AMERICAN BANKRUPTCY INSTITUTE

Southeast Bankruptcy Workshop

Consumer: Post-Petition Personal-Injury Issues

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CONCURRENT WORKSHOP

2025

ABI Southeast Bankruptcy Workshop 2025

Post-Petition Personal Injury Issues in Consumer Bankruptcy Cases

July 25, 2025

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I. Relevant Statutory Provisions[1]:

11 U.S.C. § 541. Property of the Estate:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

[1] Compiled by Jennifer Cruseturner, Chapter 13 Trustee, Western District of Tennessee.

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

11 U.S.C. § 1306. Property of the Estate:

(a) Property of the estate includes, in addition to the property specified in section 541 of this title—

(1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.

(b) Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

11 U.S.C. § 1327. Effect of Confirmation:

(a) . . .

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

11 U.S.C. § 1329. Modification of Plan After Confirmation:

(a) At any time after confirmation of the plan but before completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim . . . .

II. When Does a Cause of Action Accrue? [2]

Whether an interest is property of the bankruptcy estate is governed by 11 U.S.C. § 541. Section 541(a) states that, with few enumerated exceptions, the bankruptcy state comprises "all legal and equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541. The broad language falls in line with Congress' intentions to maximize the amount of assets that will enter the bankruptcy estate. This includes pre-petition causes of actions.

If a pre-petition cause of action is not disclosed in a bankruptcy case (whether intentionally or inadvertently), the case is commonly reopened to bring the lawsuit into the estate if proceeds emerge in the future. This is becoming commonplace as mass tort claims and other personal injury causes of action continue to grow. Whether a cause of action ultimately becomes property of the estate has many thorny aspects. There are policy considerations, and concerns over fairness and finality—these considerations and concerns become more impactful the longer a case has been closed. After all, it can hardly be considered a "fresh start" if debtors need to worry about their case being reopened thirty years after discharge.

In *Segal v. Rochelle,* the Supreme Court explained that determining property of the estate requires looking to multiple interests; while most property should be property of the estate to attempt to provide fair compensation to creditors, bankruptcy is intended to "leave the bankrupt free after the date of his petition to accumulate new wealth in the future." *Segal v. Rochelle,* 382 U.S. 375, 379 (1966). Attempting to balance those interests, *Segal* announced that while property acquired after filing is generally not part of the bankruptcy estate, it is property of the estate if it is "sufficiently rooted in the pre-bankruptcy past." *Id.* at 379–80. Most circuits, including the Eleventh Circuit, have noted that *Segal* was statutorily abrogated by Congress when it amended the Bankruptcy Code in 1978. *See, e.g., In re Bracewell,* 454 F.3d 1234, 1242 (11th Cir. 2006) (explaining "[t]he *Segal* decision told us how to define property under the old bankruptcy code, before it was amended in 1978 to include an explicit definition of property"). But *Segal's* general rule is still noted in many cases analyzing this issue since then.

Included in the bankruptcy estate, under § 541(a) are all legal interests of the debtor. Courts interpret that to include any causes of action or potential causes of action that had *accrued* as of the petition date. *In re Alvarez,* 224 F.3d 1273, 1278 n. 12 (11th Cir. 2004). While the types of property interests which are included in the bankruptcy estate are determined by federal law, those interests are defined and characterized by state law. *In re Lewis,* 137 F.3d 1280, 1283 (11th Cir. 1998). Given that, whether a cause of action accrued as of the petition date is governed by state law.

The basic determination as to whether a post-petition settlement ends up in the estate is whether, under state law, the cause of action accrued as of the petition date. The Supreme Court held that a claim accrues "when the plaintiff has a complete and present cause of action." *Wallace v. Kato,* 549 U.S. 384, 388 (2007). More simply, a cause of action accrues when all elements of the cause of action have occurred. There are certainly cases in which this is straightforward, but in many case the process for determining accrual is much more complex.

[2] Prepared by Hon. Bess M. Parrish Creswell, U.S. Bankruptcy Court for the Middle District of Alabama.

