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Attorney-Client Privilege, Or Lack Thereof, in Bankruptcy

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Introduction:

The attorney-client privilege is among "the oldest recognized privileges for confidential communication." *Swidler & Berlin v. United States*, 524 US 399, 403 (1998). Its essence transforms an attorney's office into a sanctuary where clients are encouraged to be brutally frank in seeking legal advice, secure with the knowledge that confessions will be protected and not prosecuted. The Supreme Court recognizes this privilege as virile enough to outlive the client. So, even in death, clients should feel safe about sensitive information transmitted in confidence to an attorney.

Now, consider the context of Bankruptcy Court where total disclosure is the watchword. In Bankruptcy, a debtor is forced to testify under penalty of perjury, and the debtor puts all legal and equitable assets into the hands of a trustee. Among the assemblage of bank accounts and vehicles, does the debtor also hand over this hallowed privilege? And that trusted attorney? That attorney might have obligations under the Bankruptcy Code which supersede any supposed obligation to a client. So, is there any attorney client privilege in Bankruptcy? And if so, where is it?

Attorney-Client Privilege Defined

The Seventh Circuit has laid out the following standard to determine if a communication between a client and an attorney is covered by the attorney-client privilege.

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived. *US v. White*, 950 F2d 426, 430 (7th Cir. 1991).

Attorney Client Privilege in the Bankruptcy Context

Generally, information divulged to a bankruptcy attorney for the purpose of filing a petition is not privileged.

US v. White, 950 F.2d 426 (7th Cir., 1991) holds that "(w)hen information is disclosed for the purpose of assembly into a bankruptcy petition and supporting schedules, there is no intent for the information to be held in confidence because the information is to be disclosed on documents publicly filed with the bankruptcy court." *White*, in essence, holds that there is no attorney client privilege in bankruptcy

But, see *In re Stickle*, 14-19551-BKC-PGH (S.D. Fl. Bkr. 2016). In this case, the creditors sought the "intake" questionnaire completed by debtor to be produced at a 2004 Examination. The Court found that, contrary to the holding in *White*, there is not a bright-line rule that information disclosed by a debtor to an attorney for the purpose of filing bankruptcy is discoverable and not privileged. Information, such as that disclosed on an intake questionnaire, may or may not be privileged.

Crime-Fraud Exception

The crime-fraud exception to the attorney-client privilege holds that communications made between an attorney and his client, for the purpose of furthering the commission of a future or present crime or fraud, are not protected from disclosure by the attorney-client privilege. The purpose of this exception is to assure "that the seal of secrecy between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime." *US v. Zolin*, 491 U.S. 554, 563, 109 S.Ct. 2619, 2626, 105 L.Ed.2d 469 (1989).

In order to invoke the crime-fraud exception, the Sixth Circuit has articulated a two-part test: First, to defeat the privilege, the movant must make a *prima facie* showing a sufficiently serious crime or fraud occurred, and second, the movant must establish some relationship between the communication at issue and the *prima facie* violation. *United States v. Collis*, 128 F.3d 313, 320 (6th Cir.1997) citing *In re Antitrust Grand Jury*, 805 F.2d 155, 164 (6th Cir.1986). In addition, for a movant to satisfy his *prima facie* showing, the Sixth Circuit went on to state the evidence presented by the movant must be such that a prudent person would have a reasonable basis to suspect the perpetration of a crime or fraud. *Id.*

Does a Chapter 7 Trustee become the holder of the privilege?

Another sticky question is whether or not the debtor in a Chapter 7 passes the attorney-client privilege to the Chapter 7 trustee. There are cases coming down on all sides.

Some cases hold the Trustee takes ownership of the privilege and may unilaterally waive it.

In re Smith Cutuli, No. 11-35256-BKC-AJC (S.D. Fla. Bky. 2013) held that upon filing of a Chapter 7 case, ownership of the attorney-client privilege passes to the Chapter 7 Trustee. Any attorney-client privilege which the debtor had passes by operation of law to the bankruptcy trustee. *In re O.P.M. Leasing Services, Inc.*, 13 B.R. 64 (S.D.N.Y.1981); *Citibank, N.A. v. Andros*, 666 F.2d 1192 (8th Cir.1981); and *In re Blier Cedar Co., Inc.*, 10 B.R. 993 (Bkrtcy.Me.1981). Hence, the debtor cannot assert the attorney-client privilege in bankruptcy.

On the other hand, other cases hold the Trustee cannot waive the attorney client privilege

McClarty v. Gudenau, 166 B.R. 101 (Bky. E.D. Mich.1994) holds policy concerns are the justification for preserving the privilege. "If a client knows that, should she fall on hard financial times, her privilege may be unilaterally waived by a stranger who is appointed to serve as her Trustee in bankruptcy and whose interest in the matter and concerns for privacy may differ from her own, then the fundamental purpose of the privilege could be eroded." *Id.*

Finally, other Courts have declined to make an absolute rule and have held that whether the Trustee holds the privilege must be determined on a case by case basis

In re Miller, 247 B.R. 704 (Bankr. N.D. Ohio 2000)

> The filing of a bankruptcy petition changes the relationship between an attorney and his client in regards to privilege. Many bankruptcy trustees advance the theory that a Chapter 7 trustee becomes the holder of the privilege once the petition is filed as he or she is the successor in interest of the debtor and if they so desire, can unilaterally waive the privilege.
>
> However, the trustee and the debtor can be in adversarial positions, and the potential harm to the debtor in the trustee's waiving of the privilege must be taken into consideration.
>
> However, the concept of property of the estate, over which the trustee has control, connotes something with some sort of intrinsic value which may be bought, sold or levied upon by creditors. By comparison, a person's right to assert the attorney-client privilege does not constitute such an alienable commodity.
>
> Therefore, based upon these statutorily imposed obligations, it seems apparent that Congress envisioned a scheme whereby the attorney-client privilege, which is simply a judicially created doctrine, would give way, in appropriate situations, to the needs of the bankruptcy trustee to carry through with his duties under the Bankruptcy Code.

