharge. In some cases, a small default in Plan payments or a small sum required for feasibility can be paid after plan expiration by stipulation with the Trustee to pay those funds by a date certain and authorizing Trustee to disburse the funds post-plan expiration.

However, recently, Judge Tucker sua sponte denied entry of such an order that provided Debtor to pay $195.00 post-plan expiration needed for distribution to secured claims in order for Debtor to be eligible for discharge. *In re Escoe* (16-52895, Bank. E.D. Mich. June 3, 2022), ruling that the Order "would make the Plan exceed the 5-year maximum period in 11 U.S.C. §1329(c)", consistent with his rulings in other cases that no payments made after expiration of the 60-month term may be distributed to satisfy the terms of the Plan.

Judge Tucker's similar decision was previously overturned by the District Court. *Touroo v. Terry* (*In re Touroo*), No. 18-13365, 2019 WL 2590751 (E.D. Mich. June 25, 2019). Judge Tucker noted in Escoe that the *Touroo* District Court decision was not binding on the Court in any other case.

In *Touroo*, Debtors' 60-month plan expired on July 31, 2018 and on August 23, 2018, the Trustee filed a Motion to Dismiss for failure to pay the 2017 tax refund in the amount of $1,417.00. The refund posted to the Trustee's records on August 27, 2018.

The Court conditionally granted Trustee's Motion to Dismiss, giving the Debtors 14 days to either file a proposed plan modification to excuse required payments or a Motion for a hardship discharge. Within 14 days, Debtors file a Plan Modification seeking to change the first payment due to one month after the Plan was confirmed, thereby changing the expiration date of the Plan to one-month later, which would make the tax refund paid timely. Judge Tucker denied the Plan Modification because it would violate 11 U.S.C. §1329(c) and dismissed the case. It also seems like a post-confirmation change in the commencement date of the Plan raises the issues of res judicata and when the effective date of the Plan commences discussed in *Ellison* and *Kinne.*

The district court reversed Judge Tucker's decision to dismiss the case and held that bankruptcy courts do "have the discretion to allow debtors to cure defaults after the end of the five-year period." *Touroo* at 10.

The district court adopted the reasoning in *In re Klaas*, 858 F.3d. 820 (3d. Cir. June 1, 2017), which was an appeal by creditors of the lower court's denial of their Motion to Dismiss. The appeals court rejected creditors argument that accepting payments post-plan expiration violated 11 U.S.C. §1322 which provides that a court may not approve a plan that is more than 5 year and 11 U.S.C. §1329 which provides that a post confirmation plan modification that exceeds 5 years may not be approved.

The *Klaas* court instead stated that the relevant issue was whether the court could deny a motion to dismiss and/or grant a discharge when there is a shortfall at the end of the plan term that the debtor is willing and able to cure. It reasoned that 11 U.S.C. §1307 provides that a court "may" dismiss a case for cause, but is not required to. The court further looked to the purpose of the statute, which seeks to encourage debtors to enter into a payment plan instead of a Chapter 7 liquidation, and further cited congressional intent that imposed a 5-year limit to protect the debtor from "indentured servitude" that longer periods may become:

"This time limitation for Chapter 13 plans reflects congressional concern that debtors were being forced into lengthy payment terms, which it viewed as "the closest thing there is to indentured servitude" because such plans do not "provide the relief and fresh start for the debtor that is the essence of modern bankruptcy law." *Klaas*, 858 F.3d at 830 (citing H.R. Rep. No. 95-595 at 117 (1977))".

Therefore, the time limit was meant to be a shield to protect debtors, not a sword. Further, the court agreed with the Bankruptcy Court in this case that denying debtors the opportunity to cure a default after a lengthy track record of payment would "impose a standard of perfection at the conclusion of the plan term that does not exist at any other point in the case."*Klaas* at 831, citing *In re Klaas I* , 533 B.R. 482, W.D. Penn. 2015, at 487. Finally, the Third Circuit Court concluded that doing so would lead to absurd results by both denying debtors who substantially complied with the plan the benefit of a Chapter 13 discharge and depriving creditors of distributions just because

payment was late. *Klaus* at 831.