Most states apply a discovery rule to determine when a cause of action accrued. *See, e.g., Trustmark Ins. Co. v. ESLU, Inc.,* 299 F.3d 1265, 1271 (11th Cir. 2002) ("[the] discovery rule prevents a cause of action from accruing until the plaintiff either knows or reasonably should know of the act giving rise to the cause of action"). The applicability of the discovery rule to accrual of a cause of action is not entirely clear in the Eleventh Circuit. *In re Webb* discusses this tension, noting that the *In re Alvarez* case contains language that "strongly suggest[s] the discovery rule is not applicable when determining whether a lawsuit is estate property." *In re Webb,* 484 B.R. 501, 503 (Bankr. M.D. Ga. 2012) (citing *In re Alvarez,* 224 F.3d 1273, 1276, n. 7 (11th Cir. 2000) ("a cause of action can accrue for ownership purposes in a bankruptcy proceeding before the statute of limitations begins to run")). It is important to note, though, that *In re Alvarez* relies in part on *Segal's* sufficiently-rooted test. *In re Alvarez,* 22d F.3d 1273, 1279 (11th Cir. 2000) ("[a]pplying the rationale of *Segal* to the instant case, we conclude that Alvarez's legal malpractice cause of action is also *sufficiently rooted in his pre-bankruptcy past* that it should be considered property of [ ] the estate") (emphasis added).

Other courts in the Eleventh Circuit found ways to distinguish *Alvarez.* Judge Cavender recently examined a similar matter in *In re Burris,* in which a debtor who had contracted non-Hodgkin lymphoma in 1997 received a settlement from Monsanto in 2022. *In re Burris,* No. 09-78161-JWC, 2022 WL 1131950, at *1 (Bankr. N.D. Ga. Apr. 15, 2022). The debtor filed for bankruptcy in 2009 and received a discharge in 2011. *Id.* In 2015, a publication was issued which linked the cause of debtor's cancer with the compound glyphosate, a common herbicide. *Id.* The trustee argued that the cause of action accrued prior to the bankruptcy petition, as the debtor's cancer diagnosis occurred in 1997. *Id.* at *3. Noting the "consideration of the fresh start, the interest of finality, and the length of time that has elapsed," as well as that under Georgia law, the accrual of the cause of action did not occur until the debtor learned of the cause of his cancer, Judge Cavender denied the trustee's motion to reopen. *Id.* at *4. *In re Burris* emphasized that the only way to maintain a successful action for a negligence claim under Georgia law is to establish a causal connection. *See In re Cardenas,* No. 11-62253-BEM, 2022 WL 1210064, at *5 (Bankr. N.D. Ga. Apr. 22, 2022) (explaining that *In re Burris* distinguished *In re Alvarez* and *In re Webb* by focusing on the point that causation could not be established prior to the bankruptcy petition, as "*no one* in the medical, scientific, or legal communities had established a causal link between glyphosate and NHL prior to 2015") (emphasis added).

Straightforward application of the discovery rule consistently benefits plaintiffs attempting to keep post-petition settlements out of the estate. For example, in the *In re Tarrant* case, the trustee sought to reopen a 2015 Chapter 7 bankruptcy case because the debtor had received a settlement from the Roundup cancer litigation. *In re Tarrant,* No. 15-71581, 2023 WL 2616969, at *1 (Bankr. C.D. Ill. Mar. 23, 2023). The debtor was diagnosed with cancer in 2017, nearly two years after the bankruptcy case was closed. The trustee noted that while the debtor's cancer diagnosis did not occur until after the case was closed, he used Roundup extensively prior to the bankruptcy case so the cause of action accrued prior to the bankruptcy filing.

In *Tarrant,* the court ultimately granted the motion to reopen so that the trustee could investigate the claim but advised that it became more wary of reopening long-dormant cases to investigate pre-petition causes of action. *Id.* at *2 ("[t]he Court's view on the issue changed [ ] in early 2022 when the UST moved to reopen a case filed in 2005 based on a debtor's cancer diagnosis in early 2018 and the filing of a Roundup claim in 2019"). After analyzing Illinois law,

the court laid out that "the UST and case trustee must [ ] understand that, to establish that the Roundup claim is property of the bankruptcy estate, the trustee must establish that the [d]ebtor had an enforceable claim against Roundup when he filed his Chapter 7 case in 2015." *Id.* at *7.

In contrast, Alabama is one of a few of states that does not follow the discovery rule. *See, e.g., Single Asset Finance Co., LLC v. Connecticut General Life Ins. Co.,* 975 So. 2d 375, 382 (Ala. Civ. App. 2007) ("[t]he statutory limitations period for filing a negligence action is two years. . .. The statute of limitations begins to run from the time the plaintiff's cause of action accrues, and there is no 'discovery rule' for negligence claims that would toll the [ ] statute of limitations from the time the cause of action was 'discovered' by the plaintiff"). Meaning generally, under Alabama law, even if one is unaware of a cause of action, it accrues when all the elements are met. Theoretically, a plaintiff uses a pesticide which turns out to be carcinogenic for a period of five years; three years after the last time she uses the pesticide, she develops cancer. Under Alabama law, the moment she begins to experience the cancer symptoms the cause of action accrues, and the statute of limitations begins to run. This is true regardless of whether it is known, by her or by anyone else, that the pesticide caused her cancer. Given the lack of a discovery rule in Alabama, bankruptcy filers in Alabama may find it more difficult to argue a pre-petition cause of action is not part of the estate.

