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Robert J. Volpi

Indiana University School of Law

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Property of the Bankruptcy Estate
After a Conversion from
Chapter 13 to Chapter 7:
The Need for a Definite Answer

ROBERT J. VOLPI*

[It was not the design of the Bankruptcy laws to allow the Debtor to lead the life of Riley while his creditors suffer on his behalf.]

INTRODUCTION

In recent years the number of Americans who have declared personal bankruptcy has grown phenomenally. Indeed, despite all of the publicity given to large corporations filing for bankruptcy, the vast majority of bankruptcies involve nonbusiness debtors. Most of these bankruptcies are Chapter 7 liquidations, and it is estimated that the total amount of noncollectible debt resulting from Chapter 7 discharges runs into billions of dollars annually. The cost of this is first borne by the creditor but is eventually passed on to consumers in the form of higher interest rates, greater difficulty in obtaining credit, and higher prices for goods and services.

* J.D. Candidate, 1993, Indiana University School of Law at Bloomington; B.S., 1990, State University of New York at Binghamton.


2. During a recent six-year period the number grew by 152%, from 285,000 in 1984 to 718,000 in 1990. Iver Peterson, Americans Confront the Debt the House Built, N.Y. TIMES, Aug. 11, 1991, § 4, at 5. Since 1991 and 1992 were recession years, this trend will very likely continue.


4. For example, in 1988 approximately 71% of all bankruptcy cases (both business and nonbusiness) were liquidations under Chapter 7. Id. Chapter 7 of the Bankruptcy Code is entitled “Liquidation.” 11 U.S.C. §§ 701-766 (1988). For a discussion of how Chapter 7 works, see infra notes 18-21 and accompanying text.

5. See S. REP. NO. 446, 97th Cong., 2d Sess. 6 (1982).

Congress enacted Chapter 137 of the Bankruptcy Reform Act of 19788 to encourage the honest but unfortunate debtor to make greater use of "composition with creditors" in bankruptcy.9 Chapter 13 allows debtors to retain the property necessary to achieve a fresh start and to avoid the stigma of a Chapter 7 liquidation by permitting them to repay their creditors over a longer period of time.10 Creditors prefer Chapter 13 over Chapter 711 because they tend to receive a higher return,12 although it is spread over a longer period of time. Thus, debtors should be encouraged to file under Chapter 13.

While Chapter 13 benefits creditors, it is not always the best choice for the debtor. Therefore, a substantial number of debtors who attempt a Chapter 13 plan eventually convert to a Chapter 7 liquidation.13 This Note addresses the problem of what happens when a debtor is unable to satisfactorily complete his Chapter 13 plan and must convert to Chapter 7. In particular, this Note analyzes one of the most troublesome questions that arises during a conversion from Chapter 13 to Chapter 7: Is property acquired by the debtor after he has filed under Chapter 13 included in the Chapter 7 estate14 upon conversion?

Part I of this Note provides background with respect to this problem. Part I first presents a brief overview of Chapters 7 and 13 and then

8. 11 U.S.C. §§ 101-1330 (1988). The terms "Code" and "Bankruptcy Code" are used throughout this Note to refer to this Act.
9. H.R. REP. No. 595, 95th Cong., 1st Sess. 116 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6076. A "composition with creditors" is an agreement between an insolvent debtor and his creditors, whereby the creditors agree to accept a payment that is less than the whole amount of their claims, to be distributed pro rata, in discharge and satisfaction of the whole. BLACK'S LAW DICTIONARY 286 (6th ed. 1990).
12. This derives from the fact that in 90% of Chapter 7 cases, no assets are available for distribution. See H.R. Doc. No. 137, 93d Cong., 1st Sess. 65, pt. 1 (1973). In contrast, it is mandatory in a Chapter 13 case that all disposable income over the period of the plan be included in the property of the estate and be used to satisfy debts. See 11 U.S.C. § 1322.
14. The bankruptcy estate is "the aggregation of [the debtor's] property rights which can be administered by the court in a bankruptcy case." HENRY J. SOMMER, CONSUMER BANKRUPTCY LAW AND PRACTICE 51 (3d ed. 1988).
illustrates the problem by using the case *In re Lybrook*\(^{15}\) as an example. Part II examines arguments based on the language and policies behind various sections of the Bankruptcy Code. Part III examines arguments based upon the broad policy considerations underlying the Code. Finally, this Note suggests amendments to the Code that Congress should adopt in order to make it easier for courts to determine what property should be included in the converted bankruptcy estate and to eradicate the problem of bad faith conversions.

I. CONVERSION FROM CHAPTER 13 TO CHAPTER 7: AN OVERVIEW

A. How Chapter 7 and Chapter 13 Work

For an individual debtor, the Bankruptcy Code basically provides two alternative types of relief: liquidation under Chapter 7 or reorganization under Chapter 13. These two chapters of the Code are "fundamentally" different from each other.\(^{17}\) Chapter 7 is the remedy available for debtors who are either "unable or unwilling to repay their obligations."\(^{18}\) That choice involves the surrender to a trustee of all the debtor's nonexempt assets\(^{19}\) in which the debtor has equity. The trustee attempts to sell the property\(^{20}\) and distributes any proceeds to the creditors according to certain statutory rules. The debtor gives up the property hoping to obtain a discharge that will relieve him from further personal liability for his pre-bankruptcy debts.\(^{21}\)

In contrast, Chapter 13 deals with debtor rehabilitation rather than a liquidation of the debtor's assets.\(^{22}\) In a Chapter 13 case, the debtor proposes a plan for repayment of some or all of his debts, within certain statutory guidelines. The plan is then carried out under court supervision with the court protecting the debtor, and usually all of the debtor's

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16. "Courts are divided about whether individuals may also obtain relief under Chapter 11." SOMMER, *supra* note 14, at 47 n.4.


19. Section 522 provides that certain assets of the debtor are exempted from the bankruptcy estate and are protected from the reach of creditors. These assets are referred to as "exempt assets." 11 U.S.C. § 522 (1988).

20. Unfortunately for creditors, liquidation often realizes a value far lower than fair market due to the "forced sale" nature of the liquidation. *In re Silva*, 82 B.R. at 846.


22. *Id.* at 142.
property, from creditors. Chapter 13 works on the assumption that the debtor's plan of repayment will be funded by his future earnings. Therefore the Code requires the submission of "such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan." The trustee then distributes these funds to the creditors. In return for this submission, the debtor retains possession of his property, whether or not it becomes part of the bankruptcy estate. At the end of the plan, which lasts between three and five years, the debtor gets a discharge that is more favorable than the one available under Chapter 7.

The ability to retain property under Chapter 13 provides a strong incentive for a debtor to choose that alternative over Chapter 7. By comparison, a Chapter 7 case requires any nonexempt property to be turned over to the trustee for liquidation. Thus, Chapter 13 is most attractive to a debtor who has valuable assets that he wants to protect from his creditors.

Some see in Chapter 13 a quid pro quo: in exchange for the advantages that the debtor receives under Chapter 13, he owes the creditors a duty to proceed fairly.

[R]emedies under the Bankruptcy Code are designed in the alternative. Debtors are given a choice of either a reorganizational process, which preserves the going concern value of assets, or liquidation by a trustee. . . . The provisions of [the reorganization] chapters generally permit debtors to retain assets, to restructure most secured debts, and to repay obligations over an extended period of time. In return for those powers and rights, it is expected that the debtors' reorganization plans will attempt to preserve interests and offer at least partial repayment of all obligations, including unsecured debts. Such plans must also deal fairly with all creditors.

Unfortunately, many debtors encounter problems of different sorts that make it difficult for them to complete their Chapter 13 plans. For example, unemployment, illness, unexpected expenses, or marital problems can impair the debtor's ability to continue making plan payments. One option open to the debtor who cannot continue under Chapter 13 is

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25. See id. § 1327(b).
29. SOMMER, supra note 14, at 107.
conversion to Chapter 7. Section 1307 of the Code provides that the debtor can convert his case at any time and that the right to convert cannot be waived.\(^3\)

**B. The Problem: In re Lybrook**

Although conversion is a simple procedure, problems can arise in reconciling the new Chapter 7 proceeding with the former one under Chapter 13, particularly because the property of the bankruptcy estate is defined differently under each Chapter.\(^3\) The case of *In re Lybrook*\(^3\) provides an excellent example of these problems.

Daniel and Linda Lou Lybrook operated a modest farm in northern Indiana. On March 24, 1986, Mr. and Mrs. Lybrook filed a petition for relief under Chapter 13 of the Bankruptcy Code.\(^3\) However, the Lybrooks were never able to obtain confirmation of their Chapter 13 plan.\(^3\) Consequently, after fifteen months, in June, 1987, the case was converted to Chapter 7.\(^3\) "This scenario would not be extraordinary but for the fact that debtors' financial position changed dramatically between the date they sought relief under Chapter 13 and the date of conversion to Chapter 7."\(^3\) Between these two dates, on January 17, 1987, Mr. Lybrook's father died unexpectedly, and Mr. Lybrook, who had been recently included in his father's will, inherited assets valued in excess of $70,000.\(^3\)
The father's death occurred more than 180 days after the initial filing under Chapter 13, but before the date of conversion to Chapter 7. Therefore, had this case originally proceeded under Chapter 7, the inheritance would not have become part of the Chapter 7 bankruptcy estate. Under Chapter 13, however, the bankruptcy estate is much more inclusive than the one created under Chapter 7. It encompasses not only the property that would otherwise constitute the Chapter 7 estate but also "all property of the kind specified in [section 541 of the Code] that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted . . . ." Thus, the inheritance became property of the Chapter 13 estate. The issue is "whether the inheritance remains property of the bankruptcy estate following conversion to Chapter 7."

