

Appeal No. 13-14304-FF
District Court Docket No. 1:12-cv-00156-JRH-BKE
Secondary Case No. 1:11-BKC-010407-JSD

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

In re:
GEORGE CROUSER,
Debtor.

GEORGE CROUSER,
Debtor/Appellant
v.
BAC HOME LOANS SERVICING, LP, ET AL
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA

BRIEF OF APPELLEE CHAPTER 13 TRUSTEE

RESPECTFULLY SUBMITTED:
BRENT M. MYER
Attorney for Appellee
Chapter 13 Trustee Huon Le
Post Office Box 2127
Augusta, Georgia 30903
(706) 724-1039

CERTIFICATE OF INTERESTED PERSONS

This is to certify that the following constitutes a complete list of all parties and persons having an interest in the outcome of this case:

BAC Home Loans Servicing, L.P., Defendant/Appellee

The Honorable Susan D. Barrett, U.S. Bankruptcy Court, Southern District of Georgia

Peter Conti-Brown, Attorney for Appellant

George Crouser, Debtor/Plaintiff/Appellant

Matthew J. Duncan, Attorney for Debtor/Plaintiff

The Honorable Brian K. Epps, U.S. Magistrate Judge, Southern District of Georgia

Jordan Dinos Gillman, Attorney for Appellee Chapter 13 Trustee Huon Le

Deepak Gupta, Attorney for Appellant

Gupta Beck PLLC, Attorneys for Appellant

The Honorable J. Randal Hall, U.S. District Court, Southern District of Georgia

Chapter 13 Trustee Huon Le, Appellee

McGuire Woods, Attorneys for Defendant/Appellee BAC Home Loans
Servicing, L.P.

Matthew E. Mills, Assistant United States Trustee

Brent M. Myer, Attorney for Appellee Chapter 13 Trustee Huon Le

Office of the United States Trustee, Interested Party/Appellee

Thomas Raymond Walker, Attorney for Defendant/Appellee BAC Home
Loans Servicing, L.P.

STATEMENT REGARDING ORAL ARGUMENT

Appellee Trustee does not request oral argument. Oral argument is not necessary as “the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.” Fed. Rules App. Proc. R. 34(a)(2)(C). Therefore, Appellee Trustee asks that the Court render its decision based on the briefs and the record.

TABLE OF CONTENTS

Certificate of Interested Persons.....	ii-iii
Statement Regarding Oral Argument.....	iv
Table of Contents.....	v-vi
Table of Citations.....	vii-ix
Statement of Issue.....	1
Statement of Case.....	1-3
Statement of Facts.....	3-5
Summary of the Argument.....	5-6
Argument and Citation of Authorities.....	6-20
I. The proceeds from Appellant’s action for violation of the automatic stay are property of the estate under 11 U.S.C. §§ 541 and 1306.....	6-11
a. Appellant’s construction of §§ 541 and 1306 is contrary to the plain language of the two statutes and the rules of statutory construction.....	8-11
II. The proceeds from Appellant’s action are property of the estate under <u>In re Waldron</u> , 536 F.3d 1239 (11 th Cir. 2008).....	11-14
III. Appellant’s argument that the lower court’s ruling “guts” the automatic stay in Chapter 13 is not properly before the Court.....	14-18

a. Appellant abandoned this argument by not raising it in his appeal to the District Court.....	14-15
b. None of the exceptions to the “waiver rule” apply.....	15-17
c. Appellant’s argument is not persuasive.....	17-18
IV. Appellant’s “natural persons” argument is not properly before the Court.....	18-20
a. Appellant may not raise this argument for the first time on appeal.....	18-19
b. None of the exceptions to the “waiver rule” apply	19
c. Appellant’s argument is without merit.....	19-20
Conclusion.....	21
Certificate of Compliance.....	22
Certificate of Service.....	23