III. When Are Personal Injury Claims Part of the Chapter 13 Bankruptcy Estate?[3]

Upon the filing of a bankruptcy petition, a bankruptcy estate is created that includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Section 541's scope is broad and "includes property of all types, tangible and intangible, as well as causes of actions" belonging to the debtor. *In re Meehan*, 102 F.3d 1209, 1210 (11th Cir. 1997) (citing *United States v. Whiting Pools, Inc*., 462 U.S. 198, 205 n. 9 (1983)); *see also In re Fundamental Long Term Care, Inc.*, 81 F.4th 1264, 1284 (11th Cir. 2023), *cert. denied sub nom. Est. of Arlene Townsend v. Berman*, 144 S. Ct. 1098 (2024).

In a Chapter 13 case, 11 U.S.C. § 1306(a) provides that property of the bankruptcy estate includes the property set forth in § 541 as of the petition date, and "(1) all property of the kind specified in [§ 541] that the debtor acquired after the commencement of the case but before the case is closed, dismissed, or converted … whichever occurs first." 11 U.S.C. § 1306(a)(1). Thus, § 1306(a) expands the bankruptcy estate in a Chapter 13 to include not only property in existence at the filing of the petition but also property acquired post-petition. *Id.* However, 11 U.S.C. § 1327(b) provides that "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." 11 U.S.C. § 1327(b). The Bankruptcy Code does not define what it means for the property to "vest," and courts have noted the tension between the expansionist language of § 1306(a) and § 1327(b)'s vesting language. *In re Macon*, 669 B.R. at 645–46. In response to this tension, courts have used multiple approaches to determine when post-petition settlement proceeds become part of the estate. *Id.* at 646 n.39 (setting forth five approaches used by courts to reconcile § 1306(a) and § 1327(b)).

The Eleventh Circuit, in *Telfair v. First Union Mortg. Corp.*, adopted the "estate transformation approach." 216 F.3d 1333, 1340 (11th Cir. 2000). This approach places all the debtor's property under the control of the bankruptcy court upon the filing of the petition, but upon confirmation of the plan, returns to the debtor control of so much of that property as is not needed to fulfill the plan payments. *In re Macon*, 669 B.R. at 647 (citing *Telfair v. First Union Mortg. Corp*, 216 F.3d at 1340). However, *Telfair's* estate transformation approach only applies to property existing as of the commencement of the case, not "entirely new property interests acquired by the debtor after confirmation and unencumbered by any preexisting obligation." *Waldron v. Brown (In re Waldron)*, 536 F.3d 1239 (11th Cir. 2008). In *Waldron*, the Eleventh Circuit adopted the estate replenishment approach for post-petition personal injury claims bringing them into the debtor's bankruptcy estate because they are newly acquired assets. *Id.* at 1242-43 (stating "We [the Eleventh Circuit] did not address in *Telfair* entirely new property interests acquired by the debtor after confirmation and unencumbered by any preexisting obligation. We instead stated that 'confirmation returns so much of that property to the debtor[],' and 'that property' referred to the property of the debtor placed in the control of the bankruptcy court when the debtor filed his petition. [citation omitted]. New assets that a debtor acquires unexpectedly after confirmation by definition do not exist at confirmation and cannot be

[3] Prepared by Hon. Bess M. Parrish Creswell, U.S. Bankruptcy Court for the Middle District of Alabama.

returned to him then."). The *Waldron* court adopted an "ability-to-pay" standard whereby creditors share both in the gains and losses of the debtor through modification of the plan. *Id.* at 1246.

An interesting case to follow is *In re Hill*, 652 B.R. 212 (Bankr. S.D. Ala. 2023), *aff'd sub nom. Conte, Tr. For S. Dist. of Alabama v. Hill*, 2024 WL 140247 (S.D. Ala. Jan. 12, 2024) (appeal pending in the 11th Cir.). In this case, the bankruptcy court held that while the post-petition compensatory personal injury proceeds came into the debtor's Chapter 13 bankruptcy estate, there was no justification to modify the confirmed plan to increase the percentage paid to unsecured creditors so that all the personal injury compensatory proceeds would be distributed to creditors. *In re Hill*, 652 B.R. at 224-25. Specifically, the court noted that modification of the plan was not required under the "ability-to-pay" standard since an award of compensatory damages for a post-petition personal injury was not a "substantially improved financial condition" or an "unanticipated gain" that resulted in an increase of debtor's ability to pay creditors. *Id*. at 225 (citing *Waldron*, 536 F.3d at 1246; denying trustee's motion to modify the plan to include).

