What the Appellate and Bankruptcy Courts are saying now.

Panelists:
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I. Intro
- A. Panelists/Moderator
- B. Statement about Presentation –
  1. Who benefits from the appreciation in property during a chapter 13 case?
  2. Hot topic over the last few years, but has received more litigation due to BOOM in real estate across the nation.

II. Where to begin?
- A. Property of the Estate, §§ 541 and 1306
  1. Chapter 13 context
     - a. Property acquired prior to the petition date;
     - b. Property acquired post-petition, but pre-confirmation; and
     - c. Property acquired post-confirmation.
  2. Section 541 – assets as of the petition date and those acquired within 180d of the DOF.
  3. Section 1306 – items identified in § 541, plus "property … that the debtor acquires… before the case is closed, dismissed, or converted".
- B. Vesting, § 1327
  1. Provides: confirmation "of a plan vests all of the property of the estate in the debtor" absent a plan or order confirming plan providing otherwise.
     - a. A bankruptcy trustee cannot pay creditors money received after debtors obtained a discharge because the couple's plan said estate property vested in them at confirmation, *even with debtors' consent*. *See, In re McCrorey*, 2024 Bankr. Lexis 188 (Bankr. D. Idaho 2024).
  2. The Metaphysics of Vesting – **5 Approaches**, *See, In re Maynor*, 2023 WL 9102137, 2023 Bankr. LEXIS 2884 (Bankr. E.D.N.C. Nov. 27, 2023) for a breakdown of all 5 approaches, *citing*, *In re Baker*, 620 B.R. 655 (Bankr. D. Colo. 2020).
     - a. Estate Termination Approach – at confirmation the estate ceases to exist, and all property of the estate, regardless of when acquired, becomes property of the debtor. Post-petition appreciation in value remains with the debtor, § 1327 controls;
     - b. Estate Preservation Approach – post-petition appreciation remains with the estate/trustee, § 1306 controls;
     - c. Estate Transformation Approach – at confirmation, all property becomes property of the debtor, except that needed to fund the plan regardless of when acquired. Thus, appreciation remains with the estate;

d. Conditional Vesting Approach – at confirmation, vesting gives the debtor an immediate and fixed right to use estate property, BUT that right is not final until the debtor completes the plan and obtains a discharge. Thus, the property remains with the debtor and estate/trustee; and
e. Estate Replenishment Approach – at confirmation, all property of the estate becomes property of the debtor. The chapter 13 estate continues to exist and "refills" with property defined in § 1306. Courts look to certain key dates in a case resulting in any post-confirmation appreciation belonging to the estate.

III. Other Considerations

A. Judicial Estoppel - *See*, *In re Hill*, 652 B.R. 212 (Bankr. S.D. Ala. 2023) In paying the nonexempt personal injury settlement proceeds to trustee, proceeds would be applied to debtors' cases at confirmed percentages, rather than on top of debtors' confirmed plan payments to increase the percentage paid to unsecured creditors.

B. Exempt Property

1. When is the Exemption Determined?
   a. Petition Date.
      (1) *Redstone Fed. Credit Union v. Brown*, No. 5:18-CV-00161-MHH, 2019 WL 582459 (N.D. Ala. Feb. 13, 2019) – Exemptions are determined by law in effect on petition date, not date on which underlying debt was incurred.
      (2) *Barclay v. Boskoski*, 52 F.4th 1172 (9th Cir. 2022) – Exemptions determined on Petition Date, not date on which Judgment Lien attached by recording pre-petition.
      (3) *In re Gomez*, 646 B.R. 523 (Bankr. D. Colo. 2022) - Homestead exemption at the time of filing applied, not the greater amount (due to an amended statute) at the time of the amendment to Schedule C.
   b. Other Considerations?
      (1) Judicial Estoppel – in other topics Courts always consider judicial estoppel. Should a debtor be allowed to amend the schedule C to claim the full amount of the allowed exemption at the time of filing?
         (a) *In re Gomez*, 646 B.R. 523 (Bankr. D. Colo. 2022) - Homestead exemption at the time of filing applied, not the greater amount (due to an amended statute) at the time of the amendment to Schedule C.
      (2) Debtors are free to amend their schedules, but there may be a substantive reason why an exemption may not be allowed, i.e. incorrect amount, bad faith, etc. *See Mendoza v. Montoya,* 595 B.R. 849 (B.A.P. 10th Cir. 2019).