Attorney's Obligations

To the extent there is attorney client privilege in Bankruptcy, it probably will not cover what the Debtor would like it to cover. An attorney cannot aid a client in the commission of a fraud. So, in the event an attorney uncovers damaging information post-petition, what duties does the attorney have to the Court? What follows are relevant selections from several ABA Model Rules which shed some light on what type of behavior should be expected from attorneys.

ABA Model Rule 1.6: Confidentiality of Information
(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(6) to comply with other law or a court order; or

ABA Model Rule 1.16: Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
(1) the representation will result in violation of the rules of professional conduct or other law;

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
(1) withdrawal can be accomplished without material adverse effect on the interests of the client;
(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
(3) the client has used the lawyer's services to perpetrate a crime or fraud;
(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

ABA Model Rule 3.3: Candor Towards the Tribunal

(a) A lawyer shall not knowingly:
(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Following the logic of rule 1.6 an attorney has the discretion to disclose information to the Court if the debtor will commit bankruptcy fraud and defraud creditors, but the disclosure would not be necessary.

However, rule 1.16 suggests that if the attorney does not disclose this information, withdrawal potentially becomes a necessity. And when rules 1.6, 1.16 and 3.3 are read together it becomes clear that if the attorney opts to not make the disclosure, the attorney can no longer represent the debtor because doing so would violate the duty of candor to the tribunal.

Attorney's Due Diligence

It is also worth noting that if the attorney does uncover this information, there is also the question of should the attorney have discovered this information even without the debtor disclosing it?

In Re Garrard, an Alabama case crafted a five factor reasonable inquiry test which covers the attorney's duties to the client and to the court. The factors are:

> (1) to explain the requirement of full, complete, accurate, and honest disclosure of all information required of a debtor;
> (2) to ask probing and pertinent questions designed to elicit [such disclosure];
> (3) to check the debtor's responses in the petition and Schedules to assure they are internally and externally consistent;
> (4) to demand of the debtor full, complete, accurate, and honest disclosure ... before the attorney signs the petition; and
> (5) to seek relief from the court in the event that the attorney learns that he or she may have been misled by a debtor.

The Attorney must be part investigator and cannot rely on the debtor to give complete information. If the knowledge is readily available, the Attorney has an obligation to discover it independently.

Final Stray Thought:

What obligations do you have if you only gave a consultation and they commit fraud with another attorney?

One aspect of the practice of Bankruptcy Law where the attorney client privilege may exist in the manner generally understood is where an attorney gives a consultation, sensitive information is disclosed, and the client decides to hire a different attorney. Even if this first attorney later acquires actual knowledge of the debtor defrauding the Court in the subsequent bankruptcy, the attorney arguably has no duty to the tribunal. Since the client did not retain the attorney, there was never an expectation the communication would become public. And since the attorney was never hired to prepare a petition, there was no attempt to commit fraud.

DIP Account Funds Earned Post-Petition Should Not Be Considered Property of the Chapter 7 Estate Upon Conversion from Chapter 11

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I. Summary of Argument

a. If a Chapter 11 debtor converts to Chapter 7, all funds held in the Chapter 11 DIP account earned by the debtor after the filing of the bankruptcy petition should not be considered property of the Chapter 7 estate.

b. Once a debtor exercises the statutory right to convert to Chapter 7, Chapter 11 becomes inapplicable and only the rules governing Chapter 7 cases should be followed. Debtors are immediately stripped of their role as Debtors-In-Possession and, pursuant to 11 U.S.C. § 348(a), the creation of the Chapter 7 estate requires using the date the original Chapter 11 petition was filed to determine property of the estate. Therefore, all post-petition earnings belong to the debtor because they are not considered property of the Chapter 7 estate under 11 U.S.C. § 541(a)(6).

II. Bankruptcy Code

a. Property of the Estate.

i. 11 U.S.C. § 541(a)(6): 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: 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

ii. 11 U.S.C. § 1115(a)(2): In a case in which the debtor is an individual, property of the estate includes, in addition to the property specified in section 541 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, 12, or 13, whichever occurs first.

iii. 11 U.S.C. § 1306: Property of the estate includes, in addition to the property specified in section 541 of this title, 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. Conversion.

i. 11 U.S.C. § 348(a): 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*. (emphasis added)

ii. 11 U.S.C. § 348(f)(1)(A): Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title property of the estate in the converted case shall consist of property of the estate, *as of the date of filing of the petition*, that remains in the possession of or is under the control of the debtor on the date of conversion. (emphasis added)

III. Case Law Supporting Argument

a. *Harris v. Viegelahn*, 135 S. Ct. 1829 (2015)

i. Facts: In *Harris*, the debtor filed a Chapter 13 bankruptcy petition that required him to make monthly mortgage payments of $530 to one of his creditors, Chase Bank. These payments were withheld from his post-petition wages and remitted to the Chapter 13 trustee who paid down the debtor's mortgage arrears, and then distributed the remaining funds to other creditors. When the debtor again fell behind on his mortgage payments, Chase foreclosed on his home. Following the foreclosure, the trustee continued to receive $530 per month from debtor's wages, but stopped making the payments earmarked for Chase. As a result, funds formerly reserved for Chase accumulated in the trustee's possession. Approximately a year after the foreclosure, debtor converted his case to Chapter 7 and ten days later, the trustee distributed $5,519.22 in debtor's withheld wages mainly to creditors. Asserting that the trustee lacked the authority to disburse his post-petition wages to creditors post-conversion, the debtor sought an order from the Bankruptcy Court directing the trustee to refund his post-petition earnings.