TABLE OF CITATIONS

Cases

<u>Access Now, Inc. v. Sw. Airlines Co.</u> , 385 F.3d 1324 (11 th Cir. 2004)	14, 15, 16, 19
<u>Arnold v. Weast (In re Arnold)</u> , 869 F.2d 240 (4 th Cir. 1989)	16
<u>In re Bateman</u> , 331 F.3d 821 (11 th Cir. 2003)	11
<u>In re Bratcher</u> , 2013 WL 5309549 (Bankr. S.D. Tx. 2013)	13-14
<u>In re Brown</u> , 159 B.R. 1014 (Bankr. S.D. Ga. 1993)	4, 14
<u>Carroll v. Logan</u> , 735 F.3d 147 (4 th Cir. 2013)	8-10, 11
<u>In re Chung-Chan</u> , 2009 WL 3837846 (D. Mass. 2009)	12, 14
<u>City of Chicago v. Fisher (In re Fisher)</u> , 203 B.R. 958 (Bankr. N.D. Ill. 1997)	12
<u>Clark v. Uebersee Finanz-Korporation</u> , 332 U.S. 480 (1947)	7, 10
<u>In re Cox</u> , 214 B.R. 635 (Bankr. N.D. Ala. 1997)	4, 8, 14
<u>In re Dale</u> , 505 B.R. 8 (9 th Cir. BAP 2014)	9
<u>Flynn v. IRS (In re Flynn)</u> , 169 B.R. 1007 (Bankr. S.D. Ga. 1994), aff'd in part and rev'd in part on other grounds, 185 B.R. 89 (S.D. Ga. 1995)	14
<u>In re Fridley</u> , 300 B.R. 538 (9 th Cir. B.AP. 2007)	10
<u>In re Furgerson</u> , 263 B.R. 28 (Bankr. N.D. N.Y. 2001)	4, 5, 7-8, 14
<u>In re Graham</u> , 2009 WL 8590643 (Bankr. S.D. Ga. 2009)	14
<u>In re Icarus Holding, L.L.C.</u> , 391 F.3d 1325 (11 th Cir. 2004)	6, 13

<u>Jove Engineering v. I.R.S.</u> , 92 F.2d 1539 (11 th Cir. 1996)	19-20
<u>Kawaauhau v. Geiger</u> , 523 U.S. 57 (1998)	10
<u>Koehler v. Iowa College Student Aid Comm’n (In re Koehler)</u> , 204 B.R. 210 (Bankr. D. Minn. 1997)	13
<u>Price v. United States</u> , 42 F.3d 1068 (7 th Cir. 1994).....	13
<u>In re Solis</u> , 137 B.R. 121 (Bankr. S.D. N.Y. 1992).....	8, 14
<u>In re Taylor</u> , 430 B.R. 305 (Bankr. N.D. Ga. 2010)	20
<u>In re Taylor</u> , 1990 WL 424983 (Bankr. S.D. Ga. 1990), <u>aff’d</u> 1991 WL 537024 (S.D. Ga. Sept. 5, 1991), <u>reaff’d</u> 148 B.R. 361 (S.D. Ga. 1992).....	14
<u>Telfair v. First Union Mortgage Corp.</u> , 216 F.3d 1333 (11 th Cir. 2000)	11
<u>In re Tinney</u> , 2012 WL 2742457 (Bankr. N.D. Ala. 2012).....	9, 10
<u>United States v. McPeck</u> , 910 F.2d 509 (8 th Cir. 1990).....	13
<u>United States. v. Whiting Pools, Inc.</u> , 462 U.S. 198 (1983).....	6, 13
<u>In re Veal</u> , 2011 WL 5240291 (Bankr. N.D. Ill. 2011).....	7, 14
<u>In re Waldron</u> , 536 F.3d 1239 (11 th Cir. 2008).....	3-4, 5, 11-12, 13, 16, 17-18

Statutes

11 U.S.C. § 103.....	11
11 U.S.C. § 362.....	14, 17, 20
11 U.S.C. § 541.....	1, 2, 5, 6, 7, 8, 9, 10, 11, 13, 17, 20
11 U.S.C. § 1115.....	13
11 U.S.C. § 1207.....	13

11 U.S.C. § 1306.....	1, 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 17, 20
11 U.S.C. § 1322.....	9, 10
11 U.S.C. § 1325.....	9, 10, 17
11 U.S.C. § 1327.....	12
11 U.S.C. § 1329.....	10, 17
Miscellaneous	
4 Norton Bankr. L. & Prac. 3d Section 61:1.....	7

STATEMENT OF ISSUE

Whether the Bankruptcy Court and the District Court correctly applied the plain language of §§ 541 and 1306 and binding precedent in holding that the settlement proceeds of Appellant's action for post-confirmation stay violations are property of the estate?

STATEMENT OF CASE

This case is on appeal from the United States District Court for the Southern District of Georgia (hereinafter, the "District Court"), case number 1:12-cv-00156-JRH-BKE. Appellant/Debtor, George Crouser (hereinafter, "Appellant"), seeks to overturn the Bankruptcy Court's ruling that the settlement proceeds of his cause action for post-confirmation violations of the automatic stay are property of the estate.

Appellant initiated the underlying Chapter 13 Case on March 27, 2010. (Adv. Doc. No. 35, p. 2). Appellant's Chapter 13 Plan was confirmed on August 24, 2010, with a 0% dividend to unsecured creditors. Id. On August 30, 2011, Appellant filed an adversary complaint against Appellee BAC Home Loans Servicing, L.P. (hereinafter, "BAC") alleging violations of the automatic stay. (Adv. Doc. No. 1).