The numerous courts addressing this issue have reached various results for different reasons. When trying to decide whether property acquired by the debtor during the pendency of the Chapter 13 case should be included in the Chapter 7 estate upon conversion, most courts have focused on a single question: Which date determines what property is to be included in the converted bankruptcy estate—the date of the initial Chapter 13 filing, or the date on which the case was converted to Chapter 7? Similarly, in a case like *In re Lybrook*, the issue is the date on which the 180-day provision of section 541 begins to run. The courts that have addressed this problem are not in agreement as to which date should control. In fact, it appears that the courts are almost evenly divided on the issue.

The issue of which date determines property of the Chapter 7 estate often arises in the context of post-petition, pre-conversion income.

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38. *Id.*
39. *Id.* The bankruptcy estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). It also includes "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 filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date . . . by bequest, devise, or inheritance." 11 U.S.C. § 541(a)(5), (a)(5)(A) (emphasis added).
40. 11 U.S.C. § 1306(a)(1). Note that § 1306 does not contain a 180-day time limit.
41. *In re Lybrook*, 107 B.R. at 612 (emphasis in original).
42. For purposes of this Note, the term "property" encompasses both post-petition wages paid into a plan and assets acquired by the debtor post-petition. The term "post-petition" refers to the time period after the debtor files a petition for Chapter 13 relief.
43. 11 U.S.C. § 541(a)(5).
45. For cases holding that the date of the initial Chapter 13 filing is the relevant date, see *infra* note 50. For cases holding that the date of conversion should control, see *infra* note 52.
46. The term "pre-conversion" refers to the time period before the debtor converts to Chapter 7.
received by the debtor which has not yet been distributed to creditors. Some courts take the view that such funds do not become part of the converted Chapter 7 estate. These courts hold that undistributed funds in the hands of the Chapter 13 trustee must be returned to the debtor upon conversion to Chapter 7, without any need for the debtor to claim the funds as exempt. This position is based primarily on section 541(a)(1), which defines "property of the estate," and section 348(a), which determines the effect of conversion and sets forth what some refer to as the "relation-back principle." The rationale drawn from these provisions is that the commencement of the Chapter 7 case 'relates back' to the date [of the] Chapter 13 [filing] and, thus, the converted Chapter 7 estate . . . must be determined as of this date."

Other courts hold that undistributed funds held by the Chapter 13 trustee must be turned over to the Chapter 7 trustee upon conversion. These courts take the position that the funds become property of the converted Chapter 7 estate, and view the correct date for deciding what constitutes property of the estate as the date of conversion, rather than the date of filing in Chapter 13.

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47. For the text of 11 U.S.C. § 541(a), see supra note 39.
48. For the text of 11 U.S.C. § 348(a), see infra note 70.
49. 9 AM. JUR. 2D Bankruptcy § 908 (1991). For a detailed discussion of the "relation back" argument, see infra notes 70-77 and accompanying text.
50. 9 AM. JUR. 2D Bankruptcy § 908 (1991). The debtor does not acquire an interest in post-petition income paid to, and remaining undistributed in the hands of, the Chapter 13 trustee until after the filing date. Therefore, the undistributed payments are not properly considered property of the converted Chapter 7 estate under § 541(a)(1). Rather, these are the debtor's property, the same as if the debtor had originally filed in Chapter 7. In re Peters, 44 B.R. 68 (Bankr. M.D. Tenn. 1984); In re Lennon, 65 B.R. 130 (Bankr. N.D. Ga. 1986).

A number of other courts have also held that the date of the original Chapter 13 filing should control. Genova v. Thurman (In re Thurman), 43 B.R. 108 (Bankr. D. Colo. 1984) (finding that the date of filing controls exemptions); In re Bullock, 41 B.R. 637 (Bankr. E.D. Pa. 1984) (finding that the date of filing controls status of undistributed wage deductions); Oliphant v. Amarillo Pantex Fed. Credit Union (In re Oliphant), 40 B.R. 577 (Bankr. N.D. Tex. 1984) (holding that the date of filing controls right of set-off against post-petition credit union account funds); In re McFadden, 37 B.R. 520 (Bankr. M.D. Pa. 1984) (holding that the date of filing controls status of undistributed wage deductions); Hannan v. Kirschenbaum (In re Hannan), 24 B.R. 691 (Bankr. E.D.N.Y. 1982) (finding that the date of filing controls status of post-petition accrual of damage claim, undistributed wage deductions, and post-petition account funds).

In attempting to determine what property belongs in the converted bankruptcy estate, the courts have advanced many arguments. Some of these arguments are based on the language and policies underlying particular sections of the Code, while others are based on broad policy considerations of the Code generally.

II. ARGUMENTS BASED ON THE LANGUAGE AND POLICIES OF PARTICULAR CODE SECTIONS

A. Statutory Construction

In trying to determine the composition of the bankruptcy estate upon conversion, one must first look to the Code and determine the meaning of the relevant sections. The general rule of statutory construction is that where the law is clear and unambiguous it should be applied literally. However, where statutory intent is unclear, other evidence of meaning or intent, such as legislative history, may be consulted.

A bankruptcy case implicates many sections of the Code. The provisions of chapters 1, 3, and 5 apply to all bankruptcy cases, in addition to the sections of the particular Chapter under which the debtor has filed (or to which the case has been converted). Therefore, statutory interpretation of the Bankruptcy Code should be “a holistic endeavor.”

When determining the meaning of a certain Code section,
consideration must be given to other sections or subsections which may be affected by, or have an effect on, a particular interpretation. Thus, "effect of conversion as provided under section 348 must further be examined against the statutory scheme of sections 301, 541, 1306, [and] 103(h), and of Rule 1019(1)," and the policies that stand behind each.

1. Arguments Based on 11 U.S.C. § 103(h)

Section 103, which governs the applicability of Bankruptcy Code chapters, specifically provides in subsection 103(h) that "Chapter 13 of this title applies only in a case under such chapter." What this means for a case that has been converted from Chapter 13 to Chapter 7 has been the subject of considerable dispute.

Some argue, as the court in In re Lennon did, that this language "logically" means that the applicability of Chapter 13's provisions are limited to cases that originate and remain under Chapter 13. Under this argument, section 1306, which expands the definition of "property of the estate" under Chapter 13 to include almost all property that the debtor acquired after commencement, no longer applies once the case is converted to Chapter 7. Therefore, section 541 becomes the sole determinant of which property is to be included in the new Chapter 7 estate and the Chapter 13 estate is treated as if it had never existed.

Under this reading, an inheritance that becomes property of the Chapter 13 estate because it is received by the debtor more than 180 days after filing could be, upon conversion, properly excluded from the new Chapter 7 estate.

control, even if the statutory language has a "plain" meaning, if the application of that language will produce a result demonstrably at odds with the intention of its drafters. Pennsylvania Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 565 (1990) (Blackmun, J., dissenting) (citations omitted).


58. See infra notes 69-72 and accompanying text.
59. In re Mansuy, 94 B.R. 443, 444 (Bankr. N.D. Ohio 1988). Section 301 defines the "commencement of a case" for a voluntary bankruptcy. 11 U.S.C. § 301. Section 541, which applies to all bankruptcies, determines the property to be included in the estate. Id. § 541. Section 1306, which only applies to Chapter 13 bankruptcies, determines the property to be included in the Chapter 13 estate. Id. § 1306. Section 103 governs the applicability of Bankruptcy Code chapters. Id. § 103. Rule 1019 of the Federal Rules of Bankruptcy Procedure explains the effect of a conversion on creditors' claims. FED. R. BANKR. P. 1019.
60. 11 U.S.C. § 103(h).
62. Id. at 135.
63. Id. at 134.
64. This assumes that the date of the original Chapter 13 filing is the correct date for determining property of the estate.
This reasoning is flawed. Section 103(h) does not dictate that the Chapter 13 estate be terminated retroactively upon conversion. Rather, section 103(h) merely terminates the effect of section 1306(a) from the point of conversion onward. After the case is converted to Chapter 7, section 541 should control. However, this does not mean that property acquired while the case was under Chapter 13 must now be excluded from the bankruptcy estate. Section 541(a)(7) provides that the bankruptcy estate also includes "[a]ny interest in property that the estate acquires after the commencement of the case." Obviously, this provision is broad enough to encompass in the converted Chapter 7 estate all post-petition, pre-conversion property included in the Chapter 13 estate at the time of conversion.

Furthermore, to say that the provisions of Chapter 13 should have no effect on the converted Chapter 7 case would be "inconsistent with the statutory scheme regarding post-confirmation amendments." Under the rationale of cases like In re Lennon, if a Chapter 13 debtor receives enhanced funds through an inheritance, increased income, lottery proceeds, or other source, the debtor could deprive creditors of these benefits by converting to Chapter 7. This result circumvents section 1306, which includes post-petition property in the bankruptcy estate, and section 1329(a) and (b), which allows debtors and creditors to modify the plan to take into account a change in circumstances. "When property is received during the pendency of a Chapter 13 case, creditors receive the benefit of this property."

2. Arguments Based on 11 U.S.C. Section 348(a), (b), and (c)

Section 348 controls the effect of a conversion of a case from one chapter of the Bankruptcy Code to another. It does not directly address the composition of the bankruptcy estate. It states only that, with certain exceptions, conversion "does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief." What this language portends for property acquired post-petition by the Chapter 13 estate, but before conversion to Chapter 7, is unclear.

66. Brief for Appellee at 14, In re Lybrook, 951 F.2d 136 (7th Cir. 1991) (No. 90-2926).
68. Id. at 668; see Arnold v. Weast (In re Arnold), 869 F.2d 240 (4th Cir. 1989).
69. 11 U.S.C. § 348(a) (1988). It is the "relation back" language that leads to confusion as to what property should be included in the Chapter 7 estate upon conversion.
Subsections (b) and (c), which, by the terms of section 348(a), are exceptions to the general rule of subsection (a),\(^7\) provide that under certain sections of the Code (which are not applicable here) the date of conversion shall be deemed the date of the order for relief\(^7\) rather than the date the petition was originally filed.\(^7\) Since only the exceptions to section 348(a) state that the order for relief is the date of conversion, the implication is that under section 348(a) an order for relief on a conversion is deemed to relate back to the date of the original order for relief, which, according to section 301,\(^7\) would be the date of the filing (commencement) of the initial Chapter 13 petition.\(^7\) Therefore, according to this argument, unless the proceedings fall into one of the exceptions, the date of filing should control.