ii. Ruling: The Bankruptcy Court granted the debtor's motion, the District Court affirmed, but the Fifth Circuit reversed. After hearing arguments, the Supreme Court reversed the Fifth Circuit's decision with a unanimous 9-0 decision and held that a Chapter 13 debtor's post-petition earnings do not become property of the Chapter 7 estate.

iii. Ruling: The Supreme Court unambiguously and repeatedly stressed that a Chapter 7 case is designed to give the debtor a "fresh start" by allowing him to make a clean break from his financial past. When a debtor files a Chapter 7 petition, his assets, with specified exemptions, are immediately transferred to the bankruptcy estate under 11 U.S.C. § 541(a)(1). "Crucially, however, a Chapter 7 estate does not include the wages a debtor earns or the assets he acquires after the bankruptcy filing. 11 U.S.C. §541(a)(1). Thus, while a Chapter 7 debtor must forfeit virtually all his pre-petition property, he is able to make a 'fresh start' by shielding from creditors his post-petition earnings and acquisitions." *Harris*, 135 S. Ct. at 1835. In their unanimous decision, the Court reasoned that once the statutory right to convert is exercised, "the case is placed under Chapter 7's governance, and no Chapter 13 provision holds sway. ("Chapter 13…applies only in a case under [that] chapter.")." *Id.* at 1838. Converting to 7 made the provisions of Chapter 13 no longer binding, meaning the trustee lacked authority to distribute payments and "property of the estate" was then only considered through the lens of a Chapter 7 case. In the Debtors' case, the same rule applies to Chapter 11's provisions. The *Harris* decision rejected the argument that a confirmed plan gives creditors a vested right to funds held by a trustee. "No provision in the Bankruptcy Code classifies any property, including post-petition wages, as belonging to creditors. Harris' wages may have been 'property of the estate' while his case proceeded under Chapter 13, but estate property does not become property of creditors until it is distributed to them." *Id.* at 1838-1839, *citing In re Michael*, 699 F. 3d 305, 313 (2012). Because post-petition wages are not property of the estate in a Chapter 7 case, those wages immediately revested in Harris.

b. *Wu v. Markosian (In re Markosian)*, 506 B.R. 273 (BAP 9th Cir. 2014)

i. Facts: The debtors filed a chapter 7 petition and the trustee moved to dismiss based on the debtors' high income and their ability to pay creditors. In response, the debtors converted to chapter 11, but over two years later were unable to confirm a plan because Mrs. Markosian had lost her job. Debtors reconverted their case to chapter 7, but the issue became what to do with over $100,000 that Mr. Markosian had received from his employer while the debtors' case was still under chapter 11. The debtors turned over the money to the trustee and subsequently filed a motion to determine their interest in it. The bankruptcy court denied the debtors' motion without prejudice, but permitted a new motion addressing whether the bonus was property of their chapter 11 estate pursuant to § 1115(a)(2), and if so, whether it subsequently became property of their chapter 7 estate. Debtors also filed a motion to compel the trustee to return the money as either partially exempted property of the bankruptcy estate or as property excluded from the chapter 7 estate upon reconversion to chapter 7.

ii. Holding: The bankruptcy court found the money constituted earnings from personal services within the meaning of § 1115(a)(2), but concluded that it ceased to be property of the estate upon conversion to chapter 7.

iii. Reasoning: 11 U.S.C. § 541(a)(6) excludes from the chapter 7 estate earnings from services performed by individual debtors after the commencement of the case. Therefore, by operation of 11 U.S.C.S. § 348(a), personal service income that comes into debtors' chapter 11 estate is recharacterized as property of the debtor under § 541(a)(6) when the case is converted to chapter 7. The 9th Circuit Bankruptcy Appellate Panel rejected other courts' decisions that relied on Congress' failure to enact a provision parallel to § 348(f)(1)(A) for chapter 11 debtors. The panel reasoned that interpretation fails to consider § 348(a) and results in it having no independent effect, despite the statute's plain language that makes it applicable to all case conversions. Treating chapter 11 cases differently than chapter 13 cases attempts to divine congressional intent from congressional silence, which the panel characterized as "an enterprise of limited utility that offers a fragile foundation for statutory interpretation." *Markosian*, 506 B.R. at 277. Instead, the panel considered the context of § 348(f)(1)(A). Congress amended § 348 in 1994 to add subsection (f)(1)(A), well before it enacted 11 U.S.C. § 1115, which broadened property of the estate in a Chapter 11 case to include post-petition earnings. The legislative history of 11 U.S.C. § 348(f)(1)(A) shows that an amendment was needed to resolve a split among courts concerning whether a Chapter 13 debtor's post-petition earnings remained property of the estate upon conversion to Chapter 7. The panel then determined that because the amendment was for this specific reason, the fact that Congress did not enact a parallel provision to § 348(f)(1)(A) for chapter 11 debtors when it enacted § 1115 held little, if any, significance because there was no split of authority yet to resolve. Ultimately, the panel found there was no reason to treat Chapter 11 debtors differently than Chapter 13 debtors in this context.

c. *Casey v. Hochman*, 963 F.2d 1347 (10th Cir. 1992)

i. Facts: The debtors were a husband and wife who filed for bankruptcy under Chapter 11. During the proceedings, the husband invented a new medical device and acquired patents for it. After the conversion, creditors objected to appellants' discharge in bankruptcy, and alleged concealment and misappropriation of bankruptcy estate assets. The bankruptcy judge found appellants intentionally concealed the patent and license fees paid on the medical device in violation of 11 U.S.C. § 727, and denied discharge, which the district court affirmed. The debtors appealed to the Tenth Circuit, which determined the findings on the device were not procedurally defective, and amply stated the

basis for rulings by the bankruptcy judge, and the district court. However, the facts clearly established the device, the patent and proceeds from the licensing agreement were property acquired by appellants, but were not "property of the estate."