The court in *Klaus* ruled that 5 non-exhaustive factors should be considered when deciding to allow a grace period for Debtors to cure a default post-plan expiration:

1) debtor substantially complied with the plan, including the debtor's diligence in making prior payments;
2) the feasibility of completing the plan if permitted, including that length of time needed and amount of arrearage due;
3) whether allowing a cure would prejudice any creditors;
4) whether the debtor's conduct is excusable or culpable, taking into account the cause of the shortfall and the timeliness of notice to the debtor; and
5) the availability and relative equities of other remedies, including conversion and hardship discharge. *Klaas* at 832.

Upon remand in *Touroo*, Judge Tucker held that the Debtor met 4 of the 5 factors and therefore denied the Motion to Dismiss.

In a recent opinion by Judge Gretchko, the court reviewed both the granting of a motion to dismiss and denial of a plan modification in her opinion on a motion for consideration. *In re Lee* (16-53256, Sept. 6, 2022 E.D. Mi.). The court concluded that the failure to timely provide copies of the debtor's tax returns until expiration of the plan was a material default that justified dismissal. The court did not apply the factors utilized in *Klaas* and *Touroo*.

The opinion does raise another issue related to plan length: the application of the automatic extension provision in paragraph II.A. of the model plan which provides:

"If the Plan has not been completed in the minimum Plan length, the Plan length shall be extended as necessary for completion of the requirements of the Plan; provided that in no event will the Plan term continue beyond 60 months from the date of entry of the Order Confirming Plan."

Debtor's plan was confirmed for 36 months, but continued to the 60-month maximum because the Debtor did not provide tax returns to show whether or not he received refunds that were required to be paid the plan. The court states in the first paragraph of the opinion that "when the Debtor failed to complete all the Plan payments in 36 months, the Plan length was automatically extended to 60 months." *L*ee at 1, which appears to conclude that on the day after the 36-month plan expiration, the plan length became 60 months.

It is unclear if Debtor's counsel argued or if the court considered the term of the extension "as necessary for completion of the requirements of the Plan". If applied, it appears that Debtor paid more than the amount of the 3 years of tax refunds due under the term of the confirmed 36-month plan during the additional 24 months of payments (according the numbers presented in oral argument). Under this application of the provision, Debtor's failure to provide return was detrimental to him and benefited his creditors by providing a greater dividend than if he had provided his returns and paid the refunds timely.

This opinion may require Debtor's counsel to clarify the language in paragraph II.A. of the Model Plan, otherwise an extended Plan under this provision may be interpreted in a way that continually moves the goal post for the Debtor as additional tax refunds are received and/or payments are missed during the automatic extension, instead of being applied "as necessary for

completion of the requirements of the Plan".

The Court also stated that when the proposed Plan Modification was filed post-plan expiration "there was no plan in existence to modify", relying on *In re Sanchez* (2016 WL 6127507, Bankr. S.D. Fla. Oct. 20, 2016) in which the court noted that the court could not modify an expired Plan. Therefore, Debtor's attorneys should be prepared to argue this issue and the application of 11 U.S.C. §1329(a) that provides that" [a]t any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor….." when, like in this case, a Plan Modification is proposed after expiration of the 60-month term, but "before completion of payments under such plan" as provided in the statute.

Life Goes On: Post-petition life events such, inheritance, assets, appreciation, etc.