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70. Section 348(a) provides:

Conversion of a case from a case under one chapter of this title to a case under another chapter of this title constitutes an order for relief under the chapter to which the case is converted, but, except as provided in subsections (b) and (c) of this section, does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief.

Id. (emphasis added).

71. The term "order for relief" refers to the bankruptcy court's order granting the debtor's request for bankruptcy protection.

72. Section 348(b) provides:

Unless the court for cause orders otherwise, in sections 701(a) [appointment of an interim trustee], 727(a)(10) [written waiver of discharge], 727(b) [effect of a Chapter 7 discharge], 728(a) [taxable period of the debtor], 728(b) [filing of tax returns], 1102(a) [appointment of creditors' committee], 1110(a)(1) [aircraft equipment and vessels], 1121(b) [time limit for filing of plan by debtor], 1121(c) [who may file plan after the time limit], 1141(d)(4) [written waiver of discharge], 1146(a) [taxable period of debtor], 1146(b) [filing of tax returns], 1301(a) [stay of action against co-debtor], 1305(a) [filing of post-petition claims], 1201(a) [stay of action against co-debtor], 1221 [time limit for debtor to file plan], and 1228(a) [effect of written waiver of discharge] of this title, "the order for relief under this chapter" in a chapter to which a case has been converted under section 706, 1112, 1307, or 1208 of this title means the conversion of such case to such chapter.


Section 348(c) provides:

Sections 342 [concerning the giving of notice] and 365(d) [concerning the running of 60-day period in which trustee may assume or reject executory contracts and unexpired leases of debtor] of this title apply in a case that has been converted under section 706, 1112, 1307, or 1208 of this title, as if the conversion order were the order for relief.


73. Section 301 provides:

A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter. The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.


Since section 541, which defines property of the bankruptcy estate, is not mentioned in section 348(b) or (c), it would appear that "commencement of the case" as used in section 541 would be controlled by section 348(a). Therefore "commencement of the case" refers to the date upon which the Chapter 13 petition was filed rather than the date the case was converted to Chapter 7. "Thus by the clear language of section 348(a), the conversion relates back to the initial filing of the bankruptcy petition i.e. the commencement of the case, which, as provided in section 541(a), is the date the property of the estate is determined."77

Under section 541, the property of the Chapter 7 estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." Since the debtor does not acquire an interest in the inheritance until after the commencement of his case, this property does not become property of the Chapter 7 estate.

This proposition is supported not only by the structure of the Bankruptcy Code but also by congressional policy. "Chapter 13 . . . was intended to 'encourage[] more debtors to repay their debts over an extended period rather than to opt for straight bankruptcy liquidation and discharge.'"80 In return for a debtor’s resolve to commit more of his assets to the repayment of his creditors than would be required under Chapter 7, Chapter 13 provides a debtor with a number of benefits that are unavailable under Chapter 7.81

In pointing out these benefits, the court in In re Peters noted:

In addition to the benefits specifically enumerated in the legislative history, other benefits can be identified. One such benefit is the provisions of § 348(a). Since this section treats the date of commencement of the Chapter 13 case as the date of commencement of the Chapter 7 case after conversion, the debtor is not penalized for originally pursuing a Chapter 13 case instead of a Chapter 7 case. If the debtor is unable to succeed under Chapter 13, he is treated as if he had originally filed a petition under Chapter 7.82

75. "Under the statutory interpretation doctrine of inclusio unius est exclusio alterius [the inclusion of one is the exclusion of another] §§ 1306 and 541 are therefore excluded from any exception under §§ 348(b) and (c)." In re Horton, 130 B.R. 326, 328 (Bankr. D. Colo. 1991); see also BLACK'S LAW DICTIONARY 763 (6th ed. 1990) (inclusio unius est exclusio alterius).
79. In re Peters, 44 B.R. at 70.
81. See id. at 71. For a discussion of Congress's goal of encouraging debtors to choose Chapter 13 over Chapter 7, see infra notes 124-30 and accompanying text.
82. In re Peters, 44 B.R. at 71.
Nevertheless, the proposition that the exceptions to section 348 prove that post-petition assets do not become property of the Chapter 7 estate upon conversion has not been universally accepted. The court in *In re Wanderlich* 83 held that "section 348 operates to complement, not to replace, sections 541 and 1306. Especially noteworthy is the fact that section 348 in no way interferes with the section 1306 declaration that post-petition, pre-conversion property in a Chapter 13 case is 'property of the estate.'" 84 For example, section 348(c) plainly authorizes the Chapter 7 trustee to assume or to reject all executory contracts or unexpired leases of the debtor, including those arising post-petition and even those arising post-confirmation. 85 This choice would not be possible if those interests were not a part of the estate following conversion. 86

However, this reasoning was criticized by the court in *In re Lepper*. 87 "The *Wanderlich* court apparently presumed that unless all of the former Chapter 13 debtor's property became property of the estate upon conversion, the Chapter 7 trustee would have authority over none of it." 88 The *Lepper* court felt that this reading of section 348(c) was far too broad. According to the court, section 348(c) "merely carves out from the former Chapter 13 debtor's property a category of interests which are within the Chapter 7 trustee's authority and therefore subject to the creditor protections of § 365." 89 The *Lepper* court held that section 348(c) is a very specific provision and that it means only what it says, and nothing more. The provision merely facilitates the trustee's management of the bankruptcy estate by setting a time for the assumption or rejection of executory contracts and leases. Such a power would not exist otherwise. 90

In response to the arguments that the original date of filing controls, some contend that section 348 does not interfere with the section 1306 declaration that post-petition, pre-conversion property in a Chapter 13

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84. Id. at 714; see also *In re Tracy*, 28 B.R. 189 (Bankr. D. Me. 1983) (holding that claims arising prior to the date of conversion of a Chapter 13 case to a Chapter 7 case are treated, for purposes of payment and discharge, as if the debtor had never filed a Chapter 13 petition but had commenced its bankruptcy case by filing a Chapter 7 petition on the date of conversion).
85. Under § 365(d)(1), the trustee has 60 days after the "order for relief" (which according to § 348(c) is the order for conversion) in which to assume or reject executory contracts and unexpired leases of the debtor. 11 U.S.C. § 365(d)(1) (1988).
86. *In re Wanderlich*, 36 B.R. at 714.
88. Id. at 900 (emphasis in original).
89. Id.
90. Id.
case is "property of the estate," and does not explicitly state that upon conversion a case is to be treated as if it had been originally filed under the chapter to which it is converted. Section 348(a) merely specifies that the date of filing of the petition, the commencement of the case, or the order for relief are unaffected by conversion. Section 348(a) requires that a case converted from Chapter 13 to Chapter 7 be treated as if it had commenced upon the date of the Chapter 13 filing, but this does not necessarily mean that it must be treated as if it had always been a Chapter 7 case. Nor does it mean that the bankruptcy estate must be determined only by the property interests held by the debtor at the time the Chapter 13 petition was originally filed.

Those courts which find that the converted estate is composed solely of property that existed on the date of the Chapter 13 filing (and within 180 days thereof) rely upon a very literal and isolated reading of the Code. "Section 348 cannot be construed in isolation. Like the pieces of a mosaic, it must be viewed along with the other statutory provisions of which it is intimately a part, in order to properly understand the entire creation." Section 348 is not designed to change what has gone on before, but to leave matters as they exist on the date of conversion. To require the court to reshuffle the bankruptcy estate upon conversion is to make section 348 a "source of disruption."

A more logical view is to see section 348 as a provision that ensures continuity throughout the bankruptcy proceeding. The plain language of section 541 leads to the conclusion that it preserves the bankruptcy estate as it existed just before conversion. The bankruptcy estate following conversion should be no different than the estate immediately preceding conversion.

91. In re Wanderlich, 36 B.R. at 714.
93. Id.; see also In re Kao, 52 B.R. 452 (Bankr. D. Ore. 1985) (holding only that the Chapter 13 filing date is adopted by the conversion to Chapter 7). As the court in In re Lybrook said: "It is one thing to recognize that conversion does not affect the date upon which the case was commenced. It is quite another thing, however, to draw from this principle the doctrine that the case will be treated as though it had always proceeded under Chapter 7." Robb v. Lybrook (In re Lybrook), 107 B.R. 611, 612 (Bankr. N.D. Ind. 1989), aff'd, 135 B.R. 321 (N.D. Ind. 1990), aff'd, 951 F.2d 136 (7th Cir. 1991).
94. See In re Tracy, 28 B.R. 189 (treating wages earned prior to conversion of the case to Chapter 7, but subsequent to the filing of the Chapter 13 petition, as part of the bankruptcy estate).
95. See In re Lennon, 65 B.R. 130, 133 (Bankr. N.D. Ga. 1986), superseded by statute as stated in In re Luna, 73 B.R. 999 (N.D. Ill. 1987) (applying the relation-back principle which "requires the court to look back to the date of the filing of the original Chapter 13 petition to determine the creation of the estate and what is included in the property of the Chapter 7 estate").
97. Id. at 613.
98. Id.
The Chapter 13 bankruptcy estate is created upon the commencement of the case.100 At the moment of creation, the bankruptcy estate essentially consists of all of the property in which the debtor has an interest.101 "The estate does not, however, remain static. It also includes 'any interest in the property that the estate acquires after the commencement of the case.'"102 This is the status of the estate existing at the time of conversion. There is no express language in section 348(a) requiring this estate to be terminated upon conversion. Since under section 1306(a) the Chapter 13 bankruptcy estate includes post-petition property, it makes sense that property of the new Chapter 7 estate should be determined on the date of conversion.103