C. Best Interest of Creditors Test – Application to Modifications

1. Section 1325(a)(4): [T]he value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date; . . . .

2. Value of assets as of the petition date is determined, once and for all, at confirmation [or "effective date of the plan"]. *In re Vellegas*, 573 B.R. 844 (Bankr. W.D. Wash. 2017)(Judge Lynch).
    a. *See also*, The phrase "on such date" has been held to relate back to the earlier phrase, "the effective date of the plan." *Forbes v. Forbes (In re Forbes)*, 215 B.R. 183, 189 (8th Cir. BAP 1997) *First Nat'l Bank v. Hopwood (In re Hopwood)*, 124 B.R. 82, 85 (E.D. Mo. 1991) (chapter 12 case); *In re Lupfer Bros*., 120 B.R. 1002, 1004 (Bankr. W.D. Mo. 1990) (chapter 12 case); *In re Bremer*, 104 B.R. 999, 1002–08 (Bankr. W.D. Mo. 1989) (chapter 12 case); and *In re Statmore*, 22 B.R. 37, 38 (Bankr. D. Neb. 1982)).
3. Motion to Modify – Does BICT Apply?
    a. BICT does NOT apply.
        (1) On a Motion to Modify, post-petition assets are not included in the BICT. *In re Taylor*, 631 B.R. 346 (Bankr. D. Kan. 2021).
        (2) *In re Gibson*, 415 B.R. 735 (Bankr. D. Ariz. 2009). "The 'effective date of the plan,' as it relates to the 'best interest' test applies only once and, therefore, is the same date under a modified plan as it was under the original plan." *Forbes v. Forbes (In re Forbes)*, 215 B.R. 183, 189 (8th Cir. BAP 1997) ("We thus conclude that the "best efforts" test is not a factor to be considered by a court in approving postconfirmation modifications."); *In re Marsh*, 647 B.R. 725, 739 (Bankr. W.D. Mo. 2023); *In re Villegas*, 573 B.R. 844 (Bankr. W.D. Wash. 2017)(Judge Lynch)("Value of assets in existence as of filing is determined, once and for all, at confirmation.")
    b. Modification does trigger a new BICT.
        (1) *Barbosa v. Solomon (In re Barbosa)*, 236 B.R. 540, *aff'd* 243 B.R. 562 (D. Mass. 2000), *aff'd* 235 F.3d 31 (1st Cir. 2000). The *Barbosa* case held that the effective date of a modified plan for purposes of liquidation value is the date of the plan modification.
        (2) *See also*, *In re Auernheimer*, 437 B.R. 405 (Bankr.D.Kan.2010) ("The majority position ... is that the effective date of a plan modification is the date of the modification rather than the effective date of the initial confirmed plan." A decrease to unsecured creditors permitted based on decline in the value of the personal property.)
        (3) Additional Issue – If BICT applies at a postconfirmation modification, may run into additional problems if a "change in circumstances is required. . *See*, *In re Nachon-Torres*, 520 B.R. 306 (Bankr. S.D. Fla. 2014). A mistake of an over-valuation on a vehicle was apparently not a change in circumstances that was neither known nor virtually certain at the time of confirmation. Thus, the modification was not permitted.
    c. Practical Issues
    d. Date of Determining Value
        (1) Date of filing;
        (2) Date of confirmation – generally no valuation hearing/appraisal, etd. is done, so how is higher value realized?

(a) Upon sale of real estate giving way to "new equity"; or
(b) An understatement of value at filing?

