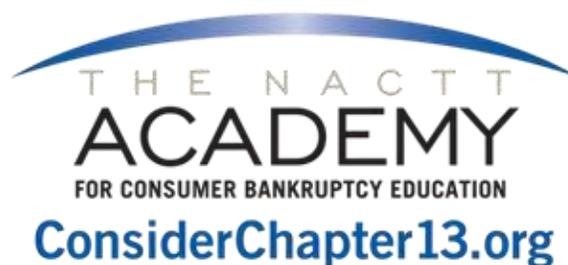


**NACTT 57th Annual
Seminar
San Francisco, CA
Educational Materials**



Friday, July 8 8:45-10:00

Windfalls: Who Gets Postpetition Property or Appreciated Values?

Moderator: Margaret A. Burks, Chapter 13 Standing Trustee for the Southern District of Ohio (Cincinnati)

Honorable Jeffery P. Hopkins, United States Bankruptcy Judge, Southern District of Ohio (Cincinnati)

David Cox, Managing Attorney, Cox Law Group (Lynchburg, VA)

Sarah Little, Kornfield Law (Oakland, CA)

MATERIALS INDEX

- 1. PDF of PowerPoint Presentation**
- 2. Speaker Biographies**

NACTT – San Francisco 2022

8:45 - 10:00: Windfalls – Who Gets Post Petition Property or Appreciated Values?

Panel -

- Moderator: Margaret A. Burks, Chapter 13 Standing Trustee for the Southern District of Ohio (Cincinnati)
- Honorable Jeffery P. Hopkins, United States Bankruptcy Judge, Southern District of Ohio (Cincinnati)
- David Cox, Managing Attorney, Cox Law Group (Lynchburg, VA)
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11 U.S. Code § 1306 - Property of the estate

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

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

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



11 U.S. Code § 1327 - Effect of confirmation

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



11 U.S. Code § 541 - Property of the estate

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

...

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

(A) by bequest, devise, or inheritance;

...



4

Post Petition Assets – Duty to disclose

- A. Inheritances Outside the 180-day window
- B. Life Insurance
- C. Casualty Proceeds
- D. Lottery Winnings
- E. Gifts
- F. Mortgage Refinancing
- G. Tax Refunds
- H. Vesting or non-vesting



5

Verbiage from Cincinnati Confirmation Order

All property acquired by the Debtor(s) after the commencement of the case and before the case is closed is within the jurisdiction of the Court.

The Debtor(s) shall keep the Trustee informed as to any claim for or receipt of money or property regarding personal injury, workers compensation, bonuses, buyout, severance package, lottery winning, inheritance, or any other funds to which the Debtor(s) may be entitled or becomes entitled to receive. Before the matter can be settled and any funds distributed, the Debtor(s) shall comply with all requirements for filing applications or motions for settlement with the Court as may be required by the Bankruptcy Code, the Bankruptcy Rules or the Local Bankruptcy Rules. The Debtor(s) shall also keep the Trustee informed as to any claim for or receipt of social security funds.



6

Counsel may wish to investigate these splits of authority so they can adequately advise their client when it comes to decisions of whether to sell property, convert, etc.

Trending debate over whether asset appreciation during Chapter 13 case inures to the benefit of the estate or the debtor in multiple contexts:

- **Conversion to Chapter 7** (compare *In re Barrera*, 22 F.4th 1217 (10th Cir. 2022) and *In re Cofer*, 625 B.R. 194 (Bankr. D. Idaho 2021) with *In re Castleman*, 631 B.R. 914 (Bankr. W.D. Wash. 2021) and *In re Goins*, 539 B.R. 510 (Bankr. E.D. Va. 2015))
- **Modification of Chapter 13 Plan** (compare *Barbosa v. Solomon*, 235 F.3d 31 (1st Cir. 2000) with *In re Larzelere*, 633 B.R. 677 (Bankr. D.N.J. 2021) and *In re Baker*, 620 B.R. 655 (Bankr. D. Colo. 2020))

7

IN RE BARRERA

22 F. 4th 1217 (10th Cir. 2022)

FACTS: At the time of a Chapter 13 filing in April, 2016, Debtors' homestead exemption and two liens exceeded the value of the Debtors' residence. At the time of filing, value was \$396,606.