3. Arguments Based on 11 U.S.C. Section 348(d) and Rule 1019

A number of courts have held that treating wages earned or property acquired after the Chapter 13 filing but prior to conversion as property of the new chapter 7 estate is consistent with the treatment of claims against the debtor which arise during the same period.104 Under section 348(d),105 claims against the debtor which arise post-petition but pre-conversion are generally treated as having arisen before the date of the original Chapter 13 filing, and thus, may be discharged after conversion to Chapter 7.106 Because section 348(d) allows the debtor to discharge claims arising during the pendency of the Chapter 13 proceeding and prior to conversion, some courts have reasoned that, for the sake of equity,107 the debtor should be required to place property acquired during this interim period in the converted Chapter 7 estate.108

Further support for the conclusion that the date of conversion controls can be found in Rule 1019(1).109 The Advisory Note to the Rule

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100. 11 U.S.C. § 541(a).
102. In re Lybrook, 107 B.R. at 613 (emphasis added) (quoting 11 U.S.C. § 541(a)(7)).
104. Id. at 452; In re Wanderlich, 36 B.R. 710 (Bankr. W.D.N.Y. 1984); In re Tracy, 28 B.R. 189 (Bankr. D. Me. 1983).
105. "A claim against the estate or the debtor that arises after the order for relief but before conversion in a case that is converted . . . shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition." 11 U.S.C. § 348(d) (1988).
107. For a discussion of the equitable treatment of debtors and creditors, see infra part III.B.
109. Rule 1019(1)(A) provides:
When a . . . chapter 13 case has been converted . . . to a chapter 7 case . . . [l]ists, inventor[ies], [and] schedules . . . theretofore filed shall be deemed to be filed in the
explains that when the debtor in a converted case has not previously prepared a schedule of assets, he must do so as if a Chapter 7 petition had been filed on the date of conversion. Since debtors must claim exemptions in the schedule of assets, Rule 1019(1) strongly suggests that the date of conversion controls what exemptions may be claimed in a converted case. If the date of conversion controls what exemptions can be claimed, it seems only logical that the same day should be used to determine property of the estate (which of course may be subject to this exemption).

B. Arguments Comparing Conversion with Dismissing and Refiling Under Chapter 7

Should Chapter 13 prove to be unsatisfactory, the debtor has two primary options. The case may be converted to Chapter 7, or it may be dismissed and followed by a separate petition for Chapter 7. From the debtor’s standpoint, there should be no substantive difference between conversion and dismissal followed by a separate Chapter 7 proceeding.

Under either option, the scope of the discharge will include post-petition debts incurred during the Chapter 13 proceeding due to section 348(d). Thus, Congress clearly intended that this choice of alternatives would have no effect upon the scope of discharge. Therefore, it is likely that Congress intended that the property of the estate should also be the same under either option.

110. FED. R. BANKR. P. 1019(1)(A) (emphasis added).
112. The opportunity to do either is almost absolute. See 11 U.S.C. § 1307(a), (b) (1988). However, a debtor would probably prefer conversion since a dismissal followed by a separate Chapter 7 petition would require additional expenses including another filing fee.
113. Section 348(d) provides:
   A claim against the estate or the debtor that arises after the order for relief but before conversion in a case that is converted under section 1112, 1307, or 1208 of this title, other than a claim specified in section 503(b) of this title, shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition. 11 U.S.C. § 348(d). Therefore, post-petition creditors of the Chapter 13 case are treated as pre-petition creditors (and are thus subject to discharge) and when a new Chapter 7 is filed those creditors actually become pre-petition creditors since they became creditors before the Chapter 7 petition was filed.
Where the case is dismissed and a new petition is filed, there is no question that the property acquired by the debtor during the course of the Chapter 13 proceeding becomes part of the bankruptcy estate in a subsequent proceeding. This is so because property of the Chapter 7 estate includes all nonexempt property that the debtor has an interest in "as of the commencement of the case." Under this alternative, the date of the commencement of the case would be the date that the new Chapter 7 petition is filed. Where there is a conversion from Chapter 13 to Chapter 7, however, debtors may argue that the “as of the commencement of the case” language refers back to the date that the Chapter 13 estate was filed, since there is no need to refile when one converts. Under this interpretation, if followed to the conclusion that is most favorable to the debtor, the new Chapter 7 estate would not include any property that was acquired more than 180 days after the Chapter 13 filing. This interpretation would lead to very different bankruptcy estates, depending on which option the debtor chose. The choice between conversion and dismissal would give debtors the ability to control which assets are to be made available to satisfy the very claims which are equally dischargeable under either option.

The Seventh Circuit has cautioned against interpreting the Bankruptcy Code in a way that would create strategic incentives which could influence the decision to choose between alternative proceedings. The exclusion of post-petition property from the converted bankruptcy estate would create such an incentive when Chapter 13 proves unsuccessful for the debtor. There should be no difference in the consequences to either debtors or creditors of a conversion as opposed to a dismissal followed by a separate proceeding. "The price of that discharge should not depend upon which alternative is selected."

117. See Northwest Eng’g Co. v. United Steelworkers of Am. (In re Northwest Eng’g Co.), 863 F.2d 1313, 1317-18 (7th Cir. 1988) (addressing similar concerns in the context of 11 U.S.C. § 507(a)(3)).
III. Arguments Based on Broad Policy Considerations

When trying to determine the composition of the bankruptcy estate upon conversion, the plain language of the statute should arguably control. However, as was demonstrated above, the language of the relevant Code sections is not plain enough to be subject to only one interpretation. Because statutory interpretation has not been particularly helpful in resolving the problem, policy arguments are explored below.

A. The Goal of Encouraging Chapter 13

There are two constant themes that run throughout congressional support of Chapter 13. First is the belief that a Chapter 13 proceeding benefits all parties: the debtor has the opportunity to repay his debts while maintaining control of his home and business, and the creditor benefits because of the increased probability of repayment and the greater amount that is likely to be distributed pursuant to a periodic payment plan, as opposed to a one-time liquidation procedure. Second is the goal that the honest debtor who meets the terms of his plan should be given effective bankruptcy relief and should be ensured a fresh start.

When Congress enacted the Code, one of its primary objectives was to increase the use of Chapter 13 plans as opposed to Chapter 7 liquidations. An "explicit effort" was made to encourage debtors

120. "[T]he words of the statute remain the most persuasive indication of Congressional intent, and their apparent meaning should be rejected only on substantial, unambiguous evidence supporting a contrary interpretation." In re Lepper, 58 B.R. 896, 899 (Bankr. D. Md. 1986) (quoting State Water Control Bd. v. Train, 559 F.2d 921, 924-25 n.20 (4th Cir. 1977)).

121. At least one court has stated that there is no way to reconcile the conflicting statutory language of §§ 348, 541, and 1306. See In re Shattuck, 62 B.R. 14, 15 (Bankr. D.N.H. 1986) (holding that property of the estate comprising the bankruptcy estate includes only assets that existed as of the original filing date).


123. Id. at 117-18.

124. In supporting the adoption of the Bankruptcy Reform Act of 1978, the Committee on the Judiciary of the House of Representatives noted:

This bill attempts to cure these inadequacies in the Bankruptcy Act and to prevent the frequent problems confronting consumer debtors that have occurred both in the bankruptcy court and out. First, the bill simplifies, expands, and makes more flexible wage earner plans, called plans for Individuals with Regular Income, under the bill.

Second, many of the provisions in the current bankruptcy law that enable private action to undo the beneficial effects of bankruptcy are changed. Third, the debtor is given adequate exemptions and other protections to ensure that bankruptcy will provide a fresh start. . . . The premises of the bill with respect to consumer bankruptcy are that use of the bankruptcy law should be a last resort; that if it is used, debtors should attempt repayment
to consider Chapter 13 first, before resorting to other alternatives. The House Report on bankruptcy law revision described those beneficial features of Chapter 13 designed to persuade debtors to choose it over Chapter 7:

The benefit to the debtor of developing a plan of repayment under chapter 13, rather than opting for liquidation under chapter 7, is that it permits the debtor to protect his assets. In a liquidation case, the debtor must surrender his nonexempt assets for liquidation and sale by the trustee. Under chapter 13, the debtor may retain his property by agreeing to repay his creditors. Chapter 13 also protects a debtor's credit standing far better than a straight bankruptcy, because he is viewed by the credit industry as a better risk. In addition, it satisfies many debtors' desire to avoid the stigma attached to straight bankruptcy and to retain the pride attendant on being able to meet one's obligations. The benefit to creditors is self-evident: their losses will be significantly less than if their debtors opt for straight bankruptcy.126

Among the incentives that Congress added in 1978 to make Chapter 13 a more attractive option to debtors was an expansion of the class of debtors who would be eligible to file under Chapter 13127 and a liberalization of the discharge provisions.128 The changes brought about by the Bankruptcy Amendments and Federal Judgeship Act of 1984129 evidence that Congress continues to favor the use of Chapter 13 as opposed to Chapter 7.130

under Chapter 13 ...; and finally, whether the debtor uses Chapter 7 ... or Chapter 13 ... , bankruptcy relief should be effective, and should provide the debtor with a fresh start.

Id.

