By Brett Weiss

An Involuntary Conversion of an Individual Case to Chapter 11 Violates the Thirteenth Amendment

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Historically, the Bankruptcy Code has not allowed creditors to force individuals to reorganize. A debtor must voluntarily choose to file under chapters 12 and 13,[1] and may dismiss such a case at any time.[2] When Congress added individual reorganization provisions to the Bankruptcy Act in 1938 (chapter XIII, now chapter 13), they gave only the debtor the choice to voluntarily file chapter 13; that chapter cannot be forced upon them, either through an involuntary proceeding[3] or a forced conversion.[4]

There was — and is — a very specific reason for these restrictions. When the current chapter 13 was enacted in 1978, it provided that post-petition wages (money earned by the debtor *after* the case was filed) would be considered estate property[5] that would need to be contributed toward the payment of a chapter 13 plan.[6]

For a chapter 13 plan to succeed, the debtor must be a willing and active participant. Congress specifically recognized that were a chapter 13 to be *in*voluntary, Thirteenth Amendment problems could result:

> As under current law [chapter XIII], chapter 13 is completely voluntary. This Committee firmly rejected the idea of mandatory or involuntary chapter XIII in the 90th Congress. The Thirteenth Amendment prohibits involuntary servitude. Though it has never been tested in the wage-earner plan context, it has been suggested that a mandatory chapter 13, by forcing an individual to work for creditors, would violate this prohibition. On policy grounds, it would be unwise to allow creditors to force a debtor into a repayment plan. An unwilling debtor is less likely to retain his job or to cooperate in the repayment plan; and more often than not, the plan would be preordained to fail.[7]

Similar reasoning applied to an involuntary chapter 13. The Official Notes to § 303 state:

> Involuntary chapter 13 cases are not permitted either. To do so would constitute bad policy, because chapter 13 only works when there is a willing debtor that wants to repay his creditors. Short of involuntary servitude, it is difficult to keep a debtor working for his creditors when he does not want to pay them back.[8]

At that time, an individual chapter 11 debtor's post-petition wages were not made property of the estate. As such, there were no direct constitutional issues in forcing an individual debtor into chapter 11, either through an involuntary conversion or an involuntary filing; the debtor's post-petition wages were not property of the estate and did not have to be used to pay creditors under a plan. The U.S. Supreme Court recognized this in *Toibb v. Radloff*.[9] As Justice Harold A. Blackmun stated, "Because there is no comparable provision in Chapter 11 requiring a debtor to pay future wages to a creditor, Congress's concern about imposing involuntary servitude on a Chapter 13 debtor is not relevant to a Chapter 11 reorganization."[10]

Only after passage of the Bankruptcy Abuse Protection and Consumer Protection Act of 2005 (BAPCPA) were an individual's post-petition wages for the first time made property of the chapter 11 estate, and Thirteenth Amendment involuntary servitudes issues were made an actuality. BAPCPA made significant changes to individual chapter 11s, grafting onto chapter 11 many provisions previously applicable only in chapter 13. As Hon. **Bruce A. Markell** (now a professor at Northwestern University Pritzker School of Law) noted in *In re Shat*:[11]

> [W]hile not entirely free from doubt, it appears that Congress inserted the individual chapter 11 provisions to ensure no easy escape from means testing. The template for this effort was to adopt and adapt as much of chapter 13 as possible with respect to indi-

continued on page 69

1 11 U.S.C. § 706(c).
2 11 U.S.C. §§ 1208, 1307.
3 *See* 11 U.S.C. § 303(a) and (b).
4 There is no provision analagous to § 706(b) allowing an involuntarily conversion to chapter 13.
5 11 U.S.C. § 1306(a)(2).
6 11 U.S.C. § 1325(b)(1)(B).
7 House Report at 120, and Sen. Report at 32, U.S. Code Cong. & Admin. News 1978 at 6080. When chapter 12 was created in 1986, § 706(a) and (c) were amended to add chapter 12 references. In chapter 12, like chapter 13, the debtor's post-petition earnings are part of the bankruptcy estate and are submitted as part of the chapter 12 reorganization plan to repay creditors, §§ 1207(a)(2), 1222(a)(1), (a)(4).
8 111 U.S.C. § 303 (Official Notes).
9 501 U.S. 157, 111 S. Ct. 2197, 115 L. Ed. 2d 145 (1991).
10 *Id.*, 501 U.S. at 166.
11 424 B.R. 854 (Bankr. D. Nev. 2010).