Confirmation order vested all property in Debtors. Market value of residence increased to \$520,000 after confirmation, and Debtors sold their house in April, 2018. Debtors took away \$140,251 from the closing.

Case converted from Chapter 13 to chapter 7 two weeks after the sale, and Chapter 7 trustee sought turnover of excess value.

ISSUE: Does §348(f) definition of "property of the estate" include post-petition appreciation beyond value of the asset on date of the petition?

HELD: §348(f)(1)(A), which states that "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..." directs that sale proceeds of the home under the circumstances above belongs to the debtors.

The Tenth Circuit distinguished assets acquired during a pending bankruptcy from an increase in value of the assets valued at the time of the bankruptcy filing, and found that the latter were not included in §348(f)(1)(A).

"bad faith" was not asserted below, so the Tenth Circuit did not consider that issue, but noted that if "bad faith" were apparent, it would also affect debtors' ability to shelter assets. §348(f)(2)

8

IN RE SCHOLL

605 B.R. 163 (Bankr. S.D. Ohio 2019)

FACTS: Debtors owned several rental properties, and maintained "replacement" insurance coverage instead of "market value" coverage.

Due to poor condition, "Wells St." property was appraised for \$15,000.00 on June 30, 2013.

Confirmation order vested all property in Debtors. Just short of the Debtors' applicable commitment period, Wells St. was lost in a fire. Insurance proceeds, including costs to clear the site to comply with municipal rules, totaled \$194,000.

Debtors filed a Motion for Distribution of Insurance Proceeds that would permit them to retain the insurance proceeds to replace their lost rental property. Debtors' request was reviewed along with a Motion to Modify filed by the Trustee pursuant to §1329.

ISSUE: Insofar as §1329 requires a review of the requirements in §1325, the Court reviewed whether the Debtors request met the requirements of "good faith" under §1325(a)(3), and whether the additional assets increased Debtors' "ability to pay" under §1325(b).

HELD: The Court was not convinced that the circumstances surrounding Debtors' request to retain a large portion of the insurance proceeds complied with their "good faith" obligation.

ISSUE: Did the insurance proceeds affect the calculation under §1325(a)(4) at the time of the proposed modification?

HELD: The Court was able to re-visit §1325(a)(4) post-confirmation, and citing case law holding that insurance was property of the estate, concluded that the net proceeds were required to pay unsecured creditors.

9

IN RE BOYD

618 B.R. 133 (Bankr. D.S.C. Ohio 2020)

FACTS: In July 2018, while still in Chapter 13, the Debtor suffered injuries from an alleged drunk driving incident. In September of 2018 he filed a personal injury suit in state court; two months later he received his Chapter 13 discharge. He did not amend his schedules to disclose this potential asset prior to his case being closed, and the state court defendants were never notified of the Chapter 13 case.

In February 2020, the state court defendants moved to dismiss the personal injury suit on the grounds of judicial estoppel, because the Debtor had never disclosed this potential asset in his bankruptcy case. The next month the Debtor successfully moved to reopen his closed Chapter 13 case so that he could amend his claimed exemptions to add this asset.

The Chapter 13 Trustee testified that (i) had the schedules been amended during the case, the asset would have been fully exempt, (ii) she would not have objected to the exemption, (iii) the case paid a 90% dividend (all but \$792) to unsecured creditors, and (iv) she was not opposing the reopening of the case or the amendment of the Debtor's schedules.

ISSUE: Do chapter 13 debtors have a duty to disclose assets acquired post-petition?