125. SOMMER, supra note 14, at 187.
127. "Pursuant to § 101(24), individuals with regular income are eligible to file under Chapter 13. This is an expansion of the previous requirement that the individual be a wage earner." Roy Ann Russ, Note, Chapter 13, 2 BANKR. DEV. J. 147, 148 n.11 (1985) (citation omitted).
128. "[Section] 1328 provides that, while educational loans are not dischargeable under Chapter 7 due to the operation of § 523(a)(8)(A), they are dischargeable under Chapter 13." Id. at 148 n.12 (citation omitted).
130. DANIEL R. COWANS, COWANS BANKRUPTCY LAW AND PRACTICE § 19.1 n.5 (1989 ed.). Cowans illustrates this as follows:

[B]y amendment to 11 U.S.C. § 342, subsection (b) was added: "Prior to the commencement of a case under this title by an individual whose debts are primarily consumer debts, the clerk shall give written notice to such individual that indicates each Chapter of this title under which such individual may proceed." Also, Official Form No. 1 [Petition] was altered to require, in the instance of a consumer debtor, an affidavit by debtor's attorney stating that the debtor has been informed that he "may proceed under Chapter 7 or 13 of Title 11, United States Code," and has been advised of the relief
It is in the public interest to encourage debtors to make good faith efforts to repay their debts through a Chapter 13 plan, rather than to liquidate. A Chapter 13 plan is "a means of avoiding the waste, hardship and social and economic disruptions usually attendant upon liquidating bankruptcy proceedings under Chapter 7." Therefore, it is argued, if the Chapter 13 approach fails and the debtor is forced to convert, it would be unfair to penalize the debtor by subjecting post-petition earnings or property acquired more than 180 days after filing to the claims of creditors when such property would not have been included in the estate had the debtor originally filed under Chapter 7. Furthermore, it is claimed that such a rule would thwart congressional policy and discourage debtors from choosing Chapter 13 in the first place.

In *In re Bobroff*, the Third Circuit held that tort causes of action which had accrued post-petition to a Chapter 13 debtor did not become property of the Chapter 7 estate upon subsequent conversion. This result is consonant with the Bankruptcy Code's goal of encouraging the use of debt repayment plans rather than liquidation. If debtors must take the risk that property acquired during the course of an attempt at repayment will have to be liquidated for the benefit of creditors if Chapter 13 proves unavailing, the incentive to give Chapter 13—which must be voluntary—a try will be greatly diminished. Thus it is believed that if their post-petition earnings were put at risk, debtors might be inclined to forego the Chapter 13 option altogether and immediately file under Chapter 7, with the assurance that they would be entitled to keep whatever property they receive in the future.

"Though it is understandable that Congress wanted to encourage the use of Chapter 13, it is difficult to believe that this policy is so imperative that the legislation was purposely designed to assist debtors in circumventing their obligations when their ability to meet those

available under each such Chapter.

*Id.* at n.5 (citation omitted).

133. See supra notes 122-26 and accompanying text.
135. *Id.* at 803-04.
136. *Id.* at 803 (citation omitted).
obligations has improved." 138 Furthermore, it is difficult to see how making conversion to Chapter 7 such an attractive option furthers the congressional interest in promoting Chapter 13. Chapter 7 will continue to be the choice for those debtors who have little or no assets. In addition, Chapter 7 will also be adopted (albeit in a roundabout fashion) by those debtors who at first appear likely candidates for Chapter 13 (those who have assets worth protecting and a steady income) but who later receive additional wealth and decide that they can not be bothered with a Chapter 13 plan. The property that they were originally trying to protect may not be so attractive when compared to their new-found wealth.

Thus, using the date of filing for determining property of the bankruptcy estate may encourage more debtors to initially file under Chapter 13. 139 However, a debtor who later finds prosperity (after 180 days) will be encouraged to convert to Chapter 7. Certainly the goal of Congress was not to encourage debtors to merely file a Chapter 13 petition; it was also hoped that debtors would stay with their plans until discharge.

B. Equitable Treatment of Debtors and Creditors

"Bankruptcy Courts are inherently courts of equity with broad remedial powers." 140 Therefore, they are not limited to merely looking at the language of the statute. The court should be able to look at what actually happened in a particular case and make a decision that is fair to both the debtor and his creditors.

Limiting the bankruptcy estate to assets that existed at the date of filing the original Chapter 13 petition frustrates the equities between the debtor and his creditors. If post-petition assets are excluded from the bankruptcy estate, then both pre-petition and post-petition creditors of the debtor will be harmed.

Pre-petition creditors will be prejudiced in two ways. First, by limiting the bankruptcy estate to those assets that existed on the date of filing, the pre-petition creditors bear the risk that the value of the bankruptcy estate will be diminished as the debtor proceeds under Chapter 13. 141 Once the

138. Brief for Appellee at 12, In re Lybrook, 951 F.2d 136 (7th Cir. 1991) (No. 90-2926).
139. This will occur if consumer debtors are actually influenced by what the bankruptcy courts decide. This is particularly unlikely since one can infer, by the mere fact that a debtor is filing for bankruptcy, that the debtor does not have much money to spend for quality legal advice.
141. The assets in the bankruptcy estate may be affected by many factors that can cause a dramatic decrease in their value during the pendency of the Chapter 13 case (e.g., depreciation, inflation,
property is revested in the debtor after confirmation of the Chapter 13 plan, he can do anything with it so long as it is not subject to a lien provided for in the plan or confirmation order.\footnote{142}{11 U.S.C. § 1327(b), (c) (1988).}

Thus, during the course of the plan, which can last as long as five years, a debtor may sell, abandon, consume, or trade-in most of his assets. Combining this with the possibility of after-acquired property means that by the time of conversion the estate may have changed completely in character and amount.\footnote{143}{In re Tracy, 28 B.R. 189, 190 (Bankr. D. Me. 1983); see 11 U.S.C. §§ 348(b), (d), 727(b) (1988).}

Second, even if the estate were not diminished, pre-petition creditors bear the risk that their share of the bankruptcy estate will shrink if more claims are made against the debtor after the Chapter 13 petition is filed. According to section 348(d), all claims arising prior to conversion to Chapter 7 are treated as if the debtor never filed a Chapter 13 petition. Instead, the claims are treated as if the debtor commenced the bankruptcy case by filing a Chapter 7 petition on the date of conversion.\footnote{144}{In re Tracy, 28 B.R. at 190 n.1.} Since, upon conversion, post-petition creditors are treated as if they are pre-petition creditors, the estate, as defined by section 541 on the commencement date of the case, will be divided among more creditors than if the debtor had simply filed a straight Chapter 7 liquidation in the first place.\footnote{145}{In re Tracy, 28 B.R. at 189 (1983).}

Excluding post-petition assets from the bankruptcy estate also prejudices post-petition creditors because these creditors would be denied an interest in the very property upon which they relied in extending the Chapter 13 debtor credit.\footnote{146}{At least one court argues that there would be very few situations involving post-petition creditors. Considering the 1984 Amendments to Title 11, and particularly new §§ 1325(b)(1) and 1329(a) (preamble), it seems unlikely that Congress considered that there would be many...}

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\footnote{142}{11 U.S.C. § 1327(b), (c) (1988).}
\footnote{143}{In re Winchester, 46 B.R. at 495.}
\footnote{144}{In re Tracy, 28 B.R. 189, 190 (Bankr. D. Me. 1983); see 11 U.S.C. §§ 348(b), (d), 727(b) (1988).}
\footnote{145}{In re Tracy, 28 B.R. at 190 n.1.}
\footnote{146}{At least one court argues that there would be very few situations involving post-petition creditors. Considering the 1984 Amendments to Title 11, and particularly new §§ 1325(b)(1) and 1329(a) (preamble), it seems unlikely that Congress considered that there would be many...}
repaid, as indicated by the financial state of the debtor or his bankruptcy estate at the time of the decision to extend credit, would be totally frustrated by limiting the bankruptcy estate upon conversion. It is only reasonable that the debtor be required to place after-acquired property into the Chapter 7 estate if he is going to be relieved from liability of post-petition claims.\footnote{Post-petition indebtedness is often used to obtain after-acquired property. \footnote{Section 348(d) "hardly would elect to treat post-petition creditors of the Chapter 13 debtor as being pre-petition claimants after conversion to Chapter 7, if post-petition ... property which the debtor acquired as a result of credit transactions were not to be included in the debtor's Chapter 7 estate."}}\footnote{In \textit{In re Lybrook}, Judge Posner stated that a rule of "once in always in is necessary to discourage strategic, opportunistic behavior that hurts creditors without advancing any legitimate interest of debtors." In addition, such a rule would encourage a Chapter 13 debtor who later acquires property to stay with the plan. If debtors knew conversion to Chapter 7 would result in a liquidation of all nonexempt after-acquired property, they would have a strong incentive to continue with their Chapter 13 plan and to pay their creditors off over time. In contrast, if the date of the Chapter 13 filing is used to determine when property of the converted bankruptcy estate is calculated, then all risk of loss would be placed on creditors while debtors would benefit exclusively from any potential good fortune. Furthermore, it may encourage debtors to choose Chapter 13 for all the wrong reasons. A debtor who lacks confidence that he can actually work his way out of his financial hole by payments under a Chapter 13 plan will nevertheless have an incentive to proceed under that Chapter for as long as he can, holding his creditors at bay and thus staving off that evil day when they seize his assets. For he knows that if his position deteriorates further it is the creditors who will bear the loss, while if he should get lucky and win a lottery or a legal judgment, or inherit money (after 180 days have passed ...), he will be able to keep his creditors since the trustee or any secured creditor holding a prepetition claim can object to confirmation if the plan dedicates less than all of the debtor's projected disposable income, which veto-power effectively precludes payments outside the plan to post-petition creditors.} Post-petition indebtedness is often used to obtain after-acquired property. Section 348(d) "hardly would elect to treat post-petition creditors of the Chapter 13 debtor as being pre-petition claimants after conversion to Chapter 7, if post-petition ... property which the debtor acquired as a result of credit transactions were not to be included in the debtor's Chapter 7 estate."\footnote{In \textit{In re Lybrook}, Judge Posner stated that a rule of "once in always in is necessary to discourage strategic, opportunistic behavior that hurts creditors without advancing any legitimate interest of debtors."\footnote{In \textit{In re Winchester}, 46 B.R. at 495.} In addition, such a rule would encourage a Chapter 13 debtor who later acquires property to stay with the plan. If debtors knew conversion to Chapter 7 would result in a liquidation of all nonexempt after-acquired property, they would have a strong incentive to continue with their Chapter 13 plan and to pay their creditors off over time. In contrast, if the date of the Chapter 13 filing is used to determine when property of the converted bankruptcy estate is calculated, then all risk of loss would be placed on creditors while debtors would benefit exclusively from any potential good fortune. Furthermore, it may encourage debtors to choose Chapter 13 for all the wrong reasons. A debtor who lacks confidence that he can actually work his way out of his financial hole by payments under a Chapter 13 plan will nevertheless have an incentive to proceed under that Chapter for as long as he can, holding his creditors at bay and thus staving off that evil day when they seize his assets. For he knows that if his position deteriorates further it is the creditors who will bear the loss, while if he should get lucky and win a lottery or a legal judgment, or inherit money (after 180 days have passed ...), he will be able to keep his creditors since the trustee or any secured creditor holding a prepetition claim can object to confirmation if the plan dedicates less than all of the debtor's projected disposable income, which veto-power effectively precludes payments outside the plan to post-petition creditors.} \footnote{\textit{In re Lepper}, 58 B.R. 896, 902 (Bankr. D. Md. 1986).} \footnote{\textit{In re Winchester}, 46 B.R. at 495.} \footnote{\textit{Id.}} \footnote{\textit{In re Wanderlich}, 36 B.R. 710, 714 (Bankr. W.D.N.Y. 1984).} \footnote{951 F.2d 136 (7th Cir. 1991).} \footnote{\textit{Id.} at 137.}
windfall by the simple expedient of converting to Chapter 7—and remember that the debtor can convert . . . at will.\textsuperscript{152}