ii. Ruling: The court reversed the judgment regarding the medical device, but the bankruptcy court's denial of appellants' discharge was undisturbed, and the case was remanded for further proceedings.

iii. The Tenth Circuit found that the rights to the post-petition invention revested in the debtor. Interpreting § 348(a), the Court held that determining the property of a Chapter 7 estate after conversion requires referencing the date of filing of the original Chapter 11 petition. *Hochman*, 963 F.2d at 1350. The trustee argued that property acquired post-petition is generally within the bankruptcy estate and that there are only two exceptions to this rule, those provided by § 541(a)(6) concerning proceeds, product, rents and profits from property of the estate. The trustee also pointed to the 180-day limitation in § 541(a)(5) which places in the estate an interest in particular types of property (inheritances, property settlements, etc.) 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, or if the debtor becomes entitled to it within 180 days after such date. The Court rejected both arguments and stated that the trustee had the general rule backwards - § 541(a)(5) and (6) are actually exceptions from the general rule that post-petition acquisitions are property of the debtor -- exceptions specially provided to include particular property within the bankruptcy estate. The estate is generally limited to the interests of the debtor in property as of the commencement of the case.

IV. Case Law Opposing Argument

a. *In re Meier*, 528 B.R. 162 (Bankr. N.D. Ill. 2015)

i. Facts: The debtor filed for bankruptcy under Chapter 11 and, after a lengthy litigation battle in both bankruptcy and state court, voluntarily converted his case to Chapter 7. After conversion, the debtor filed a final report which identified the $98,004.23 in his DIP account as "not property of the estate." A creditor filed a motion to compel turnover of those funds to the trustee, which the trustee adopted. The debtor argued that a Chapter 11 debtor's post-petition personal services income does not become property of the Chapter 7 estate upon conversion to Chapter 7 or, alternatively, even if it does become estate property, a percentage would be exempt under an Illinois statute.

ii. Holding: Under § 1115(a)(2), property of a Chapter 11 estate included earnings from services performed by debtor after the commencement of his case but before conversion to Chapter 7. § 348(f)(1) does not apply to conversion from Chapter 11, so personal service income of a Chapter 11 debtor was property of the Chapter 7 estate upon conversion and the funds had to be turned over to the trustee. The Illinois statute was also inapplicable.

iii. Reasoning: The Court based its decision on two cases: the *Markosian* case and *In re Lybrook*, 951 F.2d 136 (7th Cir. 1991)(*infra*). After examining the *Markosian* opinion, the *Meier* court disagreed with the 9th Circuit panel's statement that when Congress added § 1115(a)(2), it neglected to fix § 348(f) because there was no reason to treat Chapter 11 and Chapter 13 debtors differently. When § 348(f)(1) was enacted in 1994, Chapter 12 contained § 1207(a)(2), its own equivalent to § 1306(a)(2), which had been enacted in 1986. Because § 348(f)(1), added in 1994, only affects conversions from Chapter 13, Congress did not intend to reject the rule in *Lybrook* generally instead of only in Chapter 13. As a result, there is only an express statutory command regarding conversions

from Chapter 13. § 348(f)(1), but there is no such statute for Chapter 11. The Meier court also adopted much of the reasoning used by the 7th Circuit in *Lybrook*.

b. *In re Lybrook*, 951 F.2d 136 (7th Cir. 1991) (pre-*Harris* and pre-1994 amendment to § 348(f))

i. Facts: The Lybrooks operated a modest farm in Indiana and filed a Chapter 13 petition in March of 1986. The Lybrooks had a bad farming year and could not work out a plan with their creditors, so they converted to Chapter 7 in June of 1987 and a trustee was appointed. In January of 1987, Mr. Lybrook inherited $70,000 worth of farm land from his father under a will made after the petition for bankruptcy had been filed. In December of 1987, the trustee sought an order directing the Lybrooks to turn over the inherited property, which the bankruptcy judge granted and the district judge affirmed. The Lybrooks appealed the district court's decision to the 7th Circuit, arguing that the inheritance should not be included in the

ii. Holding: The 7th Circuit affirmed the lower court's decision, basing its decision on policy grounds seeking to discourage strategic, opportunistic behavior that would hurt creditors.

iii. Reasoning: The Lybrooks focused their argument on § 348, which provides that conversion of a case from one chapter to another does not affect the petition's filing date, meaning the inheritance was post-petition and should not be part of the Chapter 7 estate. The Seventh Circuit concluded § 348(a) had two equally plausible interpretations: (1) that the Chapter 7 proceeding should be deemed to have begun on the day the Chapter 13 proceeding was filed, limiting the Chapter 7 estate to property belonging to the debtor on the date of filing; or (2) that conversion from Chapter 13 to Chapter 7 does not affect the bankrupt estate but merely assures the continuity of the case for purposes of filing fees, preferences, statutes of limitations, and so forth. Based on policy grounds, the 7th Circuit accepted the latter interpretation after determining "a rule of once in, always in is necessary to discourage strategic, opportunistic behavior that hurts creditors without advancing any legitimate interest of debtors." *Id.* at 137.

c. *In Matter of Freeman*, 527 B.R. 780 (Bankr. N.D. Ga. 2015)

i. Facts: On July 1, 2009, the debtor was given a termination letter from his job that informed him he would receive severance pay in the amount of $29,826.92. A few days later, the debtor filed for relief under Chapter 11 of the Bankruptcy Code. Over the next couple months, he received four checks totaling $21,635.67 (the "Severance Income"), which the debtor invested into his retirement account. In April of 2010 and April of 2011, the Debtor received bonus income in the amounts of $13,395.29 (the "2010 Bonus Income") and $10,000 (the "2011 Bonus Income"), which he also invested into his retirement account. Between receiving the 2010 Bonus Income and the 2011 Bonus Income, the debtor's Chapter 11 plan was confirmed on March 1, 2011. In April of 2013, the debtor voluntarily converted his case to Chapter 7. A creditor filed an objection to the debtor's exemptions, arguing that the funds received by the debtor while a debtor in possession, including the Severance Income, the 2010 Bonus Income and the 2011 Bonus Income, became and remained property of the bankruptcy estate and could not be claimed as exempt.