HELD: Neither the Bankruptcy Rules nor the confirmed plan "placed an ongoing duty" on the Debtor in this case to "amend schedules or otherwise disclose" the lawsuit. §1306(a) expands property of the estate to include post-petition property and earnings generally, so that this lawsuit is property of the estate, but the Debtor's disclosure requirements contained in §521 don't provide the timing of those disclosures. Rule 1007(h) only provides for the filing of supplemental schedules for property acquired by the Debtor as provided by §541(a)(5). There is nothing in Rule 6002 that imposes a duty on the Debtor to schedule assets acquired post-petition that become part of the estate as a result of §1306(a).

Postscript: On 10/28/21, Judge Waites issued Order 21-04 for the District of South Carolina requiring in part II. b.3., the disclosure of post-petition lawsuits.

10

IN RE POWELL

2022 Bankr. LEXIS 937 (Bankr. C.D. Ill Apr. 7 2022)

FACTS: Debtors opposed chapter 13 Trustee's motion to modify the confirmed plan under §1329(a)(1) to increase the distribution to unsecured creditors due to property inherited by the Debtors more than 180 days after the date of filing.

Debtors argued both that the temporal limitation of §541(a)(5) in determining property of the estate and that the vesting provisions of their plan and §1327(h) prevented the Trustee from seeking such a post-confirmation plan modification.

ISSUE: May a chapter 13 Trustee modify a debtor's confirmed plan post-confirmation to account for the value of a post-petition inheritance received over 180 days after the filing?

HELD: The Court allowed the modification of the plan and adopted the majority view that the 180-day post-petition time limit for §541(a)(5) property does not limit what becomes property of the estate in a chapter 13 case.

The Court also concluded that the "vesting" of the estate property in the debtor upon confirmation under §1327(b) does not render inoperative the requirement of §1306(a) that property acquired after confirmation becomes property of the estate. Having become part of the post-confirmation estate, those property interests are a proper basis for plan modification under §1329.

The concept of vesting in §1327 only establishes with finality a debtor's rights vis-a-vis creditors (and the trustee) as to the property in the estate at the time of confirmation of the plan.

11

IN RE CASTLEMAN

19-12233 (Bankr. WD. Wash June 4, 2021)

FACTS: Debtors convert chapter 13 case to chapter 7. House has appreciated between petition date and conversion date. Chapter 7 Trustee moves to sell house, Debtors attempt to compel abandonment.

Debtors argued that post-petition appreciation is not property of the chapter 7 estate because only the value of property as it was as of the petition date is included in the chapter 7 estate upon conversion.

ISSUE: Is post-petition appreciation property of the chapter 7 estate?

HELD: Post-petition appreciation of property of the estate inures to the benefit of the bankruptcy estate, not the debtor.

The bankruptcy court disagreed with the Barrera court and the Cofer court which both held that 348(f)(1)(A) was ambiguous and relied on legislative history to determine post-petition appreciation inured to the debtor.

Post-petition appreciation is not treated as a separate asset form pre-petition property. The statute is not ambiguous and appreciation on pre-petition property belongs to the bankruptcy estate.

Currently on appeal to the District Court for the Western District of Washington.

12

In re Adamcik
2021 Bankr. LEXIS 2348 (Bankr. N.D. Texas 2021)

FACTS: During pendency of chapter 13 case, debtors purchase house and lease out homestead. The debtor loses his job and converts his case to chapter 7. Within a few weeks after conversion, debtor receives a severance of \$52,000.

Debtor did not disclose purchase of home during chapter 13 case, did not disclose lease of homesteaded property. After conversion, the debtor did not update his means test and made misstatements regarding the property acquired after filing bankruptcy, calling it lease-to-own.

ISSUE: Was the conversion to chapter 7 done in bad faith such that post-petition property is property of the chapter 7 estate?