IV. Exemptions of Personal Injury Proceeds in Chapter 13[4]

A debtor may exempt property of the estate from distribution to creditors by properly filing a claim of exemption in the property. Fed. R. Bankr. P. 4003(a). In some states, personal injury proceeds may be protected through exemptions. Under the federal exemptions, a debtor may exempt up to $27,900 for compensation received for personal bodily injury, excluding pain and suffering and punitive damages. 11 U.S.C. § 522(d)(11)(D). Many states, such as Alabama, do not allow debtors to use federal exemptions, and do not have a specific exemption for personal injury claims. Under Alabama and Florida law, personal injury proceeds are not specifically exempt as a rule, but debtors can seek to exclude them through the "wildcard" exemption. Ala. Code. § 6-10-6 (2024); Fla. Stat. § 222.25 (2024). However, these wildcard exemptions are capped at $8,225 in Alabama and $4,000 in Florida. *Id.* In contrast, Georgia law allows for up to $10,000 of personal injury proceeds to be exempt, excluding compensation for pain and suffering or punitive damages. Ga. Code Ann. § 44-13-100 (a)(11)(D).

[4] Prepared by Hon. Bess M. Parrish Creswell, U.S. Bankruptcy Court for the Middle District of Alabama.

V. What Is the Effect of "Vesting"?[5]

The filing of a bankruptcy case creates a bankruptcy estate under 11 U.S.C. § 541(a) that consists of all property owned by the debtor at the time of filing. Property of the estate under § 541 does not generally include post-petition property in the context of a Chapter 7 case, but 11 U.S.C. § 1306(a) expands the definition of property of the estate in a Chapter 13 case to include the debtor's post-petition property and the debtor's post-petition earnings until the case is closed, dismissed, or converted to another chapter.

Under § 1306(b), the debtor remains in possession of estate property unless the confirmed plan or confirmation order states otherwise, while under 11 U.S.C. § 1327(b), confirmation of a chapter 13 plan vests all property of the estate in the debtor, unless the plan or the confirmation order indicate otherwise.

Under the Estate Termination approach, the vesting of property of the estate in the debtor at confirmation under § 1327(b) results in termination of the estate, such that the debtor's property is no longer property of the estate. E.g., *In re Mason*, 51 B.R. 548 (D. Or. 1985); *In re Golden*, 528 B.R. 803 (Bankr. D. Colo. 2015); and *In re Toth*, 193 B.R. 992, (Bankr. N.D. Ga. 1996). This approach generally disregards the provisions of § 1306(a).

The Estate Preservation approach, in contrast, relies instead on § 1306(a) to find that property of the estate remains property of the estate until the entry of discharge, dismissal, or conversion. E.g., *Security Bank of Marshalltown, Iowa v. Neiman*, 1 F.3d 687, Bankr. L. Rep. (CCH) P 75, 361, 126 A.L.R. Fed. 833 (8th Cir. 1993); *In re Kolenda*, 212 B.R. 851, 38 Collier Bankr. Cas. 2d (MB) 1640 (W.D. Mich. 1997); and *In re Aneiro*, 72 B.R. 424, 15 Bankr. Ct. Dec. (CRR) 1069, 16 Collier Bankr. Cas. 2d (MB) 1070 (Bankr. S.D. Cal. 1987). This approach generally disregards the provisions of § 1327(b).

The Estate Transformation approach recognizes continued existence of an estate but limits the contents to property that is necessary to fulfill the plan. Under this approach, § 1306 brings property into the estate but § 1327(b) returns to the debtor upon confirmation the property that is not necessary to complete the terms of the plan.

The Estate Replenishment approach perhaps attempts to mesh § 1327(b) with § 1306(a) and give meaning to both. Both provisions of the Bankruptcy Code carry equal weight and effect should be given to each word of each provision in order to avoid "creating a distinction among types of post-confirmation estate property where there exists no textual basis to do so." *City of Chicago v. Fisher* (*In re Fisher*), 203 B.R. 958, at 962-963 (N.D.Ill.1997). Under this approach, property of the estate vests in the debtor at the time of confirmation under § 1327(b) but the estate continues to exist under § 1306(a), consisting of the debtor's post-confirmation income and assets. E.g., *In re Crouser*, 567 Fed. Appx. 902 (11th Cir. 2014); *In re Fisher*, 203 B.R. 958 (N.D. Ill 1997); *In re Wilson*, 555 B.R. 547 (Bankr. W.D. La 2016); *In re Zisumbo*, 519 B.R. 851 (Bankr. D. Utah 2014); *In re Reynard*, 250 B.R. 241 (Bankr. E.D. Va.