ii. Holding: The court determined the Severance Income became property of the estate upon the filing of the Chapter 11 case and the 2010 Bonus Income became property of the estate upon its being earned by debtor, but both of these property interests vested in debtor upon confirmation of the Plan

and did not revest in the bankruptcy estate upon conversion of the case to Chapter 7. However, the 2011 Bonus Income became property of the estate upon its being earned by debtor post-confirmation and remained property of the estate upon conversion of the case to Chapter 7.

iii. Reasoning: The court determined that property of the estate that existed at confirmation is returned to the debtor, unless such property is necessary to the fulfillment of the terms of the plan. Property of the estate acquired after confirmation, but before the case is closed, dismissed, or converted, does not vest in the debtor and remains property of the estate. The debtor acquired an interest pre-petition in the Severance Income when he received the letter terminating his employment, so under § 541, in the Severance Income became property of the bankruptcy estate. The 2010 Bonus Income was earned post-petition, but became property of the debtor's Chapter 11 estate §§ 541(a)(7) ("any interest in property that the estate acquires after the commencement of the case.") and 1115(a)(2) ("earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted.") The Severance Income and the 2010 Bonus Income were not necessary to the Chapter 11 plan and no other Code provision reserved the property for the estate, so both amounts vested in the debtor at confirmation and did not revest in the estate upon conversion. The 2011 Bonus Income, like the 2010 Bonus Income, entered the Chapter 11 bankruptcy estate post-petition upon being earned but, because it was earned post-confirmation, did not revest in the debtor upon confirmation and was property of the estate at the time of conversion. As to whether the 2011 Bonus Income became property of the Chapter 7 estate, the Court's analysis was similar to the *Meier* opinion in that it found the lack of a parallel provision to § 348(f)(1) controlling. The Court disagreed with the *Markosian's* finding that legislative intent can override the implication that Congress intentionally omits what it fails to include. Congress never stated that the *Lybrook* line of cases wrongly decided the issue. Instead, Congress legislatively "overruled" those cases as they apply in conversions solely from Chapter 13. Congress even recognized that the same issue could arise in cases converted from Chapter 12, but the text of the amendment did not assimilate conversion from Chapter 12 into its language. Therefore, Congress intended to limit the effect of § 348(f) to cases converted from Chapter 13.

Post Petition HOA fees should be DISCHARGED in a Chapter 13

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HOA fees that accrue post petition on property that is surrendered in a chapter 13 plan should be discharged upon successful completion of that plan, thus allowing the debtor to obtain the fresh start that bankruptcy was designed to deliver.

Relevant code sections:

1328(a) (a) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt—
(1) provided for under section 1322(b)(5);
(2) of the kind specified in section 507(a)(8)(C) or in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of section 523(a);
(3) for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime; or
(4)for restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual.

523(a)(16)
(a)A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
(16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership, in a share of a cooperative corporation, or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case;

105(a) the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Historical perspective
CASES
Dischargeable

In re Rosteck, 899 F 2d 694 (7th Cir 1990) Chapter 7
HOA fees are contractually based, and thus post petition assessment relates back to date of contract and thus are dischargeable.

In re Turner , 101 B. R. 751 (Bankr. D. Utah 1989)
Post petition HOA fees and continually accruing installments of the underlying contract to pay for benefits provided by the association, and thus are dischargeable.

Nondischargeable

In re Rosenfeld , 23 F 3d 833, 4th Cir. 1994) chapter 7
The Court determines that the homeowners association obligation is a convenant that runs with the land, and even though debtor consented to relief from stay to mortgage lender, that does not remove him as a record owner of the real estate, and thus he remains liable for post petition assessments.

In re Raymond, 129 B.R. 354 (Bankr. S. D. N.Y. 1991)
The court found that the HOA runs with the land and thus the debtor is personally liable for post petition fees that accumulate until he is no longer a record owner of the property.

CONGRESS
Congress intercedes in 1994 by adding 523(a)(16) that excepts HOA fees from discharge when the debtor physically occupies the property, or collects rent from it.
Congress acted again amended in 2005 to its current language which removed the restrictions of occupancy or rental income.

These debts are claims and should be Dischargeable

In re Colon, 465 B.R. 657 (Bankr. D. Utah 2011)
In this case, Debtors purchased a home subject to homeowner association Hidden Valley Heights Owner's Association (Hidden Valley). Debtors surrendered and vacated the home in March 2009. They filed a chapter 13 bankruptcy one year later, and they surrendered the subject real estate to mortgage lender Countrywide, and they listed HOA fees on schedule "F " denoted as '2009 HOA dues'. The plan was confirmed, and the successor mortgage creditor filed a Motion For Relief from Stay, which was granted without objection by debtors. Hidden Valley then filed a Motion for Relief From Stay, or in the Alternative, a Motion For Determination That the Stay Does Not Apply to Post Petition Debt.
FINDING - The Court found that because the debtors had surrendered and vacated the real estate, that they had no ownership or control over it and were thus unable to enjoy the benefits provided by continuation of HOA provided services, and therefore that they should not be liable for the fees associated with those costs. The post petition HOA fees are discharged.
The Court looked to an earlier decision in In re Turner, 101 B. R. 751 (Bankr. D. Utah 1989) to determine that the post petition fees that were due were claims (as opposed to a convenant that ran with the land) and thus could be addressed by a plan. Because the debtors surrendered the property related to that claim, and the claim was treated in the plan then the debt should be discharged.