Table of Contents and Discussion Points

I. Is there a duty to disclose?

A. Disclosure Generally

1. Debtor has an affirmative duty to disclose all of their assets to the bankruptcy court. (11 U.S.C.S. § 521(a). Section 521(a)(1)(B)(i))

B. Ongoing Duty

1. Debtor's Duty to Disclose is ongoing through the bankruptcy case. *(Kimberlin v. Dollar Gen. Corp., 520 Fed. Appx. 312, 2013 WL 1136563 (6th Cir. 2013*)

2. *In re Haddad, Case No. 12-67595 (Bankr. E.D. Mich. Sep. 5, 2017)*

3. *USCS Bankr R 1007 h. – Amendment to the Federal Rule*

II. Pre- and post-petition assets, interplay between 541 and 1306, post-petition sale of property, when proceeds exceed exemptions

A. Property of the Estate

1. § 541(a)(5)

2. § 1306(a) how does 1306 go beyond and modify § 541?

B. **Statutory conflict: Is 541's 180-day limitation extended by 1306?**

1. In re Sizemore, No. 09-61064, 2013 Bankr. LEXIS 5141, 2013 WL 6328260 (Bankr. E.D. Ky. Dec. 5, 2013)

2. *Carroll v. Logan, 735 F.3d 147, 151 (4th Cir. 2013)* - Issue of statutory construction

III. Post-petition sale of property & Appreciation Issues

A. CH 13- In re Larzelere, 633 B.R. 677

1. Effect of 1327 (c) – Vesting of property in the Debtor at confirmation
   a. 4 theories & approaches establishing estate property (Harmonizing 1306 and 1327.

B. **Appreciation Chapter 7 & Estate Property**

1. CH 7 Converted from 13 - In re Castleman, 631 B.R. 914,
2. CH 7 Converted from 13 – Adams
3. CH 7 Converted from 13 – Castillo

IV. Role of 1329 & Post-petition Property

A. § 1329 - Modification of plan after confirmation

1. Mechanism for treating or otherwise accounting for "windfalls" or acquisition of assets disclosed pursuant to $1306.

2. Debtor's Duty to Disclose, does that extend to any Duty to Modify?

3. Effect of a request for Modification: § 1329(b) pulls in 1325 (a)(4)

I. DUTY TO DISCLOSE

A. A debtor's duty to disclose assets is clearly laid out in the code. Generally speaking, a debtor has an affirmative duty to disclose all assets and interests to the bankruptcy court. This is specifically accomplished by the filing of schedules required by *11 U.S.C.S. § 521(a)(1)(B)(i)*. These requirements are applicable from the moment the case is commenced. However, the question arises: whether or not these duties persist and if so, for how long? The very nature of a chapter 13 plan means three, maybe even in the rare occurrence, seven years, will pass before a plan will complete. During that time, it is possible for a typical plan to undergo potentially many changes between start and finish.

B. The answer to this question is seemingly; yes. In our circuit, the 6th Circuit has opined that a debtor's duty to disclose persists throughout the life of his or her case. It's otherwise and ongoing, affirmative duty to keep the court the trustee and creditors notified of any interest that may arise during the life of the case.

1. **Kimberlin v. Dollar Gen. Corp., 520 Fed. Appx. 312, 2013 WL 1136563 (6th Cir. 2013)** In *Kimberlin*, the Debtor appealed a decision of the Southern District of Ohio District court that prevented the claimant from pursuing her Ohio public policy tort claim against her former employer. The District Court found that judicial estoppel barred the employee's claim. The decision stemmed from the debtor's failure to disclose her potential interest in an EEOC cause of action. That failure, the court opined, deprived the bankruptcy trustee, the court, and the creditors, the opportunity to consider the impact or value of the cause of action had to the estate or its creditors. In applying the principals judicial estoppel, the Court described what it characterized as "the importance of the bankruptcy debtor's affirmative and ongoing duty to disclose assets, including unliquidated litigation interests." citing White v. Wyndham Vacation Ownership, Inc., 617 F.3d 472. The failure of the debtor to update and otherwise disclose her cause of action to the

bankruptcy court was the primary basis for the denial of her claim.