Another policy argument to justify using the date of conversion was articulated in \textit{In re Stinson}.\textsuperscript{153}

If the court were to conclude otherwise a debtor with substantial assets which would not be exempt in a Chapter 7 case, could file a petition under Chapter 13, obtain confirmation of a plan based solely upon payments to the trustee from future earnings, be revested with title to all of the nonexempt property, convert his case to Chapter 7, retain all of the nonexempt property and obtain a discharge of not only those debts in existence at the time of the Chapter 13 petition but also those incurred thereafter and prior to conversion.\textsuperscript{154}

This is so because section 1327(b) states: "Except as otherwise provided in the plan or the order confirming the plan, the confirmation of the plan vests all of the property of the estate in the debtor."\textsuperscript{155} However, those who favor using the date of filing argue that section 1327(b) is rendered inapplicable by conversion of the case out of Chapter 13 (due to section 103(h)) in the same way that section 1306 is rendered inapplicable.\textsuperscript{156}

As the court in \textit{In re Hannan}\textsuperscript{157} put it:

\textit{[U]nder a Chapter 13 [plan,] the creditors get only whatever the debtor agrees to devote to the repayment of their debts out of his future income. When a Chapter 13 plan does not work out, the debtor has the privilege of converting to Chapter 7, and when he exercises that right, no reason of policy suggests itself why the creditors should not be put back in precisely the same position as they would have been had the debtor never sought to repay his debts by filing under Chapter 13.}\textsuperscript{158}

Some argue that "the application of section 1306 after conversion to Chapter 7 has the effect of penalizing the Chapter 13 debtor for attempting a Chapter 13 case."\textsuperscript{159} A significant policy reason exists, however, to measure the estate at the date of conversion rather than at the date of filing the petition—to treat creditors fairly in light of the risks they bear while the debtor proceeds under Chapter 13. Since a debtor

\textsuperscript{152} \textit{Id. at} 137-38.

\textsuperscript{153} \textit{In re Stinson}, 27 B.R. 18 (Bankr. D. Ore. 1982).

\textsuperscript{154} \textit{Id. at} 20. It is arguable, though, that "those abusive debtors described in \textit{Stinson}[] are now subject to the 1984 'watch dog' provision of \textsection 707(b)." \textit{In re Lepper}, 58 B.R. 896, 902 (Bankr. D. Md. 1986).

\textsuperscript{155} \textsection 1327(b) (1988).

\textsuperscript{156} \textit{In re Lepper}, 58 B.R. at 902.

\textsuperscript{157} Hannan v. Kirschenbaum (\textit{In re Hannan}), 24 B.R. 691 (Bankr. E.D.N.Y. 1982).

\textsuperscript{158} \textit{Id. at} 692.

\textsuperscript{159} \textit{In re Schmeltz}, 114 B.R. 607, 610 (Bankr. N.D. Ind. 1990).
enters into a Chapter 13 plan voluntarily, he does so only if he thinks that he is getting a better "deal" (that is, he thinks he is going to have to pay his creditors less) than he would have under Chapter 7. But when the "deal" goes sour there is no justification for giving the debtor a better bargain, at the expense of creditors, than the one the debtor himself chose.\footnote{As one court stated: When he [the debtor] seeks to avoid the stigma of a Chapter 7 proceeding and selects a Chapter 13 proceeding, he controls his destiny by submitting a plan consistent with his financial situation. . . . After paying towards a confirmed plan and holding the creditors at bay, the debtor should not be allowed to convert to Chapter 7 and further thwart the creditors who had reasonable expectations to receive payments under the confirmed plan. \textit{In re Halpenny}, 125 B.R. 814, 816 (Bankr. Haw. 1991). \textit{In re Brownlee}, 93 B.R. 662, 666 (Bankr. S.D. Iowa 1988). \textit{Robb v. Lybrook (In re Lybrook)}, 107 B.R. 611, 614 (Bankr. N.D. Ind. 1989), \textit{aff'd}, 135 B.R. 321 (N.D. Ind. 1990), \textit{aff'd}, 951 F.2d 136 (7th Cir. 1991). \textit{Brief for Appellee at 12, In re Lybrook}, 951 F.2d 136 (No. 90-2926). \textit{11 U.S.C. § 1329(a)} (1988).} Further, it is unlikely that creditors could ever be put back in "precisely the same position" as they would have had the debtor never filed under Chapter 13. "Since the property of the estate in existence when the petition was filed is rarely intact at the time of conversion, the approach in \textit{Hannan} and cases similar to it does not account for the realities of the preconfirmation reorganization process and the impact on all creditors."\footnote{Further, it is unlikely that creditors could ever be put back in "precisely the same position" as they would have had the debtor never filed under Chapter 13. "Since the property of the estate in existence when the petition was filed is rarely intact at the time of conversion, the approach in \textit{Hannan} and cases similar to it does not account for the realities of the preconfirmation reorganization process and the impact on all creditors."}\footnote{Further, it is unlikely that creditors could ever be put back in "precisely the same position" as they would have had the debtor never filed under Chapter 13. "Since the property of the estate in existence when the petition was filed is rarely intact at the time of conversion, the approach in \textit{Hannan} and cases similar to it does not account for the realities of the preconfirmation reorganization process and the impact on all creditors."} The possibility for the debtor to legitimately exhaust his estate and to incur further debt under Chapter 13 can seriously alter the creditors' positions.

"To exclude post-petition property from the bankruptcy estate upon conversion . . . would automatically build a strange anomaly into the Bankruptcy Code."\footnote{Further, it is unlikely that creditors could ever be put back in "precisely the same position" as they would have had the debtor never filed under Chapter 13. "Since the property of the estate in existence when the petition was filed is rarely intact at the time of conversion, the approach in \textit{Hannan} and cases similar to it does not account for the realities of the preconfirmation reorganization process and the impact on all creditors."} A holding that the 180 day clock for determining property of the estate starts running on the date of filing would create an incentive to all debtors who experience significant financial improvement after filing under Chapter 13 to convert to Chapter 7 to avoid the possibility of having to share their new found wealth with their creditors. Congress certainly did not have such an intent.\footnote{Further, it is unlikely that creditors could ever be put back in "precisely the same position" as they would have had the debtor never filed under Chapter 13. "Since the property of the estate in existence when the petition was filed is rarely intact at the time of conversion, the approach in \textit{Hannan} and cases similar to it does not account for the realities of the preconfirmation reorganization process and the impact on all creditors."} An examination of section 1329(a) indicates that Congress intended just the opposite. By providing that a plan may be modified "upon request of the debtor, the trustee, or the holder of an allowed unsecured claim"\footnote{Further, it is unlikely that creditors could ever be put back in "precisely the same position" as they would have had the debtor never filed under Chapter 13. "Since the property of the estate in existence when the petition was filed is rarely intact at the time of conversion, the approach in \textit{Hannan} and cases similar to it does not account for the realities of the preconfirmation reorganization process and the impact on all creditors."} to increase or decrease payments, Congress intended that all parties involved in a Chapter 13 proceeding would have an avenue to seek equitable relief in


\textit{Brief for Appellee at 12, In re Lybrook}, 951 F.2d 136 (No. 90-2926).

the event of a change in the debtor’s financial status. Thus, Congress must have intended that creditors be able to share in debtors’ financial improvement.

If debtors, by simply converting, were able to avoid the rigors of the “best interest test,” or a required modification to a confirmed plan, they would be able to retrieve for themselves the very property that motivated the court’s decision concerning the plan, and thus completely escape compliance with the court’s orders. “The Bankruptcy Code should not be interpreted in a way that will facilitate such evasion.”

Debtors are not always prejudiced by the conclusion that the date of conversion controls, since they may properly claim exemptions on that date and preserve their interest in exemptible property. Furthermore, debtors’ best interests arguably lie in defining the Chapter 7 estate as of the date of conversion. For instance, where conversion occurs several years after the date of filing, it would be unfair and impractical to hold the debtor accountable for all the assets he held at the time of filing. For example, the debtor may have had many accounts receivable at the time of filing which were subsequently collected and the proceeds used to pay for expenses during the pendency of the case. Debtors may be forced to turn over thousands of dollars in assets for which they would be responsible, but which were disposed of long before the conversion to Chapter 7.