In Re Pigg, 453 B.R. 728 (Bankr. M.D. Tenn. 2011)
(Though this case is a chapter 7 case – it is included to illustrate the distance to which the Courts will go to craft a remedy)
The debtor owned her home, subject to a mortgage held by Bank of America and subject to a homeowners association agreement of River Plantation, Section 10 and managed by Belle Management Corporation. The debtor's home was catastrophically damaged in a flood in May 2010. The debtor moved out of the property and filed her chapter 7 bankruptcy in September 2010. In that filing, she surrendered her interest in the condo. She also offered a deed in lieu of foreclosure . Bank of America took steps to secure the property, including changing the locks and posting a notice. Neither Bank of America nor Belle Management Corporation had instituted foreclosure proceedings.
The debtor filed an adversary in an attempt to compel the Bank to accept the deed on lieu, or to start foreclosure proceedings in an attempt to stop the accumulation of post petition HOA fees (non dischargeable in chapter 7 by virtue of 523(a)(16)), or for other equitable relief.
FINDING – the Court writes a particularly political opinion and slams Congress for crafting special protection to HOAs ("special interest lobbying") and eradicating the promise of a "fresh start" to homeowners who, in this case, is the victim of a disaster. The Court acknowledges that it cannot force the secured lender or the HOA to foreclose the property, but believes that it has an obligation to balance the interests of debtors and lienholders. Therefore, this the Court ordered that the discharge set to be temporarily set aside, the trustee reappointed and the house sold by the trustee and the liens to be paid from proceeds of the sale.

In re Heflin, No. 09-18642, 2010 WL 1417776 (Bankr. E.D. Va. Apr. 1 2010)
The debtor owned real estate subject to a mortgage held by Bank of New York Mellon and the Potters Glen Community Association. The debtor surrendered the property in his plan, and Potters Glen objected to that plan as it failed to address the payment of post petition HOA fees.
FINDING – The court finds that because 523(a)(16) is inapplicable in a chapter 13, surrender of the property related to HOA fees is acceptable and those post petition fees would be discharged under 1328(A).

In re Hovious, 10-3917-JMC-13 , Southern District of Indiana, February 15, 2017 (J. Carr unpublished opinion)
In this chapter 13 filing, the debtor owned real estate subject to a mortgage of Bank of America, and a homeowners association agreement of Bridgewater Homeowners Association, Inc. (Bridgewater) . The plan treated the secured claims as a "surrender". The debtor completed his chapter 13 and was granted a discharge . Bridgewater attempted to collect post petition HOA fees, and the debtor filed an adversary proceeding asserting that the collection efforts by Bridgewater constitute a willful violation of the discharge injunction and requesed damages.
FINDING – The court finds that the attempt to collect these fees may be a technical violation of the discharge, but declines to award damages. The court notes that the post petition fees would be discharged only if the debtor gave up "all incidents of occupancy". The Court finds that the debtor surrendered the real estate and "ceased to enjoy any significant incidents of ownership" and thus personal liability

should not be imposed. Further, because 523(a)(16) is not an enumerated exception under 1328(a), the 'super' discharge applies and the fees are dischargeable.

These debts run with the land and are not Dischargeable

In re Foster, 435 B.R. 650 (9th Cir. BAP 2010)
The debtor purchased property in 2005 subject to the Double R Ranch Association homeowners association agreement. In 2008, debtor filed a chapter 13 and listed the association as an unsecured creditor in Schedule F. The debtor's plan failed to treat pre or post petition association fees, and Double R objected to that plan. The debtor also filed an adversary to determine whether post petition assessments were dischargeable. The bankruptcy court found that the pre and post petition assessment of fees were secured claims and that the post petition assessments were not dischargeable. The debtor appealed to the BAP.
FINDING – the Court acknowledges that there may be some dispute as to whether Congress meant to include the 523(a)(16) exception to discharge in the 'super' discharge afforded under 1328(a) - but determined that it does not matter in this case because the HOA fees are not claims but are a convenant that runs with the land, and personal liability for those fees will continue to accrue to the debtor, as long as he is an owner of the property.

In Re Hijjawi, 495 B.R. 839, (N.D. Ill. 2013)
This debtor filed a chapter 11 case that was later converted to one under chapter 7. Debtor owned three condo units at the time of the chapter 11, and upon conversion, sought a ruling that the post petition pre conversion HOA assessments would be discharged. The ruling was sought in the context of a Motion to Extend Stay, and before the final ruling by the Bankruptcy Court, the case was closed. However, the Bankruptcy Court ruled and the debtor appealed that ruling. The District Court determined that the appeal was not mooted by the closing, and ruled on the matter.
FINDING - The court discussed the interplay between 548 and 727 and found that the bankruptcy court correctly treated the post petition pre conversion assessments as debts arising pre-petition and relating back to the initial date for relief ordered. The Court goes on to acknowledge that nothing in 348 limits the application of 523(a)(16) and that its application to these pre petition assessments results in a finding that these assessments are not dischargeable.

In re Montalvo, 546 B.R. 880 (Bankr. Ct. M.D. Fla 2016)
Debtor owned 2 condominiums that were subject to the Villa Medici Condominium Association agreement. Debtor failed to pay some association dues and later filed a chapter 13 bankruptcy and surrendered his interest in the condominiums. Debtor did not make any post petition HOA payments and received a discharge. The Association employed a receiver to rent out the units and received rent from one of debtor's units – which it applied to pre and post petition assessments. Debtor reopened his case and filed a motion for sanctions, arguing that the obligation to pay association fees arose from a contract and that the pre petition obligations were discharged, and that he had no obligation to pay post petition assessments. The association argues that it had a valid lien and that the obligation to pay the assessments runs with the land, and that the debtor would be liable until the property is transferred out of his name.