On February 15, 2012, Appellant filed a Motion to Approve Settlement and Dismiss Adversary Proceeding with Prejudice. (Adv. Doc. No. 13). Appellee

Chapter 13 Trustee Huon Le (hereinafter, “Appellee Trustee”) filed an objection to said motion on March 8, 2012. (Adv. Doc. No. 17). Appellee Trustee filed an amended objection on April 19, 2012. (Adv. Doc. 22).

A hearing was held on the motion to approve settlement, at which the Bankruptcy Court requested the parties brief whether the non-exempt portion of the settlement proceeds constituted property of the estate. (Dist. Ct. Doc. No. 9, p. 2). Appellant filed his brief on June 11, 2012. (Adv. Doc. No. 30). Appellee Trustee filed her brief on June 20, 2012. (Adv. Doc. No. 33).

On August 20, 2012, the Bankruptcy Court entered a consent order approving the motion to approve settlement but leaving unresolved the allocation of the non-exempt portion of the settlement proceeds. (Adv. Doc. No. 34). On the same day the Bankruptcy Court entered an Opinion and Order concluding that the settlement proceeds were property of the estate under §§ 541 and 1306. (Adv. Doc. No. 35, pp. 3-5).

On September 4, 2012, Appellant filed a notice of appeal in the Bankruptcy Court. (Adv. Doc. No. 38). After the issues were fully briefed, the District Court issued an order affirming the Bankruptcy Court on August 21, 2013. (Dist. Ct. Doc. No. 9). The District Court held that the settlement proceeds were property of the estate under § 1306 and applicable precedent. Id. at p. 8.

On September 20, 2013, Appellant filed its Notice of Appeal to this Court. (Dist. Ct. Doc. No. 11).

STATEMENT OF FACTS

Appellant was represented by attorney Matthew J. Duncan in the adversary proceeding. (Adv. Doc. No. 1). Appellant had received collection letters from BAC on April 4th and August 5th of 2011. Id. at ¶¶ 15, 20. BAC also sent Appellant a Notice of Sale under Power and published said notice in The Augusta Chronicle. Id. at ¶¶ 16, 17.

Attorney Duncan negotiated a settlement of the adversary proceeding. (Adv. Doc. No. 13 and 34). Appellant and BAC agreed to damages totaling \$25,000. (Adv. Doc. No. 34, p. 2). In addition, the settlement agreement “cured” nine post-petition mortgage payments that were not made by Appellant and/or were rejected by BAC. Id. BAC also agreed to credit any late fees or other charges relating to said mortgage payments. Id.

In the Bankruptcy Court attorney Duncan briefed whether the non-exempt portion of the settlement proceeds were property of the estate. (Adv. Doc. No. 30). Appellant raised the following arguments in the brief submitted to the Bankruptcy Court: 1) the proceeds are not property of the estate because an action for violation of the automatic stay cannot exist as of commencement of a case; 2) In re Waldron, 536 F.3d 1239 (11th Cir. 2008) is distinguishable because said case involved a

personal injury action; 3) In re Furgerson, 263 B.R. 28 (Bankr. N.D. N.Y. 2001) does not apply due to a substantive difference in the vesting clauses in the confirmation orders; 4) In re Brown, 159 B.R. 1014 (Bankr. S.D. Ga. 1993) is distinguishable because the Brown court was addressing sovereign immunity; 5) the court did not conduct a detailed analysis in In re Cox, 214 B.R. 635 (Bankr. N.D. Ala. 1997); and 6) there are policy considerations supporting Appellant's position. (Adv. Doc. No. 30).

While the Bankruptcy Court concluded that the non-exempt portion of the settlement proceeds were property of the estate, the other terms of settlement were approved by the Bankruptcy Court. (Adv. Doc. No. 34 and 35). Attorney Duncan's attorney fees for representing Appellant in the adversary proceeding also were approved by the Bankruptcy Court. (Adv. Doc. No. 31). One-third of the \$25,000 settlement award was retained by attorney Duncan pursuant to his fee agreement. (Adv. Doc. No. 35, p. 9).

Attorney Duncan also represented Appellant on the appeal of the Bankruptcy Court's order to the District Court. (Adv. Doc. No. 38). Attorney Duncan prepared Appellant's brief seeking to overturn the holding that the non-exempt settlement proceeds were property of the estate. (Dist. Ct. Doc. No. 3). Appellant raised the following arguments in said brief: 1) the proceeds are not property of the estate because an action for violation of the automatic stay cannot exist as of

commencement of a case; 2) Waldron is distinguishable because said case involved a personal injury action; 3) the court's construction of §§ 541 and 1306 in Furgerson is flawed; and 4) the "sovereign immunity cases" are distinguishable. (Dist. Ct. Doc. No. 3).