> vidual debtors in chapter 11.... What remains is a sort of hybrid chapter 13, in which many provisions of chapter 13 sit uneasily in chapter 11.[12]

These quasi-chapter 13 provisions include: (1) including post-petition earnings as property of the estate; (2) requiring that a chapter 11 plan for an individual debtor provide for the payment to creditors of such post-petition earnings or other future income of the debtor as is necessary for execution of the plan; (3) requiring that individual debtors pay their "disposable income" during a portion of the chapter 11 plan in certain cases; (4) delaying discharge until the completion of payments unless otherwise ordered by the court; and (5) allowing certain post-confirmation modifications. The BAPCPA provisions were copied virtually verbatim from chapter 13 and pasted into chapter 11 with little thought as to how they would integrate into the existing chapter 11 framework or work in actual cases. One indication of this lack of forethought is the fact that neither § 706(b) nor § 303 were changed to reflect the new reality that post-petition wages were now considered part of the chapter 11 estate, and to address the problem of involuntary servitude.

As shown in *Matter of Noonan*, "The fact is that Congress perceived the usual [chapter] 13 case as emanating from a nonbusiness debtor and determined to make the relief of that chapter voluntary in order to avoid the spectre of involuntary peonage for a hapless debtor laboring for his creditors on their petition and their plan, which could strip the debtor and his family of all that made their lives otherwise worth living."[13] If there are no or minimal nonexempt assets available for distribution, the forced inclusion of fruits of the debtor's labor — their wages — would be the only way to obtain a confirmable plan.

Once an individual debtor's case is involuntarily converted to a chapter 11 or an involuntary case is filed against them, they would effectively be trapped in the chapter 11 case, with no right to dismiss[14] or convert.[15] The debtor must dedicate their disposable income to a plan as a fiduciary for creditors, or a creditor could file a plan explicitly forcing the debtor to work for creditors.[16] If a debtor does not cooperate in this peonage, the court could also appoint a chapter 11 trustee under § 1104 and force it upon the debtor.

The Thirteenth Amendment to the U.S. Constitution, which abolished slavery, involuntary servitude and peonage,[17] states, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." The Supreme Court has explained peonage as "compulsory service in payment of a debt. A peon is one who is compelled to work for his creditor until his debt is paid."[18] The fact that a debt was voluntarily entered into does not exclude peonage from the Thirteenth Amendment's prohibition.[19]

This principle's relevance to bankruptcy has long been recognized. The Supreme Court explained the deleterious impact of peonage at length in *Local Loan Co. v. Hunt*:[20]

> When a person assigns future wages, he, in effect, pledges his future earning power. The power of the individual to earn a living for himself and those dependent upon him is in the nature of a personal liberty quite as much if not more than it is a property right. To preserve its free exercise is of the utmost importance, not only because it is a fundamental private necessity, but because it is a matter of great public concern. From the viewpoint of the wage-earner there is little difference between not earning at all and earning wholly for a creditor. Pauperism may be the necessary result of either. The amount of the indebtedness, or the proportion of wages assigned, may here be small, but the principle, once established, will equally apply where both are very great. The new opportunity in life and the clear field for future effort, which it is the purpose of the Bankruptcy Act to afford the emancipated debtor, would be of little value to the wage-earner if he were obliged to face the necessity of devoting the whole or a considerable portion of his earnings for an indefinite time in the future to the payment of indebtedness incurred prior to his bankruptcy.

The underlying purpose of the Bankruptcy Act — and of the modern Bankruptcy Code — is consistent with the purposes of the Thirteenth Amendment: prevent the imposition of penal consequences on debtors who act honorably and in good faith but cannot pay their debts. It allows such persons to contribute fully to all of society with a fresh start. The Thirteenth Amendment contains no exemptions from its prohibitions for debtors in bankruptcy to be forced into servitude and cannot be used as a tool by creditors to force debtors to choose between work and wage slavery. Sections 1115(a) (makes an individual's post-petition earnings property of the chapter 11 estate), 1129(a)(15) (requires that disposable income be paid into the chapter 11 plan) and 1127(e) (allows holders of allowed unsecured claims to seek modification of a confirmed plan to increase the amount of payments) violate these long-established constitutional principles in an involuntary case.

12 *Id.* at 859-61.
13 *In re Noonan*, 17 B.R. 793, 799 (Bankr. S.D.N.Y. 1982). *See also In re Markman*, 5 B.R. 196 (Bankr. E.D.N.Y. 1980) (same principles supported order barring trustee from extending chapter 13 plan beyond period fixed by Congress).
14 11 U.S.C. § 1112(b).
15 11 U.S.C. § 1112(a).
16 11 U.S.C. § 1121(c).
17 *Pollock v. Williams*, 322 U.S. 4, 64 S. Ct. 792, 88 L. Ed. 1095 (1944); *Bailey v. Alabama*, 219 U.S. 219, 31 S. Ct. 145, 55 L. Ed. 191 (1911); *Clyatt v. United States*, 197 U.S. 207, 25 S. Ct. 429, 49 L. Ed. 726 (1905). *See also* 42 U.S.C. § 1994 ("[A]ll acts ... orders ... by virtue of which any attempt shall be ... made to establish, maintain, or enforce ... the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void.").
18 *Bailey v. Alabama*, 219 U.S. at 242.
19 *Pollock v. Williams*, 322 U.S at 24 (state may not "directly or indirectly command involuntary servitude, even if it was voluntarily contracted for").
20 292 U.S. 234, 245, 54 S. Ct. 695, 78 L. Ed. 1230 (1934).