FINDING – The Court determined that the association's declaration is a convenant that runs with the land, and is not in the nature of a contractual obligation. Therefore, the debtor is personally liable for the assessments until he is no longer an owner of the property. And while the debtor may not be personally liable for any prepetition assessments, the association had a lien interest in the property and properly applied the collected rents to that pre petition lien. The court reiterated that surrender in bankruptcy does not relieve the debtor of his ownership interest, only a transfer of title will accomplish that.

Direct payments to mortgage creditors are "payments under the plan" as contemplated by 11 U.S.C. 1328(a). Failure to make direct payments to a mortgage creditor should result in denial of discharge, conversion or dismissal. Rule 3002.1 should be amended to require a mandatory hearing and final order.

Faiq Mihlar
Heavner, Beyers & Mihlar, LLC
Decatur, Illinois

V. Summary of Argument

a. If Chapter 13 debtors propose a plan to cure the pre-petition mortgage arrears and maintain their mortgage payments during the plan, but fail to make their regular direct mortgage payments to their mortgagee during the duration of the plan, they should not be entitled to receive a chapter 13 discharge.

b. Direct payments to a mortgage creditor are payments under or through the plan. Though payments are to go directly from the debtors to the mortgage creditor, the debt, once listed in the plan, is provided for by the terms of the plan. Any direct mortgage payments made would be payments "under the plan."

c. If the debtors complete the plan payments to the Trustee, but fail to make their ongoing direct mortgage payments, the failure to make said payments is a material default. In such case, the only options are conversion to a Chapter 7 pursuant to §1307(c) or dismissal "for cause" under §1307(c).

d. If the Trustee files a Notice of Final Cure and the Creditor responds to the same, the Debtor or the Trustee have the option of asking the Court to make a determination as to whether the default has been cured. However, in practice, these motions are not routinely filed and the parties are left with several uncertainties. The procedures set forth in Rule 3002.1 do not provide finality and should be amended to require a mandatory hearing and final order.

VI. Bankruptcy Code and Rules

a. 11 U.S.C. §1307(c)(6): Except as provided in subsection (f) of this section, on request of a party in interest or the United States trustee and after notice and hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including –…(6) material default by the debtor with respect to a term of a confirmed plan…

b. 11 U.S.C. §1322(b)(5): The plan may "provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due.

c. 11 U.S.C. §1328(a)(1): [A]s soon as practicable after completion by the debtor of all payments under the plan…the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt (1) provide for under section 1322(b)(5).

d. Federal Rule of Bankruptcy Procedure 3002.1

(f) NOTICE OF FINAL CURE PAYMENT. Within 30 days after the debtor completes all payments under the plan, the trustee shall file and serve on the holder of the claim, the debtor, and debtor's counsel a notice stating that the debtor has paid in full the amount required to cure any default on the claim. The notice shall also inform the holder of its obligation to file and serve a response under subdivision (g). If the debtor contends that final cure payment has been made and all plan payments have been completed, and the trustee does not timely file and serve the notice required by this subdivision, the debtor may file and serve the notice.

(g) RESPONSE TO NOTICE OF FINAL CURE PAYMENT. Within 21 days after service of the notice under subdivision (f) of this rule, the holder shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required

to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with § 1322(b)(5) of the Code. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement. The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f).

(h) DETERMINATION OF FINAL CURE AND PAYMENT. On motion of the debtor or trustee filed within 21 days after service of the statement under subdivision (g) of this rule, the court shall, after notice and hearing, determine whether the debtor has cured the default and paid all required postpetition amounts.

VII. Case Law Summary

Case	Trustee	Debtor(s)	Creditor	Results	Comments
In re Evans, 543 B.R. 213 (Bankr. E.D. Va. 2016).	Filed a Motion to Close Case without Entry of Discharge.	Orally confirmed the default in direct payments.	Filed a timely RNOFC alleging a default in post-petition payments.	The Trustee was given time to fila an amended motion for dismissal or conversion. Trustee filed the motion requesting dismissal without discharge and the Bankruptcy Court granted the same.	The Court specifically noted that the remedies available to the Trustee under the Bankruptcy Code are either conversion or dismissal under Section 1307. The case could not be closed without discharge, the proper mechanism was a motion to dismiss or convert.
In re Heinzle, 511 B.R. 69 (Bankr. W.D. Tex.2014).	Filed a Motion to Deny Discharge and Dismiss Debtor's case.	Asserted that the default was not material.	Filed a timely RNOFC alleging default in post-petition payments.	Trustee's Motion to deny Debtors' discharge was denied, and the Trustee's Motion to Dismiss was granted, subject to Debtors exercising their right to convert to Chapter 7.	The Court indicated the Debtors' argument that the default was not material was without merit, but a denial of discharge would put the Debtors in the difficult position of potentially seeking further bankruptcy relief and would require creditors to determine the legal effect of a denial of