SUMMARY OF THE ARGUMENT

The Bankruptcy Court did not err in concluding that the settlement proceeds of Appellant's action for post-confirmation violations of the automatic stay are property of the estate. Such proceeds are property of the estate by virtue of 11 U.S.C. §§ 541 and 1306. Appellant's construction of §§ 541 and 1306 is contrary to the plain language of the two statutes and the rules of statutory construction. Appellant's construction imposes the temporal restrictions of § 541 on § 1306. Appellant's construction erodes the expanded definition of property of the estate in Chapter 13 and cuts the statutory "price tag" for that chapter's enhanced relief.

The proceeds also are property of the estate under In re Waldron, 536 F.3d 1239 (11th Cir. 2008). Appellant's attempts to harmonize Waldron with his position are unavailing.

Appellant's argument that the lower court's ruling "guts" the automatic stay in Chapter 13 cases is not properly before the Court. Said argument was not raised in the District Court and none of the exceptions to the "waiver rule" apply to allow

this argument to be raised, for the first time, in this Court. Furthermore, the argument is unpersuasive.

Finally, Appellant's "natural persons" argument also is not properly before this Court. Appellant did not raise this argument in the Bankruptcy Court or the District Court. Appellant may not raise this argument for the first time on appeal. Again, none of the exceptions to the "waiver rule" apply. Moreover, even if the Court were inclined to consider an argument raised for the first time on appeal, Appellant's "natural persons" argument is without merit.

ARGUMENT AND CITATIONS OF AUTHORITY

I. The proceeds from Appellant's cause of action for violations of the automatic stay are property of the estate under 11 U.S.C. §§ 541 and 1306.

Appellant seeks to overturn the Bankruptcy Court's ruling that the settlement proceeds from his cause of action for violations of the automatic stay are property of the estate under 11 U.S.C. §§ 541 and 1306. Property of the estate includes all legal and equitable interests of the debtor as of commencement of the case. 11 U.S.C. § 541(a)(1). "Legal and equitable interests" include potential **legal causes of action**. See U.S. v. Whiting Pools, Inc., 462 U.S. 198, 204-05 n.9 (1983); In re Icarus Holding, L.L.C., 391 F.3d 1325, 1319 (11th Cir. 2004) (emphasis added).

In the Chapter 13 context, the reach of § 541 is expanded. 4 Norton Bankr.

L. & Prac. 3d Section 61:1. The Chapter 13 estate includes:

(a) [I]n 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 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 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.

11 U.S.C. § 1306(a)(1) & (2).

Provisions within a statute are read to be consistent whenever possible. Clark v. Uebersee Finanz-Korporation, 332 U.S. 480, 488 (1947). Reading §§ 1306(a)(1) and 541(a)(1) as consistent with each other, the former section expands the latter section so as to include **legal causes of action** acquired by a debtor after the case is commenced but before it is closed, dismissed, or converted.

The actions of BAC that gave rise to Appellant's cause of action occurred after his case was commenced but before it was closed, dismissed, or converted. Accordingly, the proceeds of said cause of action are property of the estate under §§ 541(a)(1) and 1306(a)(1). See In re Veal, 2011 WL 5240291, *2 (Bankr. N.D. Ill. 2011) (damages award for stay violation was property of the estate under §§ 541(a)(1) and 1306(a)); In re Furgerson, 263 B.R. 28, 34 (Bankr. N.D. N.Y. 2001)

(settlement proceeds for violation of stay were property of estate by operation of §§ 541(a)(1) and 1306(a)(1)); In re Cox, 214 B.R. 635, 649 (Bankr. N.D. Ala. 1997) (damages for violating stay were property of the estate under § 1306(a)(1) and (2)); In re Solis, 137 B.R. 121, 126 (Bankr. S.D. N.Y. 1992) (claim for stay violation was property of the estate by operation of §§ 541 and 1306).

- a. Appellant's construction of §§ 541 and 1306 is contrary to the plain language of the two statutes and the rules of statutory construction.

Appellant argues that a cause of action for violation of the automatic stay cannot be property of the estate under §§ 541 and 1306 because the latter section incorporates only property “of the kind referenced” in § 541. Appellant further argues that because the automatic stay does not arise until commencement of the case, a cause of action for violation of the stay is not property “of the kind referenced” in § 541. Appellant’s construction is erroneous. The property “of the kind” in § 541 which is incorporated by § 1306 includes **legal and equitable interests** acquired by Appellant after commencement but before his case is closed, dismissed, or converted. “Legal and equitable interests” include legal causes of action. Accordingly, the proceeds of Appellant’s post-confirmation cause of action constitute property of the estate.