(3) Practical Application – value is determined on 'date of filing' unless a party in interest asks for a later date.
(a) *See*, *In re Goudreau*, 530 B.R. 783, 788 (Bankr. D. Kan. 2015)("The Court finds that the better view is that the date the Chapter 13 petition was filed should be considered the "effective date of the plan" for purposes of the § 1325(a)(4) liquidation analysis. Choosing this date allows a court to make the Chapter 7 analysis using the information in the original schedules, including the property of the estate under § 541, the non-exempt portion of the debtor's property, the value of the non-exempt property, and the identification and value of the debtor's claimed exemptions."); *In re Fleishman*, 372 B.R. 64, 71 (Bankr. D. Or. 2007) (dicta) ("Most courts deciding 'best-interests-of-creditors' test issues in Chapter 13 have considered a hypothetical liquidation of the debtor's assets in Chapter 7 as of the petition date, and consequently have determined that for purposes of § 1325(a)(4), the petition date, in effect, is the 'effective date of the plan.'"); *In re Green*, 169 B.R. 480, 482 (Bankr. S.D. Ga. 1994)("The Court interprets the "effective date of the plan" as the date the petition was filed."); *Matter of Statmore*, 22 B.R. 37, 38 (Bankr. D. Neb. 1982)("Viewed with that historical perspective, I read the statutory language "on such date" to refer to the effective date of the plan but not to the assets in existence on the effective date of the plan. I read the statutory provision to suggest that if the estate of the debtor were liquidated under Chapter 7 on the effective date of the plan, the rights of creditors would refer back to the petition date."); *see also*, *In re Nielsen*, 86 B.R. 177 (Bankr. E.D. Mo. 1988)(Chapter 12 case).

D. Ongoing Duty to Disclose
   1. Applicable Code and Rules
      a. §§ 521(a)(1), 541(a)(7), and FRBP 4002(a) – These sections, which provide the requirement to list assets, that property of the estate includes post-petition assets, and an ongoing duty to cooperate with the trustee, respectively, requires an ongoing duty to disclose when read in conjunction with one another.
      b. FRBP 1007(h) – A debtor is obligated to report § 541(a)(5) property, such as life insurance proceeds that are either paid or payable to the debtor within one hundred and eighty (180) days of filing.
   2. Required To Disclose
      a. **5th Cir. -** *Allen v. C & H Distribs., L.L.C.*, 813 F.3d 566 (5th Cir. 2015)
      b. **11th Cir. -** *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1274-75 (11th Cir. 2010); *Waldron v. Brown (In re Waldron)*, 536 F.3d 1239, 1244 (11th Cir. 2008).
      c. **W.D. TX** - *In re Pautin*, 521 B.R. 754 (Bankr. W.D. Tex. 2014).

d. **E.D. VA**- *In re Ilyev*, 2022 Bankr. LEXIS 2046, 2022 WL 2965029 (Bankr. E.D. Va. July 26, 2022) ; *In re Robinson*, 2023 Bankr. Lexis 699 (Bankrs. E.D. VA, 2023)
e. **D. S.C.** – *In re Ingram,* 531 B.R. 121 (2015)
f. **U.S. District Court of New Jersey** – *Coles v. Carlini*, 2013 U.S. Dist. Lexis 101873.