There are other situations in which debtors can benefit from this rule. For example, if between the time the debtor files under Chapter 13 and the time he converts, the state changes its homestead exemption rule to provide for a more generous exemption, the debtor would be entitled to this exemption, even though it did not exist on the date of filing. This is only fair since the new exemption will probably be a more accurate reflection of the economic environment at the time of conversion.

165. If the plan was not yet confirmed, debtors would also be encouraged to convert their case in order to circumvent the “best interests of the creditors” test for plan confirmation under 11 U.S.C. § 1325(a)(4). See infra note 167 for details of the “best interests of the creditors” test.

166. Brief for Appellee at 12, In re Lybrook, 951 F.2d 136 (No. 90-2926).

167. One of the requirements that a Chapter 13 plan must meet before it will be confirmed is known as the best interests of the creditors test: “the value . . . of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under Chapter 7 of this title on such date.” 11 U.S.C. § 1325(a)(4). This test is meant “to ensure that unsecured creditors would not be harmed by a debtor’s choice of Chapter 13 over Chapter 7.” SOMMER, supra note 14, at 190.


169. See FED. R. BANKR. P. 1019(1)(A).

homestead exemption that was established many years earlier may be outdated and insufficient to protect the debtor's interest. Allowing the debtor to determine his exemptions on the date of conversion fulfills the congressional policy of providing the debtor with a fresh start.\textsuperscript{171}

Given the arguments above, it is clear that the proposals suggesting that property of the bankruptcy estate be determined as of the date of conversion from Chapter 13 to Chapter 7 are stronger than those that suggest the date of the initial filing. Using the date of conversion is the best way to take into account the changes in circumstance that led to the debtor's decision to convert. It would be arbitrary and artificial to allow the filing date of a failed Chapter 13 case to control what property is to be included in a new Chapter 7 bankruptcy estate.

\section*{IV. Proposed Solutions}

Section 541 provides that the bankruptcy estate is composed of "all legal or equitable interests of the debtor in property as of the commencement of the case."\textsuperscript{172} The problem of determining what property is to be included in the bankruptcy estate after a conversion from Chapter 13 to Chapter 7 comes down to the question of which date controls "the commencement of the case"—the date of conversion or the date of filing. If the date of the initial Chapter 13 filing controls, then only the property that the debtor owned on the date of filing his Chapter 13 petition would come into the new Chapter 7 estate. Property that the debtor acquired more than 180 days after filing, with a few exceptions,\textsuperscript{173} would be excluded from the new Chapter 7 estate, even though it had been included under Chapter 13. If the date of conversion controls, then all of the property that the debtor owned on the date of conversion, including property acquired while the Chapter 13 plan was in effect, would become property of the new Chapter 7 estate.

\textsuperscript{171} However, the court in \textit{In re Lepper} was not persuaded by such arguments. "[T]he date of filing the Chapter 13 petition is the relevant date for determining what constitutes property of the Chapter 7 estate upon conversion. If a debtor is unhappy with the result, that debtor has the opportunity to dismiss the case and file a second petition . . . ." \textit{Id.} at 902. Presumably, at that time, the debtor would get to claim all new exemptions.

\textsuperscript{172} 11 U.S.C. § 541(a)(1) (1988). In addition, the property of the estate also includes any interest in inheritances, divorce settlements, and life insurance benefits that the debtor acquires or becomes entitled to acquire within 180 days after the date of filing of the bankruptcy petition. \textit{Id.} § 541(a)(5).

\textsuperscript{173} If acquired within 180 days of the Chapter 13 filing, property acquired by the following means would be included: by bequest, devise, or inheritance; as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce; or as a beneficiary of a life insurance policy or of a death benefit plan. 11 U.S.C. § 541(a)(5).
Currently, a great deal of judicial resources are being wasted on trying to determine whether the date of filing or the date of conversion should control which assets of the debtor become property of the estate. Courts that have considered the problem have reached contradictory results. \(^{174}\)

There are numerous arguments, both statutory and policy based, to support the use of either date. A strict reading of section 541 in isolation would lead to the conclusion that the date of filing should control. However, when interpreting the Code as a whole and taking into account the policies behind the Code, it is clear that the date of conversion should control. Furthermore, a trend seems to be developing at the appellate level favoring the date of conversion over the date of filing. Although the lower courts are still split on the issue, at least four appellate courts have reached a consensus.

In *In re Winchester*,\(^ {175}\) the Bankruptcy Appellate Panel for the Ninth Circuit held that the date of conversion from a Chapter 13 to a Chapter 7 bankruptcy determines the applicable exemptions which can be claimed in the Chapter 7 estate. The Eighth Circuit reached a similar conclusion in *In re Lindberg*,\(^ {176}\) holding that the date of conversion controls the homestead exemption. In that case, the debtor was entitled to claim a homestead exemption that was different from the one designated when the Chapter 13 petition was filed.\(^ {177}\) As to the composition of the bankruptcy estate, the Seventh Circuit held, in *In re Lybrook*,\(^ {178}\) that the date of conversion controls, and therefore after-acquired property is to be included in the Chapter 7 estate. The Tenth Circuit recently agreed with the *Lybrook* court's reasoning and held that all property acquired post-petition and pre-conversion becomes property of the Chapter 7 estate.\(^ {179}\)

Under the current state of uncertainty, there is a danger that unscrupulous debtors could attempt to twist the Bankruptcy Code to benefit themselves at the expense of their creditors. The United States Constitution grants Congress the sole power to determine the bankruptcy laws. "The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States . . . ."\(^ {180}\)

\(^{174}\) See supra notes 42-45 and accompanying text.

\(^{175}\) Winchester v. Watson (*In re Winchester*), 46 B.R. 492 (Bankr. 9th Cir. 1984).


\(^{177}\) Id. at 1088.

\(^{178}\) Robb v. Lybrook (*In re Lybrook*), 951 F.2d 136 (7th Cir. 1991).


\(^{180}\) U.S. CONST. art. I, § 8, cl. 4.
Thus, Congress should take the initiative and settle the issue once and for all.

The conundrum is to come up with a solution that does not interfere with the congressional policy of encouraging debtors to choose Chapter 13 over Chapter 7, while at the same time preventing debtors from using conversion from Chapter 13 to Chapter 7 as a strategy for cheating creditors. This is a difficult task to accomplish since part of the attractiveness of Chapter 13 is the unlimited power to convert. This Note proposes two alternative solutions to the problem of determining the property of the converted bankruptcy estate which Congress may choose to adopt and which bankruptcy courts may use to guide their decisions.

A. Proposal Number One:
Define the Relevant Date as the Date of Conversion

The first proposal is a simple one. Congress can amend the Bankruptcy Code to make it clear that the date of conversion of the bankruptcy case from Chapter 13 to Chapter 7 is the relevant date for determining property of the new Chapter 7 bankruptcy estate.

The amendment can be made in one of two ways. Section 541, which defines property of the estate, can be amended to make it clear that property of the estate includes “in a case that has been converted, all legal or equitable interests of the debtor in property as of the date of conversion.” In the alternative, section 348, which determines the effect of conversion, can be amended as follows: “Property that the estate acquires after the order for relief but before conversion in a case that is converted shall be treated for all purposes as if such property had been acquired by debtor immediately before the date of the filing of the petition.”

The proposed amendment to section 348 is better than the proposed amendment to section 541 for two reasons. First, it recognizes the continuity of the bankruptcy estate from one chapter to another. Only that property which became property of the estate under Chapter 13 would become property of the converted estate under Chapter 7. In contrast, the amendment to section 541 could bring in additional property that was not property of the Chapter 13 estate. The Code should seek to maintain continuity between the Chapter 13 and Chapter 7 estates, not to punish the debtor for converting. Second, the section 348 amendment is preferable to the section 541 amendment since section 348 is under the section

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181. This amendment would be the companion of § 348(d), which treats claims against the estate or the debtor that arise post-petition, but pre-conversion, as if they arose pre-petition.
entitled “effect of conversion.” This is the logical location for a rule that explains the effect of conversion on the property of the estate.

1. Benefits of Proposal Number One

This proposal eliminates the problem of strategic conversions since property of the estate will remain unchanged after conversion. There is no longer the possibility of a retroactive exclusion of property from the bankruptcy estate. This proposal also has the advantages of being predictable and easy to apply. This black letter law makes clear to debtors and creditors alike what the effect of conversion on the bankruptcy estate would be. No longer will both sides have to present arguments trying to persuade the court to look at one date or the other. No longer will the outcome be based upon which judge happens to hear the case. Finally, judicial resources will be saved by eliminating needless litigation expenses, which will benefit not only the courts but also debtors and creditors.

2. Potential Criticisms of Proposal Number One

There is a potential argument that this proposal is too broad because it will affect all debtors who choose to convert, whether they convert for legitimate reasons or with the intent to defraud their creditors. The mens rea of the debtor, however, is not important; what is important is giving creditors fair treatment. This is supported by section 1307, which provides that a debtor may convert at any time. It does not require the debtor to have a good reason. Furthermore, since proving the mens rea of a debtor can be difficult, such a requirement would lead to a further drain on limited resources.

Critics may also argue that making the date of conversion the relevant date would discourage the use of Chapter 13. Under Chapter 13, the debtor is required to pay all of his disposable income into a plan that may last as long as five years.182 It does not seem fair that the debtor, if he converts, could also be required to give up anything that he may inherit while the plan is in effect. If the debtor had originally filed under Chapter 7, he would be able to keep his disposable income and his inheritance,183 but if he originally filed under Chapter 13 and then

183. Of course, this assumes that the debtor's right to the inheritance vested more than 180 days after the filing. This is so because under Chapter 7 only the property that the debtor owns on the date of filing and that which he inherits within 180 days after the date of filing come into the bankruptcy estate. See 11 U.S.C. § 541. Under Chapter 13, however, there is no 180 day limit. Therefore, any inheritance
converted to Chapter 7, he runs the risk of losing both. Debtors should be encouraged to try Chapter 13, but under this rule the debtor would actually be punished for making the attempt. Therefore, the argument goes, debtors will avoid Chapter 13 and go straight into Chapter 7.