[5] Prepared by Jennifer Cruseturner, Chapter 13 Trustee for the Western District of Tennessee.

2000); *In re Trumbas*, 245 B.R. 764 (Bankr.D.Mass.2000); *In re Holden*, 236 B.R. 156; *In re Rangel*, 233 B.R. 191 (Bankr.D.Mass.1999).

Under the Future Vesting approach, the vesting that occurs at confirmation under § 1327(b) is an immediate and fixed right to the future enjoyment of property of the bankruptcy estates, free and clear of claims of creditors that the provides for pursuant to § 1327(c), when the debtor has completed all obligations under the plan and is entitled to a discharge. Because all property of the debtor is property of the estate until discharge, this approach has the same outcome as the Estate Preservation approach.

VI. Duty to Disclose Post-Petition Causes of Action:[6]

A) Disclosure.

1. Debtors usually have an ongoing duty to disclose post-petition/post-confirmation causes of action they acquire after the filing of the bankruptcy. *Flugence v. Axis Surplus Ins. Co. (In re Flugence)*, 738 F.3d 126, 129 (5th Cir. 2013). *See Also Waldron v. Brown (In re Waldron)*, 536 F.3d 1239, 1243 (11th Cir. 2008).

2. This duty exists through the last month of the case. *Kimberlin v. Dollar Gen. Corp.*, 520 F. App'x 312, 315 (6th Cir. 2013) (Debtor judicially estopped from pursuing cause of action that accrued with only 41 day left in her Chapter 13 Plan).

3. In *Kimberlin*, the Sixth Circuit speculates that the proceeds of the claim could be reserved and paid in after the 60th month. Is this practical? Does this delay the debtors' discharge?

4. What about cases that are disclosed but have not reached finality before 60 months? Does the Debtor keep those proceeds? *See In re Lugo*, No. 18bk18603, 2020 Bankr. LEXIS 1012, at 6 (Bankr. N.D. Ill. Mar. 12, 2020)(Trustee may receive proceeds after 60th month if provided for in plan); *but cf. In re McCrorey*, No. 18-00696-NGH, 2024 Bankr. LEXIS 188, (Bankr. D. Idaho Jan. 26, 2024)(Chapter 13 Trustee's motion to reopen case to administer asset denied).

B) You've disclosed the cause of action? What can you do?

1. Did the action arise outside of the debtor's applicable commitment period? If you are a below median debtor but elect a plan longer than 36 months, are you required to contributed all property received?

   In the E.D. Ky., we have form plan language that reads, "If fewer than 60 months of payments are specified, additional monthly payments will be made to the extent necessary to make the payments to creditors specified in this plan." Generally, I may add a non-standard provision that reads:

   "The Debtor's applicable commitment period is 36 months. The Debtor may expand the plan if necessary, to pay in sums sufficient to meet liquidation, however, she shall not be required to commit any sums above those necessary to pay administrative, priority, and secured claims, if any."

2. Section 1325(b)(1) requires that a debtor commit either funds sufficient to pay claims in full, OR "all of the debtor's projected disposable income to be received in the applicable commitment period[.]" This would seem to imply that "disposable income" received after the applicable commitment period may not need to be

[6] Prepared by Michael B. Baker, Esq., The Baker Firm PLLC, Covington, Kentucky.

committed to pay general unsecured claims.

3. One source of tension with this approach may be whether post-confirmation cause of action proceeds are "disposable income" or something else. If a personal injury proceeds are not "disposable income" then it may not matter. Also, the language of § 1306 talks about property acquired before the case is "closed, dismissed or converted" as property of the estate – the case does not close at the end of the applicable commitment period.