2. **In re Haddad, Case No. 12-67595 (Bankr. E.D. Mich. Sep. 5, 2017)**

In Haddad, the court is faced with a dismissed, but not yet closed chapter 13 case. The issues of interest are being discussed against the backdrop of a debtor who failed to list a post-petition cause of action which arose from an automobile accident. The cause of action arose post-petition, but prior to the confirmation of the plan. At all relevant times, the debtor failed to amend her petition or schedules or otherwise disclose the existence of her claim despite pursuing the claim on her own. Years later, debtor's interest in the accident claim came to light after the settlement administrator contacted the chapter 13 trustee. The Settlement administrator advised the trustee of the value of the settlement claim in the amount of $764,880.40. This event caused the chapter 13 trustee to seek modification of the plan to allow for administration of the settlement which would have provided a plan that would yield 100% dividend to unsecured creditors as well as allow the debtor to retain over $700,000 proceeds from her accident. In response to the trustee's modification, the debtor sought to dismiss her chapter 13 case. The Debtor's request for dismissal of her Chapter 13 was approved. However, in response, the Trustee filed a motion which sought to vacate the order of dismissal from which this opinion arose.

In the relevant portions of his opinion, the court; citing Browning v. Levy, 283 F.3d 761, 775 (6th Cir. 2002) reiterated that debtors "have "an affirmative duty to disclose all of [their] assets to the bankruptcy court." *Id at 775*. This disclosure is accomplished by the filing of schedules as required by § 521(a) of the Bankruptcy Code. Section 521(a)(1)(B)(i) which requires a debtor(s) to file a schedule of all assets. "It is well settled that causes of action are among the assets that must be disclosed on a debtor's schedules." Johnson v. Lewis Cass Intermediate Sch. Dist. (In re Johnson), 345 B.R. 816, 822 (Bankr. W.D. Mich. 2006). The court also reiterated a conclusion from the *Kimberlin* court, which comprised "debtor's affirmative and ongoing duty to disclose assets" This duty, combined with the Debtor's repeated failure to disclose her interest in the litigation, constituted sufficient cause for the court to craft an equitable solution to the Debtor's breach of duty that deprived the Court, Trustee and Creditors from being able to assess the value and impact of the accident claim to the estate. The court

elected to amended order dismissing debtor's case and allow for a manifestly more equitable result, which included the allowance of the trustee to administer settlement funds sufficient to pay creditors in full.

3. ***Effective 12/01/2022: USCS Bankr R 1007 h.*** Lists, Schedules, Statements, and Other Documents; Time Limits. The Supreme Court has adopted amendment to the federal rule bankruptcy procedure 1007 (h). The amendment change is the rule to provide the following:

(h) INTERESTS ACQUIRED OR ARISING AFTER PETITION. If, as provided by § 541(a)(5) of the Code, the debtor acquires or becomes entitled to acquire any interest in property, the debtor shall within 14 days after the information comes to the debtor's knowledge or within such further time the court may allow, file a supplemental schedule in the chapter 7 liquidation case, chapter 11 reorganization case, chapter 12 family farmer's debt adjustment case, or chapter 13 individual debt adjustment case. If any of the property required to be reported under this subdivision is claimed by the debtor as exempt, the debtor shall claim the exemptions in the supplemental schedule. This duty to file a supplemental schedule continues **even after the case is closed, except for property acquired after an order is entered:**

(1) confirming a chapter 11 plan (other than one confirmed under § 1191(b)); or

(2) discharging the debtor in a chapter 12 case, a chapter 13 case, *or a case under subchapter V of chapter 11 in which the plan is confirmed under § 1191(b).*

II. Pre and post-petition assets, interplay between § 541 and § 1306, post-petition sale of property, when proceeds exceed exemptions

A. 11 U.S.C. § 541(a)(5) provides:

> (5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date –
>
> **(A)** by bequest, devise, or inheritance;
>
> (**B)** as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or
>
> **(C)** as a beneficiary of a life insurance policy or of a death benefit plan.