HELD: failures to disclose change in income during the chapter 13 case, failure to disclose purchase of real property and disclose the debt on the purchase property, failure to file a chapter 7 means test and updated schedule of liabilities demonstrated a lack of candor. The debtor's "obfuscations, misrepresentations and failures" frustrated the UST's efforts to assess good faith. The conversion was done in bad faith. Severance money and post petition property was property of the chapter 7 estate



Speaker Biographies



Margaret A. Burks, Esq. was appointed as the Chapter 13 Trustee for the Southern District of Ohio at Cincinnati in July of 1992. Ms. Burks received a Bachelor of Science and a Bachelor of Arts from the University of Cincinnati in 1977, magna cum laude. She is a member of Phi Beta Kappa. She received her Juris Doctor from Salmon P. Chase, College of Law in 1985. While at Chase College of Law, Ms. Burks was a member of the Law Review. She was Law Clerk to Honorable J. Vincent Aug, Jr., U.S. Bankruptcy Judge from 1988 to 1991, and Counsel to PNC Bank in the areas of bankruptcy and commercial law. Ms. Burks has served as Chairperson of the CBA Bankruptcy Committee. She is a past President of the National Association of Ch. 13 Trustees. She has also co-chaired the ABI Consumer Bankruptcy Committee. She is also on the Board of Parkinson Support and Wellness, a local Cincinnati educational charity <https://parkinsoncincinnati.org>.



The Honorable Jeffery P. Hopkins was appointed to the bankruptcy court in Cincinnati in April of 1996. Judge Hopkins graduated from Bowdoin College with degrees in government and legal studies and anthropology-sociology (1982) and earned his J.D. (1985) from The Ohio State University, Michael E. Moritz College of Law. Upon graduation, he clerked for the Honorable Alan E. Norris on the Sixth Circuit and later became an associate with the law firm, n.k.a., Squire, Patton & Boggs, specializing in complex commercial litigation. In 1990, Judge Hopkins was appointed as an Assistant U.S. Attorney and rapidly advanced to become Chief of the Civil Division. Judge Hopkins was elected President of the National Conference of Bankruptcy Judges in 2007. He served in several leadership roles including chair of the NCBJ-NBA Liaison committee where he founded the Blackshear Lecture series and NCBJ Presidential Blackshear Fellowship program in order to attract underrepresented minorities to bankruptcy law practice. Chief Justice John G. Roberts, Jr. appointed Judge Hopkins to the Committee for the Judicial Branch and more recently to the Judicial Conference of the United States as the Bankruptcy Judge observer. In 2010, Judge Hopkins received the William K. Thomas Distinguished Jurist Award from Ohio State. Currently Judge Hopkins serves as board chair of the iconic Cincinnati Museum Center, president of the Law and Leadership Institute, coconvener of the BLAC-CBA Round Table and board member of The National Underground Railroad Freedom Center. Judge Hopkins is married to Michelle. They are proud parents of one daughter who is the law clerk for the Honorable Wende C. Cross and a son attending Ohio State.



David Cox is the founding member of Cox Law Group and practices bankruptcy law throughout the Western District of Virginia. Prior to entering private practice, David served as a law clerk for the late Hon. William E. Anderson. He coedits the treatise, *Bankruptcy Practice in Virginia*, coauthored the fourth edition of the American Bankruptcy Institute's book, *Consumer Bankruptcy: Fundamentals of Chapter 7 and Chapter 13 of the U.S. Bankruptcy Code*, was published in the *Norton Annual Survey of Bankruptcy Law*, 2019 edition, and has lectured at numerous regional and national CLE programs. David is a permanent member of the Fourth Circuit Judicial Conference, a Fellow of the American College of Bankruptcy, Secretary/Treasurer of the Bankruptcy Law Section of the Virginia Bar Association, and serves on the Board of the American Bankruptcy Institute.



Sarah Little practices consumer and business bankruptcy law. She represents debtors and creditors in chapters 7, 13 and 11, including bankruptcy litigation. Sarah also serves as a Chapter 7 Trustee for the Northern District of California, Oakland Division. Sarah is partner at Kornfield, Nyberg, Bendes, Kuhner & Little, P.C. in Oakland, California. Previously, Sarah was a solo practitioner for 15 years representing debtors in chapter 7 and 13s. She also worked as a consultant

for Ernst and Young in their State and Local Tax Department, and as a consultant for Bankruptcy Management Corporation. Sarah graduated from Hastings College of the Law with a tax concentration and has a B.S. in Business Administration/Finance from Cal. State East Bay.