VII. Disclosures of Personal Injury Claims in Bankruptcy and Retention of Personal Injury Counsel:[7]

When filing a bankruptcy petition, a debtor in Chapter 13 is obligated to disclose the existence of personal injury claims or potential claims as of the petition date in their schedules within 14 days of the petition date. 11 U.S.C. § 521(a)(1); Fed. R. Bankr. P. 1007(b). Failure to make these disclosures may have serious consequences, including denial of discharge. No provision of the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure requires a Chapter 13 debtor to supplement or amend schedules to disclose property acquired post-petition that comes into the bankruptcy estate, except for a narrow class of inheritances within 180 days of the petition as described in § 541(a)(5). *In re Boyd*, 618 B.R. 133, 153 (Bankr. S.C. 2020) (citing Keith M. Lundin, LUNDIN ON CHAPTER 13, § 127.9, at ¶ 23, LundinOnChapter13.com). However, many courts will include language in the confirmation order or require a provision in the plan to account for the disclosure of changes in income on a regular basis. *Id.*

Bankruptcy courts disagree as to which statutory provisions and corresponding rules—§ 327/Rule 2014, § 329/Rule 2016, or both—govern a Chapter 13 debtor's retention of personal injury counsel while the bankruptcy case is pending. In *In re Smith*, 637 B.R. 758, 773–75 (Bankr. S.D. Ga. 2022), Judge Coleman provides a summary of the arguments set forth by courts, ultimately finding that § 327 applies in cases where the trustee retains counsel and § 329 is applicable where the debtor retains counsel. *In re Smith*, 637 B.R. at 774. Courts that apply § 329 hold that special counsel's representation of the debtor in a personal injury claim is sufficiently intertwined with the bankruptcy case to be "in connection with the case[,]" such that disclosures of compensation and agreed compensation must be disclosed as set forth in Rule 2016. *Id.* However, many courts require approval of special counsel's retention by the court under § 327 and compliance with Rule 2014 before employment. The process includes an application that outlines the attorney's qualifications, scope of representation, and potential conflicts of interest. Fed. R. Bankr. P. 2014(a). Courts are diverse in their procedures addressing the retention of special counsel, so it is important to review local rules and understand local practice with regards to special counsel employment.

[7] Prepared by Hon. Bess M. Parrish Creswell, U.S. Bankruptcy Court for the Middle District of Alabama.

VIII. Approval of Personal Injury Settlements and Special Counsel Attorney Fees and Expenses[8]

Once the parties have settled the personal injury claim, a motion to approve the settlement pursuant to Rule 9019 and an application to approve attorney fees and expenses pursuant to § 330 and Rule 2016 should be filed, and the court should enter orders granting the motion and application before **any** distributions are made from the settlement proceeds. The attorney is required to provide detailed disclosures through an application that includes: (1) a breakdown of services rendered; (2) time expended; (3) expenses incurred; and (4) compensation received or expected. Fed. R. Bankr. P. 2016. This disclosure serves to ensure that all fees are reasonable and necessary and allows the trustee and the court to scrutinize fees accordingly. 11 U.S.C. § 330. Because the settlement proceeds come into the bankruptcy estate, failure to obtain court approval of the settlement and attorney fees and expenses as required under the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure could result in sanctions against the debtor and/or the personal injury attorney, including disgorgement of attorney fees. Similar with special counsel retention, bankruptcy courts are diverse in their procedures addressing approval of settlements and attorney fees and expenses. Thus, an understanding of local rules and practice is needed to avoid pitfalls, which could delay the distribution of proceeds to the debtor and payment of fees and expenses to special counsel.

[8] Prepared by Hon. Bess M. Parrish Creswell, U.S. Bankruptcy Court for the Middle District of Alabama.

IX. Judicial Estoppel[9]:

Judicial estoppel is a discretionary equitable doctrine that can significantly impact bankruptcy cases. It prevents a party from taking a legal position that is contrary to a position they successfully asserted in earlier legal proceedings.

In the context of bankruptcy, judicial estoppel typically arises when a debtor fails to disclose an asset (often a legal claim or lawsuit) in their bankruptcy filings and then later tries to pursue that claim. *See James v. Penny OpCo, LLC*, Case No. 24-12086, 2025 WL 883963 (11th Cir. slip op. March 21, 2025).

For example, if a debtor files for bankruptcy but fails to disclose a pending or potential lawsuit as an asset, the defendant in the lawsuit may seek dismissal of the cause of action based on judicial estoppel. The debtor's failure to disclose the cause of action is "tantamount to a denial of the claim's existence." *Hughes v. Canadian National Railway Co.*, 105 F.4th 1060, 1069 (8th Cir. 2024). A subsequent assertion of the claim in nonbankruptcy court is clearly inconsistent with the position taken in the bankruptcy case. *Id*. Therefore, judicial estoppel could bar the plaintiff (debtor) from seeking monetary damages from the cause of action. *Id*.; *Stanley v. FCA US, LLC*, 51 F.4th 215 (6th Cir. 2022).