B. 11 U.S.C. § 1306(a) provides:

> **(a)** Property of the estate includes, in addition to the property specified in section 541 of this title—
>
> **(1)** all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first; and
>
> **(2)** earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.
>
> **(b)** Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

C. Conflict of Statutory Construction:

11 U.S.C. § 1306(a) applicable in Chapter 13, appears to modify § 541(a) to effectively

sweep in property of the type contemplated by §541, but at *any time* during the chapter 13 plan and in so doing, creating a statutory conflict with §541's 180-day limitation on after-acquired property.

1. **In re Sizemore, 2013 Bankr. LEXIS 5141** (majority view within the 6th circuit) In *Sizemore*, a post-petition debtor became entitled to receive a $100,000.00 life insurance benefit after her husband passed away. The debtor sought to exempt the entire benefit amount. However, having determined that the post-petition insurance proceed was property of the estate, and debtor was entitled to only a limited exemption, she was ultimately only permitted to exempt a little over $10,000.00. The court, before addressing the issue of exemptions, was first required to contemplate the applicability of this post-petition windfall and whether or not § 1306 expands the 180-day limitation set forth in section § 541. The court reasoned that "Section 1306(a)(1) provides that property of the estate includes; in addition to property specified in § 541, "all property of the kind specified in such section that the debtor acquires after the commencement of the case, but before the case is closed, dismissed, or converted, . . . " Further, the court opined that "that § 1306 expands the 180-day time period in § 541(a)(5)(C) to include an inheritance or other "windfall" received more than 180 days after commencement of the case. Sizemore expresses the view that most "windfalls" are swept into the chapter 13 case.

2. ***Carroll v. Logan, 735 F.3d 147, 151 (4th Cir. 2013*).** *In Logan*, debtors appeal the bankruptcy court's decision which determined that the debtors' interest in an inheritance that arose more than 180 days post-petition, was property of the estate. In their argument, debtors cited the 180-day limitation in §541, asserting that the court should adhere to two principals of statutory construction, that the court 1) "must give effect to every word of a statute," and that 2) "specific language in a statute governs general language. (See Carroll v. Logan, 735 F.3d 147 at 149)

The Logan court took the plain meaning of the statutory construction between §1306 and §541 and examined congressional intent, it rejected appellants' theory, and chose to give effect to what was in effect, every word of §1306 to expand the definition of property of the estate and harmonize that with congressional intent. The court reached the conclusion that §1306 (c) sweeps in the kind of property interests enumerated in §541 that are acquired before the chapter 13 Case is closed, dismissed, or converted. The result was that the inheritance was deemed property of the chapter 13 estate.

III. Post-petition sale of property & Appreciation Issues

A. Appreciation in Chapter 13

In re Larzelere, 633 B.R. 677 (August 24, 2021) This matter came up for consideration upon the chapter 13 trustee's objection to debtor's motion to sell real property. After the confirmation of the plan, the certain real property owned by Debtor had significantly appreciated in value and was offered for sale. The Trustee requested that the proceeds from the increased equity from the sale be treated as property of the estate for use and benefit of the creditors. Further, the chapter 13 trustee argued that the appreciation in value of the property should be considered property of the estate pursuant to §1306 a. The question to the Court was what impact of §1327(b) & (c)'s provisions on the inclusion of the sale proceeds as property of the estate. §1327(b) & (c)'s provisions specifically contemplate effect of vesting at the time on confirmation of the plan and respectively provide:

> "§1327(b) Except ***as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor."***
>
> "§1327 (c) ***Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan."***

In addressing the issue of property of the estate and problem created by vesting language in §1327, the Court noted the significant circuit split on this issue and the 4 predominant theories arising in the circuits:

1) An **"estate termination"** approach holds that at confirmation, "the estate ceases to exist and all property of the estate, whether acquired before or after confirmation, becomes property of the debtor." In re Baker, 620 B.R. 655, 663 (Bankr. D. Colo. 2020). – *The Court rejected this theory on basis on basis that this theory ignores* §1327(b) & (c).
2) The **estate preservation** approach, in holding that all property of the estate remains so after vesting, and only means debtor's rights become fixed after plan completion. This has been

criticized as putting all its weight on section §1306(a) while ignoring section 1327(b) "largely . . . as mere surplusage." In re Clouse, 446 B.R. 690, 700 (Bankr. E.D. Pa. 2010)

– *The Court rejected this theory on basis on basis that this theory ignores* §1327(b) & (c).