In effect, Appellant’s construction of §§ 541 and 1306 imposes the temporal restrictions of the former section on the latter with respect to actions for violation of the automatic stay. However, “[t]he **kind** of property is a distinct concept from the

time at which the debtor’s interest in the property was acquired.” Carroll v. Logan, 735 F.3d 147, 150 (4th Cir. 2013) (emphasis added) quoting In re Tinney, 2012 WL 2742457, at *2 (Bankr. N.D. Ala. 2012) see also In re Dale, 505 B.R. 8, at 11-12 (9th Cir. BAP 2014). The court in Carroll concluded that § 1306(a)(1) incorporates the kind of property listed in § 541(a)(5) but does not incorporate said section’s 180-day restriction. Id. at 150. Clearly, Appellant’s construction of §§ 541 and 1306 is flawed as it imposes the “as of the commencement of the case” restriction of § 541 on § 1306.

Appellant’s construction also ignores the purpose of § 1306 – to expand the definition of property of the estate in Chapter 13 cases. “With Section 541, Congress established a general definition for bankruptcy estates. With Section 1306, it then expanded on that definition specifically for purposes of Chapter 13 cases.” Carroll, at 150. The expanded definition of property of the estate in Chapter 13 correlates with the enhanced relief that chapter provides. “Chapter 13 proceedings provide debtors with significant benefits ... debtors may retain encumbered assets and have their defaults cured, while secured creditors have long-term payment plans imposed upon them and unsecured creditors may receive on [sic] only a fraction of their claims.” Id. at 151 citing 11 U.S.C. §§ 1322, 1325.

However, the enhanced relief of Chapter 13 comes with a “price tag.” Tinney, at *3. “In exchange for those benefits, a Chapter 13 debtor makes a multi-year

commitment to repay obligations under a court-confirmed plan.” Carroll, 735 F.3d at 151 citing 11 U.S.C. §§ 1322, 1325. “The repayment plan remains subject to modification for reasons including a debtor’s decreased ability to pay according to plan, as well as the debtor’s increased ability to pay.” Carroll, at 151 citing 11 U.S.C. § 1329; see also Tinney, at *3 (“If those changed circumstances result in additional post-petition estate property becoming available, the debtor’s plan should be modified to increase the amount paid to unsecured creditors.”); In re Fridley, 300 B.R. 538, 544 (9th Cir. B.AP. 2007) (“part of the statutory bargain inherent in chapter 13 is that the debtors must, for the prescribed life of the plan, run the gauntlet of exposure to trustee or creditor requests to increase payments.”). Appellant’s construction of §§ 541 and 1306 erodes the expanded definition of property of the estate in Chapter 13 and cuts out the statutory “price tag” for its enhanced relief.

Lastly, Appellant’s construction of §§ 541 and 1306 is inconsistent with the principles of statutory construction. Provisions within a statute are read to be consistent whenever possible. Clark, 332 U.S. at 488. “When two provisions may conflict, a construction that renders one superfluous or insignificant should be avoided.” Kawaauhau v. Geiger, 523 U.S. 57, 62 (1998). Appellant’s construction of §§ 541 and 1306 renders superfluous a portion of the latter section. Specifically, Appellant’s construction makes superfluous the “after the commencement” language in § 1306(a)(1). In contrast, the Bankruptcy Court’s construction of §§

541 and 1306 does not render any portion of the two statutes superfluous. Instead, each provision has meaning and purpose.

Similarly, Appellant's construction violates the rule that a general provision should not be read so as to supersede specific substantive provisions. See In re Bateman, 331 F.3d 821, 825 (11th Cir. 2003). The definition of property of the estate in § 541 applies to all bankruptcy cases whereas the definition in § 1306 applies only to Chapter 13 cases. See 11 U.S.C. § 103(a), (i) and Carroll, at 150. Accordingly, § 1306 is the specific provision and § 541 is the general provision. Appellant's construction of §§ 541 and 1306 results in the general provision superseding the specific provision with regard to causes of action for violation of the automatic stay. Accordingly, Appellant's construction of §§ 541 and 1306 should be rejected.

II. The proceeds from Appellant's cause of action for violations of the automatic stay are property of the estate under In re Waldron, 536 F.3d 1239 (11th Cir. 2008).