3. No Duty to Disclose
   a. Under Rule 1007(h) the specific requirement to amend is only for property set forth in 541(a)(5). There is no provision in the Code or Rules that requires a debtor to report the receipt of postpetition assets or increases in income, except the narrow class of inheritances. *See* Keith M. Lundin, Lundin on Chapter 13, § 127.9, at ¶ 23, lundinonchapter13.com (last visited Aug. 17, 2022).
   b. It is also important to note that while Rule 1007(h) requires scheduling of property of the estate pursuant to section 541(a)(5), it does not require scheduling of property acquired postpetition that becomes property of the estate only due the operation of section 1207(a) or section 1306(a). Because all property acquired postpetition can become property of the estate, at least until confirmation of the plan, to require scheduling of such property would be completely impracticable. The debtor's cash on hand could, literally, change every day, as items are purchased and new paychecks are received. Similarly, every item purchased or discarded could provide cause for amending the schedules. The primary purpose of sections 1207 and 1306 is to give the protection of section 362(a) to property acquired postpetition in order to ensure the debtor's ability to perform under a plan. 9 Richard Levin & Henry J. Sommer, Collier on Bankruptcy ¶ 1007.08 (16th ed. 2022) (footnote omitted); *see In re Boyd*, 618 B.R. 133 (Bankr. D. S.C. 2020).
   c. *See In re Poe*, 2022 Bankr. Lexis 2338 (Bankr. N.D. Ohio 2022) "[t]his court is not aware of any Code, Rule…or confirmation order, that places an obligation on Debtor to self-report an voluntarily pay increased wage earnings to Trustee." "But that doesn't mean postpetition changes in income are immaterial or not subject to disclosure." The court suggests the requirement to turnover income requires disclosure, but may not require self-reporting.

4. Other Options
   a. Include the requirement in the Plan.
   b. Include the requirement in the Order of Confirmation.

5. Exceptions – Judicial Estoppel.
   a. In many courts there is a clear duty to update litigation assets that arise postpetition or there are negative consequences for the debtor based upon judicial estoppel.
   b. If there is a general duty to disclose or no general duty to disclose, where there are inconsistencies in the positions taken in the bankruptcy schedules

and in the tort litigation, that prevents the debtor from being able to go forward with the litigation on their own behalf. The problem is – how is there reliance by the bankruptcy court if there is no duty to disclose the postpetition tort rights? There are some fairly extreme examples in the Sixth Circuit's case law.

IV. Who gets the INCREASE in Value When the Property is Actually Sold During the Chapter 13?

A. Case Law

1. *See Chart.*
2. Debtor
   a. *In re Baker*, 620 B.R. 655 (Bankr. D. Colo. 2020). Debtor gets the non-exempt surplus on sale during the Chapter 13.
   b. *In re Elassal*, 654 B.R. 434 (Bankr. E.D. Mich. 2023). Proceeds from post-confirmation sale of home were not "disposable income," of kind that debtor could be required to devote to payments under plan.
   c. *In re Klein*, No. 17-19106-JGR, 2022 Bankr. Lexis 2418 (Bankr. D. Colo. 2022). Appreciation in property in Chapter 13 case belongs to debtor. Debtor owned minority interest in LLC that Debtor valued at $15,000.00, which was not exempt and fully accounted for in calculating best interest of creditors and determining plan payment and dividend to unsecured creditors. After confirmation, LLC sold primary asset and distributed $75,000.00 to Debtor as his proportionate share of proceeds. Chapter 13 Trustee attempted to claim proceeds for benefit of creditors arguing that proceeds were post-petition property that belong to the estate under Section 1306. Court noted that while Section 1306 sweeps into estate any new property, Section 1327 vests in Debtor property existing at confirmation, free and clear of any claim or interest of any creditor provided for the plan. Section 1327 is more specific than Section 1306. Section 1306 protects assets acquired post-petition by imposing protection of automatic stay while Section 1327 revests property in Debtor and allows Debtor to dispose of property and retain proceeds. Proceeds of sale of asset during a Chapter 13 do not become disposable income regardless of whether property is exempt. While Debtor may voluntarily use proceeds to make payments under Chapter 13 plan; Debtor cannot be compelled to do so.
3. Estate/Trustee
   a. *In re Marsh*, 647 B.R. 725 (Bankr. W.D. Mo. 2023). Proceeds from post-confirmation sale of debtors' residence, but before end of case, were property of estate under estate replenishment approach.
   b. *In re Calixto*, 648 B.R. 119 (Bankr. S.D. Fla. 2023). A post-petition litigation claim is property of the estate as it is one described under § 541 in that it is a legal or equitable interest of the debtor in property and was acquired after the commence of the case, but before it closed, § 1306(a)(1).

c. *Rodriguez v. Barrera*, 22 F4th 1217 (2022). Post-confirmation proceeds from sale of debtor's residence do not constitute property of the estate due to the plain language of § 1327(b), because confirmation "vests all of the property of the estate in the debtor". Proceeds generated from the debtor's property after confirmation does not become POE as the underlying property no longer belongs to the estate.