This argument is tenuous at best. It is unlikely that debtors enter Chapter 13 with the intent of converting to Chapter 7. Furthermore, the only debtors who are harmed by this rule are those who receive new found wealth, such as an inheritance, during the course of their Chapter 13 plan. Thus, the only people who would be discouraged from attempting a Chapter 13 would be those who believe there is a high probability that they will receive a substantial inheritance in the near future. It seems unlikely that a person who thought he was going to receive such wealth would even be filing for bankruptcy.

Despite the potential drawbacks to the proposal of making the date of conversion the relevant date, it is better than the alternative. If Congress amends the Code to make the date that the debtor filed under Chapter 13 the relevant date for determining property of the bankruptcy estate, it could lead to abuse of the bankruptcy system by debtors. Under such a formulation, debtors would keep the advantages of Chapter 13 while putting all the risk on creditors.\textsuperscript{185}

\begin{flushleft}
\textbf{B. Proposal Number Two: Empower Courts to Limit Bad Faith Conversions}
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Since abuse of the bankruptcy system by debtors is the primary concern, a logical solution would be to amend the Bankruptcy Code to discourage "bad faith" conversions, eliminating the need to address the problem of which date controls the composition of the Chapter 7 bankruptcy estate. Courts should have the power to limit the ability to convert in cases where the conversion would result in substantial abuse.

Under the current Bankruptcy Code, courts have no power to deny a conversion since section 1307(a) states that the debtor may convert a case under Chapter 13 to a case under Chapter 7 "at any time."\textsuperscript{186} Therefore, the Code would have to be amended to give courts the power to deny a conversion under certain circumstances. In the language of the Code, this rule would appear as follows:

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\textsuperscript{184} These advantages include, for example, the right to hold on to property and the greater discharge available under Chapter 13.

\textsuperscript{185} The risk is that, by the time the Chapter 13 plan fails, the bankruptcy estate may be so depleted that creditors end up getting less than they would have had the debtor originally filed under Chapter 7.

\textsuperscript{186} 11 U.S.C. § 1307(a).
Notwithstanding section 1307(a), after notice and a hearing, the court, on its own motion or on a motion by the United States Trustee, but not at the request or suggestion of any party in interest, may deny a request by a debtor to convert a case under chapter 13 to a case under chapter 7 of this title if the court finds that the granting of the conversion would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.¹⁸⁷

Under this rule, if the court finds that a conversion to Chapter 7 would be an abuse of the Bankruptcy Code, it may deny the conversion. In order to avoid excessive litigation, a motion to deny the conversion may be made only by the bankruptcy court or the United States Trustee. Creditors may not make the motion. If the court suspects abuse, it should look at all of the facts and circumstances surrounding the conversion. The court may consider a number of factors in deciding whether to deny a conversion: whether distributions to creditors under the new Chapter 7 plan would be substantially less than the payments they would have received under the Chapter 13 plan; whether the debtor has acquired new found wealth during the Chapter 13 plan; whether the assets of the original Chapter 13 estate are still substantially intact; whether the debtor entered into the Chapter 13 plan with a good faith intention of completing it;¹⁸⁸ and whether the conversion is for reasons beyond the debtor’s control.¹⁸⁹ If the dominant purpose of the conversion is to cheat creditors out of a share of the debtor’s new found wealth, the conversion should be denied.

Of course, there should be a presumption in favor of allowing the conversion, and the burden of proof should be on the court or the trustee to show bad faith. Creditors should be provided notice of the court’s investigation and have a full opportunity to be heard on the issue.

1. Benefits of Proposal Number Two

This proposed rule would have the effect of frustrating those debtors who would try to abuse the Bankruptcy Code for their own benefit, while still keeping the liberal provisions of Chapter 13 intact. The advantage of this rule is that it would, unlike a blanket rule using date of conversion

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¹⁸⁷. The language of this proposed amendment is similar to the language in 11 U.S.C. § 707(b), which gives the bankruptcy court the power to dismiss a consumer debtor’s Chapter 7 case if the court finds that the granting of relief (i.e., permitting liquidation) would be an abuse of Chapter 7.

¹⁸⁸. Some may argue that the conversion itself is per se evidence of bad faith; however, such a holding goes against public policy. Congress wanted to encourage Chapter 13 filings, and among the benefits of Chapter 13 is the right to convert the case at any time. Therefore, the debtor should receive a presumption of good faith.

¹⁸⁹. This list of factors is by no means exhaustive.
as the date for determining property of the estate, only affect dishonest debtors. The honest debtor is still free to explore all of his options. Thus, honest debtors will not be discouraged from attempting a Chapter 13 plan since they know that if it is not successful they will always have the option of converting to Chapter 7 without any penalty.

2. Potential Criticisms of Proposal Number Two

One potential criticism of this rule is that, because the debtor’s cooperation is needed in order for a Chapter 13 plan to work, it would be impracticable to keep a debtor in a Chapter 13 plan against his wishes. Chapter 13 requires a debtor to have “regular income.” If the debtor no longer liked the idea of all of his disposable income going to his creditors, he could simply quit his job or refuse to go to work, thereby reducing his disposable income to zero. Since the United States Constitution prohibits involuntary servitude, the court could not force the debtor to continue working for the benefit of his creditors. Thus, the uncooperative debtor would be able to frustrate the plan.

This proposed rule, however, does not force the debtor to stay in Chapter 13 until it is completed; it merely forbids the dishonest debtor from converting to Chapter 7. The dishonest debtor is still free to dismiss his Chapter 13 case under section 1307(b) and refile under Chapter 7. However, doing so would probably not be a wise decision on the debtor’s part because dismissing and refiling creates a whole new bankruptcy case, thereby changing the date upon which property of the estate is determined. The property of the Chapter 7 estate is determined “as of the commencement of the case.” Therefore, property of the new Chapter 7 case would be determined on the date that the Chapter 7 petition was filed. Consequently, all nonexempt property that the debtor owns on the date of the new Chapter 7 filing, including his new found wealth, would become property of the Chapter 7 estate and be liquidated for the benefit of the creditors. In sum, instead of dismissing the Chapter 13

190. “Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000 . . . may be a debtor under chapter 13 of this title.” 11 U.S.C. § 109(e) (1988) (emphasis added).
192. Likewise, if the debtor is uncooperative, the court can dismiss the Chapter 13 case.
194. A voluntary bankruptcy case is “commenced” by filing a petition with the bankruptcy court. Id. § 303.
195. For a discussion concerning the difference between conversion and dismissal, see supra notes 112-19 and accompanying text.
claim and refiling under Chapter 7, it is probably in the debtor's best interests to modify the Chapter 13 plan to take into account the new found wealth and to continue making payments under the plan.

Critics will charge that because this amendment puts a limitation on conversion it could theoretically discourage debtors from choosing Chapter 13. One way to encourage debtors to give Chapter 13 a try is to provide them with an escape route: if for any reason at any time a debtor is not completely satisfied with his Chapter 13 plan, he has the unconditional right to convert to Chapter 7 with no questions asked. This is currently accomplished through section 1307, which gives Chapter 13 debtors an unlimited ability to convert. In contrast, limiting the ability to convert would make trying Chapter 13 riskier and less appealing to the debtor.

This argument is weak for two reasons. First, it is highly unlikely that the average debtor actually takes into account future strategies, such as converting from one chapter to another, when he is choosing which chapter to initially file under. Further, the only debtors who need to fear this amendment (and thus be potentially deterred from choosing Chapter 13) are those who plan to convert in bad faith—that is, with the intent to harm their creditors.

The biggest disadvantage of this rule, when compared to the current black letter rules in bankruptcy, is the absence of a bright line for determining what constitutes "substantial abuse." To be sure, this rule would require a fact specific inquiry, which could lead to longer and more expensive bankruptcy proceedings. Whether the added cost will be outweighed by the increase in fairness to all parties to the bankruptcy remains to be seen.

CONCLUSION

Of the two alternative solutions proposed by this Note, the first is preferable to the second. The second alternative is not as definite and therefore may lead to more court time being wasted. The first solution is

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196. This is true for a number of reasons. For example, the debtor filing for bankruptcy obviously does not have much money, and therefore cannot afford much legal advice—particularly with respect to hypothetical questions such as "What happens if I inherit a large sum of money?" Furthermore, a debtor who believes he may be acquiring new found wealth would probably not file for personal bankruptcy in the first place.

197. An advantage of simple bankruptcy rules is the savings in time and money for the courts and the parties involved. A study of the amount of time it takes for a judge to dispose of bankruptcy cases indicates that a Chapter 7 nonbusiness case with scheduled debts of less than $50,000 requires 11.4 minutes of a judge's time; a Chapter 13 case with scheduled debts of less than $50,000 requires 47.4 minutes of a judge's time. JOHN E. SHAPARD, THE 1981 BANKRUPTCY COURT TIME STUDY 36 (1982).
a simple black letter rule which will cut down on much confusion and lead to greater predictability and uniformity. Furthermore, there is less of a chance that the first alternative will discourage debtors from choosing Chapter 13 since it preserves the unlimited right to convert, which is arguably one of the factors that induces debtors to try Chapter 13 in the first place.

Until Congress acts, the courts should be guided by the principles underlying the Bankruptcy Code, namely allowing the honest but unfortunate debtor to obtain a fresh start. Almost as important as insuring that the honest debtor receives a fresh start is preventing the dishonest debtor from violating the spirit of the law by exploiting loopholes in the Code. Congress, as well as the courts, should seek to “discourage strategic and opportunistic behavior that hurts creditors without advancing any legitimate interest of debtors.”198

198. *In re Lybrook*, 951 F.2d 136, 137 (7th Cir. 1991).