Appellant contends that Waldron is consistent with his position that the settlement proceeds do not constitute property of the estate. Appellee Trustee respectfully disagrees. The debtor husband in Waldron had been involved in an automobile accident after plan confirmation. Mr. and Mrs. Waldron argued that Telfair v. First Union Mortgage Corp., 216 F.3d 1333 (11th Cir. 2000) was controlling, and that the cause of action had re-vested in Mr. Waldron at confirmation. Waldron, 536 F.3d at 1242. The Court did not apply Telfair because

said case only addressed property existing at confirmation. Waldron, 536 F.3d at 1242-43. The Court concluded that Mr. Waldron's post-confirmation cause of action was property of the estate. The Court explained as follows:

While the case is pending, the post-petition property ... [is] added to the estate until confirmation, the event that triggers [section] 1327(b) and "vests" the property of the estate in the debtor. That is, the property interests comprising the pre-confirmation estate property are transferred to the debtor at confirmation, and this "vesting" is free and clear of the claims or interests of creditors provided for by the plan, [section] 1327(b), (c). Finally, the property of the estate once again accumulates property by operation of [section] 1306(a) until the case is "closed, dismissed, or converted."

Waldron, 536 F.3d at 1243, citing City of Chicago v. Fisher (In re Fisher), 203 B.R. 958, 962 (Bankr. N.D. Ill. 1997).

BAC's actions giving rise to Appellant's **cause of action** occurred after the Bankruptcy Court confirmed the plan. Since BAC's actions occurred after confirmation, Appellant's interest in the cause of action did not re-vest in him at confirmation. Further, BAC's actions occurred before Appellant's case was closed, dismissed, or converted. Accordingly, the proceeds of the cause of action are property of the estate under Waldron. See In re Chung-Chan, 2009 WL 3837846, *3 (D. Mass. 2009) (court cited reasoning of Waldron in concluding that settlement proceeds for stay violation were property of the estate under § 1306(a)).

Appellant's attempt to harmonize his position with Waldron is unavailing. Appellant contends that Mr. Waldron's claims under the underinsured motorist

policy were “property of the kind” that could exist at commencement while claims for violation of the automatic stay are not. As a result, the settlement proceeds for a stay violation would not be property of the estate under Waldron. However, both claims are legal causes of action. Legal causes of action constitute “legal and equitable interests” under § 541. Whiting Pools, Inc., 462 U.S. at 204-05 n.9 and Icarus Holding, L.L.C., 391 F.3d at 1319. “Legal and equitable interests” arising after commencement but before a case is closed, dismissed, or converted constitute property of the estate under § 1306(a)(1). Accordingly, Appellant’s argument is without merit.

Appellant also attempts to square Waldron with his position by distinguishing between bankruptcy and non-bankruptcy causes of action. Nowhere in the Bankruptcy Code is such a distinction made. See 11 U.S.C. §§ 541(a)(1), 1115(a)(1), 1207(a)(1), 1306(a)(1). This Court has refused to create a “distinction among types of post-confirmation estate property where there exists no textual basis to do so.” Waldron, 536 F.3d at 1243. Case law does not distinguish between bankruptcy and non-bankruptcy causes of action. See Price v. United States, 42 F.3d 1068, 1072 (7th Cir. 1994); United States v. McPeck, 910 F.2d 509, 513 (8th Cir. 1990); Koehler v. Iowa College Student Aid Comm’n (In re Koehler), 204 B.R. 210, 219 (Bankr. D. Minn. 1997); In re Bratcher, 2013 WL 5309549, at *3 (Bankr. S.D. Tx. 2013)(“no reason to treat a postpetition cause of action arising from an

automatable accident differently from a postpetition cause of action for violation of the automatic stay.”); Veal, at *2; Chung-Chan, at *3; In re Graham, 2009 WL 8590643 (Bankr. S.D. Ga. 2009); Furgerson, 263 B.R. at 34; Cox, 214 B.R. at 649; Solis, 137 B.R. at 126; In re Taylor, 1990 WL 424983, *2 (Bankr. S.D. Ga. 1990), aff’d 1991 WL 537024 (S.D. Ga. Sept. 5, 1991), reaff’d 148 B.R. 361 (S.D. Ga. 1992); In re Brown, 159 B.R. 1014, 1017 (Bankr. S.D. Ga. 1993); Flynn v. IRS (In re Flynn), 169 B.R. 1007, 1016 (Bankr. S.D. Ga. 1994), aff’d in part and rev’d in part on other grounds, 185 B.R. 89 (S.D. Ga. 1995). Nothing in the policies underpinning the Bankruptcy Code supports making such a distinction. Appellant’s distinction between bankruptcy and non-bankruptcy causes of action is specious.

III. Appellant’s argument that the lower court’s ruling “guts” 11 U.S.C. § 362(k) is not properly before the Court.

a. Appellant abandoned this argument by not raising it in the District Court.