B. Realizing the Value – At Confirmation or Post-petition Increase.
   1. Issue – because valuations are not commonly done in chapter 13, how do parties know if the increase in value is from a low-value at filing or a post-petition increase?
   2. Objecting to When Property of the Estate Vests, *see In re Adams*, 654 B.R. 703 (Bankr. M.D.N.C. 2023). *See also* §§ 1322(b)((9) and 1327(b) and (c).
      a. Can a Trustee avoid the problem of a shaky valuation or a post-petition increase by objecting to when POE actually vests?
   3. If still property of the estate….?
      a. Is a Modification of Plan required? OR
      b. BICT done post-confirmation?
      c. Is the increase income?

V. Who gets the Increase in Value if Converted?

A. Debtor
   1. Due to case being converted, POE in the converted case shall consist of POE as of the date of filing the petition. Post-petition appreciation is a *different* asset, § 348(f)(1)(a). *See In re Barrera,* 22 F.4th 1217 (10th Cir. 2022). [NOTE: If remained a chapter 13, the result would be different. The 10th Cir. points out that § 348(f)(2) provides a recourse if the conversion is in bad faith.]

B. Estate/Trustee
   1. Appreciation goes to Chapter 7 Trustee upon conversion. *In re Goetz*, 647 B.R. 412 (Bankr. W.D. Mo. 2022), *aff'd*, 651 B.R. 292 (B.A.P. 8th Cir. 2023) Distinguishes "equity" as being an interest and something that stems from the underlying asset, which is the real estate. The RE was POE at filing and is still at conversion.
   2. *In re Castleman*, No. 2:21-CV-00829-JHC, 2022 WL 2392058 (W.D. Wash. July 1, 2022), *aff'd sub nom. Matter of Castleman*, 75 F.4th 1052 (9th Cir. 2023) – Post-petition pre-conversion equity in Chapter 13 becomes property of estate in Chapter 7. Section 348 unambiguously sweeps into Chapter 7 estate any property acquired after commencement of Chapter 13 and before conversion. Section 541 sweeps in all property owned by Debtor as of commencement including proceeds, profits and rents except to extent resulting from earnings from services performed by individual debtor post-petition. Post-petition appreciation is not separate, after-acquired property interest but is part of property itself. Property becomes property of Chapter 7 estate at conversion, including appreciation in value from commencement of case. If Debtors made mortgage payments post-petition Debtor may apply for administrative claim status under Section 503(b).
   3. Section 348 sweeps in all POE on DOF in debtor's possession at conversion. Section 541 sweeps in all legal or equitable interests as of the commencement

of case. Value is not a separate asset, but an attribute or incident of the property itself. *In re Adams*, 641 B.R. 147 (Bankr. W.D. Mi. 2022).

4. Insurance proceeds acquired in month 60, for fire that destroyed a business, were POE, because the Trustee filed a timely Motion to Modify and would have to be used to satisfy the BICT. *In re Scholl*, 605 B.R. 163 (Bankr. S.D. Ohio 2019).

C. Other Outcomes/Thoughts
   1. Valuations of ***property*** and claims in a chapter 13 are not binding in a chapter 7, § 348(f)(2).
   2. Claiming homestead exemption of "100% of FMV" included post-petition appreciation where there was no timely exemption in chapter 11 conversion to chapter 7, despite the "snapshot" rule.
   3. *In re Snyder*, 645 B.R. 595 (Bankr. N.D. Ohio 2022). Under Ohio law, each debtor's homestead was limited to the debtor's interest in the parcel of real property used as a residence by debtor. (Two co-owned parcels of real estate with Debtors living separately.)
   4. What compels a Trustee to go after the increase in value postconfirmation and/or what is the statutory basis for a Trustee to recover the increase in value.