Judicial estoppel is meant to protect the integrity of the judicial process by preventing debtors from hiding assets during bankruptcy to gain the benefit of debt discharge, and later benefiting from those hidden assets after the bankruptcy case is over. In addition, application of the doctrine in the bankruptcy context is intended to ensure the court, the trustee, and creditors are not "deprived of the informational value and corresponding opportunity to assess whether plan modification or conversion might be appropriate." *Hughes*, 105 F. 4th at 1068; *accord Stanley*, 51 F.4th at 219-220 (creditors "did not have a complete accurate picture" of the debtor's assets when considering whether to object to confirmation.).

It is possible in some jurisdictions, but unlikely in most jurisdictions, that courts will decline to apply judicial estoppel to bar the bankruptcy estate from recovering damages in the undisclosed cause of action. For example, judicial estoppel did not apply to the extent the cause of action is being prosecuted only on behalf of the estate. *Wilson v. Dollar General Corp.*, 717 F.3d 337, 341 (4th Cir. 2013) (debtor who eventually amended Schedule B to disclose a prepetition wrongful termination lawsuit had standing to bring the action on behalf of the bankruptcy estate); *see also Eastwood v. Mac's Convenience Stores LLC*, Case No. 3:23-cv-00070-MJD-RLY, 2023 WL 8237006 (S.D. Ind., slip op. Nov. 28, 2023) (chapter 13 trustee reopened closed bankruptcy case, employed counsel, and pursued the late-disclosed cause of action for the benefit of the estate). But the majority position is that judicial estoppel will bar the prosecution of any cause of action not scheduled in the bankruptcy case, whether arising pre- or post- petition, regardless of merit, regardless of the amount of damages, regardless of nondischargeability of debts. The doctrine bars personal injury, wrongful termination,

[9] Prepared by Jennifer Cruseturner, Chapter 13 Trustee for the Western District of Tennessee, and Beverly M. Burden, Chapter 13 Trustee for the Eastern District of Kentucky.

employment discrimination, and any other nonbankruptcy proceeding. The potential loss to debtors – and to their creditors – is monumental.

X. Can the Chapter 13 Trustee Modify the Plan to Capture the Proceeds?:[10]

The trustee may modify a plan to increase a distribution to creditors "at any time after confirmation of the plan but before the completion of payments under the plan." 11 U.S.C. § 1329(a) (emphasis added).

If a cause of action arose prepetition and is duly scheduled, the plan or order confirming plan in most jurisdictions will include a provision for the turnover of any nonexempt proceeds. The plan or order confirming may also designate that those proceeds are to be disbursed in such a way as to satisfy the "liquidation" or "best interest of creditors" test of 11 U.S.C. § 1325(a)(4). In that situation, "completion of payments under the plan" might not occur until the personal injury action is settled or otherwise resolved and the proceeds are remitted to the trustee.

If a cause of action arises post-petition, is disclosed, and is property of the estate (i.e., has not vested in the debtor to the exclusion of the estate), the trustee can request a modification of the plan to increase the distribution to unsecured creditors. *See, e.g.*, *In re Moore*, 602 B.R. 40 (Bankr. E.D. Tenn. 2019) (nonexempt proceeds of an inheritance received more than 180 days post-petition could be pulled into the estate for the benefit of unsecured creditors).

If a cause of action accrued either pre-petition or post-petition but was not disclosed or discovered until after the debtor received a chapter 13 discharge, the ability of the trustee to modify the plan to capture the proceeds becomes problematic. Pursuing the cause of action after entry of a chapter 13 discharge could not possibly benefit the estate because it is too late to modify the plan after plan payments have been completed. *Scott v. International Paper Co.*, Case No. 2:18-CV-211 (WOB-CJS), 2021 WL 2211356 (E.D. Ky., slip op. June 1, 2021).

In a case in which the debtor received a chapter 13 discharge upon completion of payments under the plan, a motion to reopen the case for the purpose of converting it to a chapter 7 so that the chapter 7 trustee can pursue the undisclosed cause of action is unlikely to succeed. *See In re Gillis*, 664 B.R. 1 (Bankr. D. Mass. 2024) (chapter 13 trustee's motion to reopen case and convert it to chapter 7 was denied; motion was filed when chapter 13 trustee discovered the undisclosed cause of action several years after discharge; other remedies such as judicial estoppel or criminal actions for fraud provide the necessary protections).

[10] Prepared by Beverly M. Burden, Chapter 13 Trustee for the Eastern District of Kentucky.

XI. Can the Debtor Convert or Dismiss After the Cause of Action is Discovered or Settled?[11]

A) Does converting or dismissing your case to avoid paying a windfall to creditors raise the issue of bad faith?