Appellant contends that the “district court’s rule would gut the automatic stay in Chapter 13 of any meaning.” Appellant raised a similar argument in the Bankruptcy Court. (Adv. Doc. No. 30, p. 3). However, Appellant did not raise this argument in the District Court. (Dist. Ct. Doc. No. 3). An appellant waives his right to raise an argument in this Court when he fails to raise that argument in the District Court. Access Now, Inc. v. Sw. Airlines Co., 385 F.3d 1324, 1331 (11th Cir. 2004).

This argument was abandoned by Appellant in the District Court. Therefore, the argument has not been preserved for appeal.

b. None of the exceptions to the “waiver rule” apply.

While there are narrow exceptions to the “waiver rule,” Appellant has not argued that any of them apply. The Court considers five, exceptional circumstances when determining whether an issue may be raised for the first time on appeal: (1) whether the issue involves a pure question of law and refusal to consider it would result in a miscarriage of justice; (2) whether the appellant had an opportunity to raise the issue in the lower court; (3) whether the interest of substantial justice is at stake; (4) whether proper resolution is beyond any doubt; and (5) whether the issue presents significant questions of general impact or great public concern. Id. at 1332.

While the issue before the Court involves a pure question of law, refusal to consider the issue will not result in a miscarriage of justice. The settlement agreement “cured” nine, post-petition mortgage payments. (Adv. Doc. No. 34, p. 2). The settlement agreement also forgave all late fees and charges accrued in connection with said post-petition mortgage payments. Id. Lastly, the attorney fees Appellant incurred in prosecuting the cause of action were satisfied out of the gross settlement proceeds. (Adv. Doc. No. 35, p. 9). Therefore, refusal to consider the issue will not result in a miscarriage of justice.

Appellant also had ample opportunity to raise the argument in the District Court. Appellant was represented by Matthew J. Duncan on his appeal to the District Court. (Dist. Ct. Doc. No. 3). Attorney Duncan also represented Appellant in the adversary proceeding. (Adv. Doc. No. 1). Attorney Duncan negotiated a settlement of the adversary proceeding. (Adv. Doc. No. 34). Attorney Duncan prepared Appellant's brief submitted to the Bankruptcy Court. (Adv. Doc. No. 30). Said brief raised an argument similar to the argument raised now. Id. at p. 3. Appellant, through attorney Duncan, abandoned the argument by not raising it in his appeal to the District Court. (Dist. Ct. Doc. No. 3).

The interest of substantial justice is not at stake. Appellant was compensated for BAC's violations of the automatic stay. (Adv. Doc. No. 31 and Adv. Doc. No. 35, p. 9). Appellant is simply unhappy that he was not able to exempt the settlement proceeds and now must share his gains with unsecured creditors. See Waldron, 536 F.3d at 1246 citing Arnold v. Weast (In re Arnold), 869 F.2d 240, 242 (4th Cir. 1989) ("Certainly Congress did not intend for debtors who experience substantially improved financial conditions after confirmation to avoid paying more to their creditors."). Appellant's case is not the exceptional case in which the "substantial justice" exception applies. See Access Now, Inc., 385 F.3d at 1333 ("this Court has never once elected to evaluate a new argument on this basis.").

Proper resolution of the issue is beyond doubt. The Bankruptcy Court's construction of §§ 541 and 1306 is proper. Said construction is supported by the rules of statutory construction, binding precedent, and the courts that have addressed the issue.

Lastly, the issue does not present significant questions of general impact or great public concern. This issue impacts a small number of debtors. Specifically, only debtors who acquire awards for post-confirmation violations of the automatic stay in excess of their available exemptions will be affected. Therefore, none of the exceptions to the "waiver rule" apply in the instant case.

c. Appellant's argument that the lower court's ruling "guts" § 362(k) in Chapter 13 cases is unpersuasive.

Even if the Court concludes that an exception to the "waiver rule" applies, Appellant's argument is unpersuasive. Appellant contends that the lower court's ruling disincentivizes compliance with the automatic stay because "the damages would flow from one of the creditor's pockets to the other." This statement mischaracterizes the effect of the lower court's ruling. Should the lower court's ruling be affirmed, a modified plan increasing the dividend to unsecured creditors by the non-exempt portion of the settlement proceeds would be appropriate. See 11 U.S.C. §§ 1325(a)(3), (4); 1325(b); 1329 and Waldron, 536 F.3d at 1245 ("The disclosure of postconfirmation assets gives the trustee and creditors a meaningful right to request, under section 1329, a modification of the debtor's plan to pay his

creditors.”). Only unsecured creditors would benefit from such a modification. While BAC possesses a **secured** claim, it does not possess an unsecured claim. (Adv. Doc. No. 1, ¶¶ 10, 12, 14). Clearly, the non-exempt portion of the settlement proceeds would not flow from one of BAC’s pockets to the other.