continued on page 70

from page 69

In re Fitzsimmons[21] deals with the problem caused by the appointment of a chapter 11 trustee in an individual case. The *Fitzsimmons* court faced the issue of whether a chapter 11 debtor's post-petition income was property of the estate. It noted that the comparable provisions of § 1306(a)(2), which makes a chapter 13 debtor's income property of the estate, are constitutional because chapter 13s are voluntary, and a debtor cannot be forced into chapter 13. The court concluded:

> The consistency of the foregoing provisions of the Bankruptcy Code demonstrate implementation of a policy designed to prevent involuntary submission to the bankruptcy estate of post-petition earnings from services of an individual. This is consonant with the spirit, if not the letter, of the Thirteenth Amendment to the [U.S.] Constitution prohibiting involuntary servitude.

Forcing an individual chapter 11 debtor to remain in chapter 11 involuntarily would appear to be unconstitutional because the provisions of § 1112(a) and (b) do not confer an absolute right upon an individual chapter 11 debtor to dismiss their case or convert it to one under chapter 7.[22]

One author noted that there are at least six reasons why chapter 13 provisions governing post-petition earnings are constitutional:[23]

> (1) involuntary cases may not be filed under Chapter 13, which means that an individual debtor cannot be forced to subject his or her income to the requirement of paying creditors to receive a discharge in Chapter 13;
> (2) a Chapter 13 debtor has the right to dismiss his or her Chapter 13 case or to convert it to Chapter 7, if the case has not been previously converted, thereby enabling the debtor to avoid the post-petition earnings restrictions in Chapter 13;
> (3) only a Chapter 13 debtor can file a Plan;
> (4) only a Chapter 13 debtor may modify a Chapter 13 Plan prior to confirmation, whereas creditors only may object to confirmation;
> (5) a Chapter 13 Plan may not last longer than [five] years; and
> (6) at one time, a creditor or a trustee could not force a Chapter 13 debtor to extend Plan payments, although that is no longer the case.

These six aspects of Chapter 13 that saved (or at least previously saved) the provisions applicable to post-petition earnings from constitutional challenge under the Thirteenth Amendment cannot be found under the post-BAPCPA provisions of chapter 11.

Similarly, "an order directed to a debtor who lacks sufficient current assets but who has ample earning capacity to find work or to continue working, and to make payments to creditors out of that income stream, runs head-on into the Thirteenth Amendment."[24] In *In re Nine Applications for Appointment of Counsel in Title VII Proceedings*,[25] the court stated, "Since earnings are within the estate, the debtor is an involuntary fiduciary as to those earnings; he cannot just abandon them without consequence."[26]

Because debtors who have been involuntarily converted to chapter 11 or against whom an involuntary proceeding has been filed are forced to dedicate post-petition wages to the payment of creditors, have no right to dismiss or convert the chapter 11 case, and may have creditors file or modify a chapter 11 plan, such actions violate the Thirteenth Amendment and are unconstitutional. abi

21 725 F.2d 1208 (9th Cir. 1984).

22 In *In re Molina y Vedia*, 150 B.R. 393, 399 (Bankr. S.D. Tex. 1992), the court analyzed whether an individual chapter 11 debtor's income was property of the estate. It compared chapter 11 to chapters 12 and 13, and noted that constitutional concerns were addressed by the debtor's absolute right to covert: "Similar Congressional concern for the Thirteenth Amendment is evidenced by the fact that debtors under Chapter 12 and Chapter 13 have an absolute right to convert or dismiss their cases. *See* 11 U.S.C. § 1307 and 11 U.S.C. § 1208." *But see In re Breland*, No. 1:17-CR-00312-JB (S.D. Ala. 2019).

23 Daniel McCarthy, "The Shackles of an Individual Chapter 11 Debtor's Servitude," 30 *Cal. Bankr. J.* 159, 166-67 (2009).

24 Margaret Howard, "Bankruptcy Bondage," 2009 *U. Ill. L. Rev.* 191 (citing *United States v Kozminski*, 487 U.S. 931, 952, 108 S. Ct. 2751, 101 L. Ed. 2d 788 (1988)).

25 475 F. Supp. 87, 88 (N.D. Ala. 1979).

26 *See also* Robert J. Keach "Dead Man Filing Redux: Is the New Individual Chapter Eleven Unconstitutional," 13 Am. Bankr. Inst. L. Rev. 483 (2005), abi.org/member-resources/law-review/dead-man-filing-redux-is-the-new-individual-chapter-eleven (last visited Feb. 18, 2026).