					discharge on future bankruptcy filings.
In re Kessler, 655 Fed. App'x 242 (5th Cir. 2016).		Moved for entry of discharge.	Filed a timely RNOFC alleging a default in post-petition payments, but did not object to the Debtor's Motion for Entry of Discharge.	Denial of discharge under §1328 affirmed.	The Court noted that the Creditor is not required to file an objection to the Debtor's Motion for Entry of Discharge.
In re Diggins, 561 B.R. 782 (Bankr. D. Colo. 2016);	Filed a Motion to Dismiss for failure to make post-petition mortgage payments.	Objected to the Motion to Dismiss based on loan modification; Filed a Certification to Obtain Discharge.	Filed a timely RNOFC alleging a default in post-petition payments, but also alleged Debtor was in process of completing a loan modification.	Discharge entered	The Court noted that it would be inequitable to deny the debtor's discharge in this situation as the Debtor made payments for 4 years and promptly acted to modify the mortgage once her income dropped. As a result, the Court denied the Trustee's Motion to Dismiss and entered the discharge, despite the fact that the debtor did not complete the mortgage modification until the expiration of the 60-month period.
In re Hanley, 2017 WL 3575847, (Bankr. E.D.N.Y., 2017).	Filed a Motion to Dismiss based on the RNOFC.	Objected to the Motion to Dismiss and moved to strike the RNOFC; Filed a Loan Mod Motion.	Filed a timely RNOFC alleging a default in post-petition payments.	Motion to Dismiss granted; Motion to Strike Denied; Loan Mod Motion Denied.	The Court noted that its equitable powers cannot override the statute or provisions of a confirmed chapter 13 plan, and

					denied the debtor's loan modification motion to cure the default after the expiration of the plan.
In re Thornton, 2017 WL 2804874 (Bankr. W.D. Mo., 2017).	Objected to the Debtor's Discharge Motion.	Filed a Motion for Entry of Discharge.	Filed a timely RNOFC alleging a default in post-petition payments; Filed a last minute Motion for Relief from Automatic Stay.	Debtor allowed to convert the case to Chapter 7 or have it dismissed.	The Court noted that given that the Creditor "sat on its hands and allowed the debt to grow without taking any action," the debtor should be allowed to either convert the case to Chapter 7, or have it dismissed.
In re Ramos, 540 B.R. 580 (Bankr. N.D. Tex. 2015)	Objected to the Discharge Motion; objected to Plan Modification Motion.	Filed the Certification and Motion for Discharge; Filed a Motion to Modify Plan to Surrender Collateral in Full Satisfaction of Claim.	Filed a timely RNOFC; but never filed a Motion for Relief from Automatic Stay despite that the Debtor failed to make 3 years of payments.	Debtor allowed to convert and pursue a discharge in Chapter 7 if eligible; Plan Modification Denied.	The Court noted that the result in this case may be avoided had the Creditor acted more proactive in the bankruptcy case, and that the Debtor waited too long to address the issue with the court; Post-confirmation Modification to reclassify claim denied because it was not allowed under §1329.
In re Payer, 2016 WL 5390116 (Bankr. D. Colo. 2016)	Filed a Statement Regarding Debtors' Eligibility for Discharge	Acknowledged that the default was correct, but asserted that they have received conditional	Filed a timely RNOFC alleging delinquency in post-petition payments.	Debtors were allowed to convert under Chapter 7 or case will be dismissed; However, upon	In its opinion, the Court discussed the effect of discharge on the subordinate lienholders and noted that such

	and Final Report noting the defaults.	approval for loan modification and the trial payments have been completed.		the Debtor's Motion for reconsideration based on the loan mod, the court granted discharge.	lien interest should not be extinguished without strict compliance with the requirements in the Bankruptcy Code and the confirmed plan. Upon the Debtor's Motion for Reconsideration, the Court entered discharge although the loan modification was not final approved prior to the expiration of the plan period.
In re Bethe, 2017 WL 399481 (Bankr. E.D. Wis. 2017)	Filed a NOFC, to which the creditor responded. Then filed Final Report.	Debtors did not contest they failed to make the post-petition mortgage payments, but requested that the court not vacate the discharge order because failure to make the payments was not a material default.	Filed a timely RNOFC alleging default in post-petition payments.	Discharge not vacated; Court indicated the equities did not warrant vacating the discharge order.	The Court itself noticed that the discharge was entered despite the timely filed RNOFC asserting default. Court warned that practices must be changed to ensure compliance with §1328, future reliance on them to defend an erroneously granted discharge will likely be unavailing.
In re Coughlin, 568 B.R. 461 (Bankr. E.D.N.Y. 2017)	Trustee filed a response to the Court's Order to Show Cause, supporting vacating the Discharge Order.	Debtor filed opposition to the Court's Order to Show Cause why the Discharge Order should not be vacated.	Filed a timely RNOFC alleging a default in the post-petition payments, but took no position on whether the discharge order should be vacated.	Discharge not vacated.	The Court itself noticed that the discharge was entered despite the timely filed RNOFC asserting default. However, the Court stated that revocation of a discharge is an extraordinary

					remedy and that the discharge should not be vacated when it was not obtained by fraud or due to mistake by court.
In re Gonzales, 532 B.R. 828 (Bankr. D. Colo. 2015).	Filed a Notice of Completion of Plan and requesting entry of the Debtor's Discharge.	Did not seek judicial determination as to whether the Debtors had paid all post-petition amounts.	Filed a timely RNOFC alleging a default in post-petition payments.	Discharge vacated.	The Court itself issued a Rule to Show Cause after noticing that the Debtor's Certification to Obtain Discharge conflicts with the Creditor's RNOFC. This Court also discussed the effect of discharge on the subordinate lienholders and noted that such lien interest should not be extinguished without strict compliance with the requirements in the Bankruptcy Code and the confirmed plan.
In re Tumblson, 2016 WL 889772 (Bankr. ED. Ok. Mar. 8, 2016).	Filed a Motion to Dismiss.	Filed an objection to the Trustee's Motion to Dismiss.	Creditor informed Trustee Debtor was delinquent in post-petition payments.	Denial of Discharge and case dismissed due to failure to make post-petition payments.	
In re Hoyt-Kieckhaben, 546 B.R. 868 (Bankr. Colo. 2016).	Filed a Motion to Dismiss and Opposition to Debtor's Certification to Obtain a Discharge.	Debtor filed Certification to Obtain Discharge and alternative request for conversion.	Filed a timely RNOFC alleging a default in post-petition payments.	Case converted.	