Also, the lower court’s ruling does not discourage compliance with the automatic stay. A number of debtors will continue to prosecute actions for violation of the automatic stay, and, therefore, encourage compliance with the automatic stay. For instance, debtors with exemptions sufficient to exempt all of their damages will continue to prosecute such actions. Debtors claiming damages in excess of the unsecured claims in their cases also will continue to pursue such actions. Debtors wanting to exit bankruptcy early will pursue stay violation actions. In addition, debtors seeking equitable relief such as cancellation of a security interest or forgiveness of a debt will continue to prosecute such actions. Accordingly, the lower court’s ruling does not “gut” the automatic stay in Chapter 13 cases.

IV. Appellant’s “natural persons” argument is not properly before the Court.

a. Appellant may not raise this argument for the first time on appeal.

Appellant contends that “Only natural persons – not bankruptcy estates – can recover damages for violations of the automatic stay.” Appellant did not raise this argument in the Bankruptcy Court or the District Court. (Adv. Doc. No. 30 and Dist.

Ct. Doc. No. 3). Appellant may not raise this argument for the first time on appeal. Access Now, Inc., 385 F.3d at 1331.

b. None of the exceptions to the “waiver rule” apply.

Appellant does not argue that any of the exceptions to the waiver rule apply. For the reasons outlined in Subsection b of Section III above, the first, third, fourth, and fifth exceptions do not apply in the instant case.

The second exception to the “waiver rule” also does not apply. Appellant had ample opportunity to raise his “natural persons” argument in the Bankruptcy Court. As noted earlier herein, Appellant was represented by attorney Duncan in the adversary proceeding. (Adv. Doc. No. 1). Attorney Duncan prepared Appellant’s brief which was submitted to the Bankruptcy Court. (Adv. Doc. No. 30). The “natural persons” argument was not raised in Appellant’s brief. Id. Apparently, Appellant chose not to raise this argument.

c. Appellant’s “natural persons” argument is without merit.

In the event the Court concludes that an exception to the “waiver rule” applies, Appellee Trustee respectfully shows that Appellant’s “natural persons” argument is without merit. Appellant claims that the lower court’s ruling cannot survive in the face of this Court’s ruling in Jove Engineering v. I.R.S., 92 F.2d 1539 (11th Cir. 1996). In Jove a corporate debtor sought actual damages for a violation of the automatic stay. Id. This Court concluded that the corporate debtor could not recover

said damages because the term “individual” in § 362(k) is limited to “natural persons.” Id. at 1550-53. The ruling in Jove does not apply in the present case.

Jove may prevent Appellee Trustee from filing and prosecuting an action for violation of the automatic stay. See In re Taylor, 430 B.R. 305, 315-16 (Bankr. N.D. Ga. 2010). However, Appellee Trustee did not take any such actions in this case. Appellee Trustee did not file the underlying action for violation of the automatic stay. Appellee Trustee did not claim to have concurrent standing with Appellant in the adversary proceeding initiated by Appellant. Appellee Trustee did not claim to be an “injured individual” entitled to actual damages for violation of the automatic stay. Instead, Appellee Trustee has asserted that the settlement proceeds of Appellant’s cause of action are property of the estate under §§ 541 and 1306 and binding precedent. Accordingly, Appellant’s “natural persons” argument is without merit.

CONCLUSION

For the aforementioned reasons, the decision of the District Court should be
AFFIRMED.

Respectfully Submitted,

/s/ Brent M. Myer

BRENT M. MYER

Georgia Bar No. 435191

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,737 of words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).

This also brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point font and New Times Roman style.

Dated: 3-13-2014

/s/ Brent M. Myer

BRENT M. MYER

Georgia Bar No. 435191

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the Brief of Appellee Chapter 13 Trustee upon the parties listed below either electronically or by placing a copy of the same in the United States Mail, postage prepaid, and properly addressed as follows:

Deepak Gupta
Peter Conti-Brown
Gupta Beck PLLC
1625 Massachusetts Ave., NW, Ste. 500
Washington, DC 20036

Thomas Raymond Walker
McGuire Woods, LLP
1230 Peachtree St., NE,
Promenade II, Ste. 2100
Atlanta, Georgia 30309

Matthew E. Mills
Assistant United States Trustee
2 E. Bryan St., Ste. 725
Savannah, Georgia 31401

George Crouser
3928 Marsella Court
Augusta, Georgia 30907

Dated: 3-13-2014

/s/ Brent M. Myer

BRENT M. MYER

Georgia Bar No. 435191

Attorney for Chapter 13 Trustee Huon Le

Post Office Box 2127

Augusta, Georgia 30903

(706) 724-1039