3) **The estate transformation** approach holds that "[a]t confirmation, [**9] all property of the estate becomes property of the debtor except, property essential to the debtor's performance of the plan; the Chapter 13 estate continues to exist, but it contains only property necessary to the performance of the plan, whether acquired before or after confirmation." Baker, 620 B.R. at 663. – *The Court rejected this theory on basis that this theory reads in nonexistent text to §1306 by establishing property that is necessary to confirmation and that which is not necessary for confirmation and its establishment of "Necessary" is open to interpretation and hard to implement.*

4) The **estate replenishment (a/k/a reconciliation)** approach also provides that at confirmation, all property of the estate becomes property of the debtor, but then provides that the estate then refills, regardless of whether that property is necessary to carry out the plan. Baker, 620 B.R. at 663. – the court chose this application, noting that this approach allowed for the vesting of §1327 to be interpreted as more than a mere Possessory interest of the debtor established at confirmation.

Conclusion: because the property vested in the debtors at confirmation, and vesting included more rights to the debtor than a mere possessory interest, the interest in property ceased to be property of the bankruptcy estate upon confirmation. As such, any appreciation of the property belonged to the debtor and would have no future effect on property of the estate. The result was that debtor would be permitted to retain those proceeds post-confirmation.

B. Appreciation Chapter 7 & Estate Property (Conversions from Chapter 13)

1. In re Castleman, 631 B.R. 914, 2021 Bankr. LEXIS 1517,2021 WL 2309994

In Castleman, 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 and its conversion to a Chapter 7. This result was 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.

2. **In re Adams, 641 B.R. 147 (W.D.M. June 2022)**

   In Adams, the debtor was not entitled to an order compelling the Trustee to abandon real property. The court reasoned that because, in a voluntary case like this one, a debtor's filing of a petition creates an estate comprising all legal or equitable interests of the debtor in property as of the commencement of the case, 11 U.S.C.S. § 541(a)(1). Further, among those interests included within the estate, is the right to sell the property and enjoy the proceeds of sale, including any post-petition appreciation in value, § 541(a)(6).

3. **In re Castillo (10-54273 CAG, W.D. Texas 3/24/2014)**

   In Castillo, a chapter 13 Debtor inherited fractional interests in real property after a succession of deaths in her family. The series inheritances by intestate succession occurred during the life of the confirmed chapter 13 plan but prior to conversion to chapter 7. After the chapter 13 trustee moved for dismissal for Debtor's failure to make plan payments, Debtors converted to chapter 7. without making any disclosures to the prior chapter 13 trustee, the court or creditors. Upon learning of the inheritance which occurred during the chapter 13, the Chapter 7 Trustee sought turnover of the property as property of the estate under § 541, § 1306, Rule 1007(h) and § 348(f)(2) asserting the failure of the debtors to disclose the inheritances during the chapter 13 constituted a bad faith conversion. In assessing the applicability of § 348(f)(2) the court applied a totality of the circumstances approach for a good faith conversion following prior courts president. (See In re Mullican), 417 B.R. 389 (Bankr. E.D. Tex. 2008). Ultimately, the court found that the Chapter 7 trustee did not meet its burden to show there was a bad faith filing and the court found that the inherited interests were not property of the estate.

IV. Role of 1329 & Post-petition Property

A. § 1329 - Modification of plan after confirmation. (General Discussion)

1. Mechanism for treating or otherwise accounting for "windfalls" or acquisition of assets disclosed pursuant to §1306. (General Discussion)

2. Debtor's Duty to Disclose, does that extend to any Duty to Modify? (General Discussion)

3. Effect of Post Confirmation Modification: § 1329(b) pulls in 1325 (a)(4) "best interests of creditors" (General Discussion)