1. As far as dismissal, many courts have held that a debtor appears to possess what appears to be an absolute right to dismiss its case. *See Nichols v. Marana Stockyard & Livestock Mkt., Inc. (In re Nichols)*, 10 F.4th 956, 963 (9th Cir. 2021); *Barbieri v. RAJ Acquisition Corp. (In re Barbieri)*, 199 F.3d 616, 619 (2d Cir. 1999); *Smith v. U.S. Bank N.A. (In re Smith)*, 999 F.3d 452, 455 (6th Cir. 2021); *In re Minogue*, 632 B.R. 287, 290 (Bankr. D.S.C. 2021); *In re Kemp*, No. 21-40365, 2022 Bankr. LEXIS 16, at 11 (Bankr. D. Kan. Jan. 5, 2022).

2. Others have held that bad faith may be a reason to curtail this right. Jacobsen v. Moser (In re Jacobsen), 609 F.3d 647, 660 (5th Cir. 2010); In re Armstrong, 408 B.R. 559, 560 (Bankr. E.D.N.Y. 2009)(Questioning whether Barbieri v. RAJ Acquisition Corp. (In re Barbieri) had been abrogated by statute).

3. Marrama v. Citizens Bank, 549 U.S. 365 (2007), is the primary guidepost for conversion in Chapter 13. In short, Marrama that a Chapter 7 debtor that engages in bad faith behavior does not enjoy an absolute right to convert his case to Chapter 13. The debtor in Marrama started in Chapter 7. Id. at 368. Essentially, the Court reasons that if the debtor could have his case converted to Chapter 7 for cause under § 1307(c), he had effectively forfeited his right to be in Chapter 13 by his bad faith conduct. Id. at 703.

4. What of conversions the other way? The language of § 1307(a) is very similar to § 1307(b). Unlike the debtor in Marrama, debtors in Chapter 13 have started in the only "voluntary" chapter. Generally the effect of §348(f) conversion is limit property of the estate that the debtor owned on the date of filing. So can a debtor that receives a right to a large personal injury settlement post-confirmation simply convert and exclude unsecured creditors from sharing in the wealth? Maybe? Maybe Not?

B) Section 1307(f)(2) provides that if a debtor converts from chapter 13 in bad faith, then property of the converted estate shall consist of property of the estate on the date of conversion.

1. What's bad faith anyway?

   In determining whether a Chapter 13 case has been converted in bad faith, the Court considers whether the conversion was motivated by an inability to make required

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payments to the Chapter 13 trustee. The Court also considers whether the debtors have been forthcoming regarding the existence of any post-petition change in circumstances that might affect their ability to make payments to their creditors and whether the conversion would create a windfall for the debtors (other than a decrease in liabilities) to which they would not have been entitled but for the existence of their pending Chapter 13 case.

In re Lien, 527 B.R. 1, 7-8 (Bankr. D. Minn. 2015).

2. In *Lien*, the debtors received a sizable inheritance more than 180 days after the filing of the case which they did not disclose. *Lien* at 10. They also concealed other assets. *Id.* After conversion they also testified that they could have continued making their Chapter 13 payments. *Id.*

   The Court found their conversion was in bad faith.

   If the inheritance-related property is not brought into the chapter 7 bankruptcy estate, the Debtors will receive a windfall by virtue of their conversion to chapter 7. The Court finds that the main reason for the Debtors' conversion from chapter 13 to chapter 7 was to avoid paying to the chapter 13 trustee the non-exempt inheritance received by Bruce Lien during the chapter 13 bankruptcy.

   Id at 23-24.

3. The standard employed was a "totality of the circumstances" analysis. The Court was quick to point out that no one piece of the puzzle alone was enough. Lien at 23. Many times, those circumstances involve a lack of disclosure of the asset the debtor is seeking to protect. In re Siegfried, 219 B.R. 581, 585 (Bankr. D. Colo. 1998).

4. In Siegfried, the debtors' schedules had many failings, including failing to list funds they were eligible to receive from a foreclosure overbid. The Court focused on what it described as the "unfair manipulation" of the bankruptcy process.

5. One court describes "bad faith" in the context of conversion as "not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; . . . it contemplates a state of mind affirmatively operating with furtive design or ill will." In re Bejarano, 302 B.R. 559, 562 (Bankr. N.D. Ohio 2003). The Bejarano noted that it's more than just the debtors are negligent they have to have some intent to manipulate the system.

6. Generally, it's important to remember, this litigation will often be taking place in the Chapter 7 AFTER you have converted. Counsel would be wise to try to reach a deal with the Chapter 13 Trustee or Chapter 7 Trustee before bad faith litigation begins.

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Faculty

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