Conversion from Chapter 13 to Chapter 7 of the Bankruptcy Code: What Constitutes Property of the Post-Conversion Estate?

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I. INTRODUCTION

Article 1, Section 8 of the United States Constitution grants Congress the authority to enact uniform laws of bankruptcy procedure.1 While Congress has been fairly successful in enacting uniform bankruptcy laws, complete uniformity remains an elusive ideal mired in nebulous interpretations and conflicting adjudications.2 In fact, bankruptcy legislation may be incapable of complete uniformity; few statutes, if any, are able to adequately resolve every contingent question that arises subsequent to their promulgation.3 Nonetheless, uniformity remains the standard, and nonuniform applications of the bankruptcy statute not only flout the constitutional mandate, they penalize some participants simply because of such fortuitous circumstances as where the bankruptcy petition is filed. And when fortuity is replaced by forum shopping, the result is equally troubling: a less than uniformly applied bankruptcy statute should not reward creative debtors and their lawyers who strategically exploit its weaknesses.4

This comment examines one particular weakness of the current bankruptcy statute that has engendered considerable

1. U.S. CONST. art I, § 8, cl. 4 ("[Congress shall have power to] establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.").
4. See In re Lybrook, 951 F.2d 136, 137 (7th Cir. 1991) ("We are more impressed by the . . . observation that a rule of once in, always in is necessary to discourage strategic, opportunistic behavior that hurts creditors . . . "); Northwest Eng'g Co. v. United Steelworkers (In re Northwest Eng'g Co.), 863 F.2d 1313, 1318 (7th Cir. 1988); In re Petrie, 142 B.R. 404, 405 (Bankr. D. Nev. 1992) (suggesting that forum shopping is inappropriate for Chapter 13 cases).
controversy. The nature of Chapter 13 estate property is generally clear and uncontested. However, when a case is converted from Chapter 13 to one under Chapter 7, the statute offers little guidance in determining the proper composition of the post-conversion estate. Some courts have found that the Chapter 13 estate survives conversion and constitutes the new Chapter 7 estate in its entirety. In contrast, other courts have concluded that only those property interests the debtor possessed at the commencement of the original Chapter 13 bankruptcy qualify as part of the new Chapter 7 estate. In short, the proper composition of the post-conversion Chapter 7 estate presents "a legal question on which there is no harmony of opinion." While most courts have held that after-acquired


An examination of developing case law in the area at issue reveals that two divergent lines of authority have developed. A majority of the cases considering the question of whether property of the estate in a case converted from Chapter 13 to Chapter 7 includes property acquired after the filing of the Chapter 13 . . . [petition] have held that the Chapter 7 estate does not include property acquired by the debtor subsequent to the filing of the original [petition] . . . . However, clearly a substantial number of cases have rejected this same conclusion and thereby included this property in the Chapter 7 estate upon conversion.

In re Leach, 101 B.R. 710, 713 (Bankr. E.D. Okla. 1989); see also Blood v. Wineburg (In re Marshall), 79 B.R. 147, 149 (Bankr. N.D. N.Y. 1987) ("This proceeding concerns an issue which the Trustee acknowledges has resulted in a split
Chapter 13 estate property does not become part of the post-conversion Chapter 7 estate, this comment argues that the post-conversion Chapter 7 estate should include the entire Chapter 13 estate. Part II introduces the Bankruptcy Code and relevant provisions of Chapter 13. Parts III and IV then present and analyze the nature of post-conversion Chapter 7 estates, finding that they are properly composed of the entire pre-conversion Chapter 13 estate.

II. THE BANKRUPTCY LAWS

A. Development of the Current Statute

Bankruptcy began as a collection device used to ensure equal division of a debtor's property among his creditors. Indeed, some have written that in Roman times "creditors did not merely divide the debtor's possessions, [they] took the debtor to the plaza and divided him.'

In contrast to the harsh origins of creditor-favored "bankruptcy," a separate and subsequent development of bankruptcy law emerged that was favorable to debtors. This so-called insolvency law, which was always voluntary, allowed debtors to place their property with the court in lieu of themselves being condemned to debtors' prison. While insolvency law provided a "discharge" from debtors' prison, it did not discharge debtors from their underlying financial obligations; creditors were still entitled to nonimprisonment collection remedies.

The tension between creditor-favored "bankruptcy" law and debtor-favored "insolvency" law existed in America throughout the nineteenth century. Congress was initially unable to reconcile these two conflicting interests, and its attempts to enact uniform laws did not fare well. However, with the enact-

The Bankruptcy Act of 1898 was subsequently amended by the Chandler Act of 1938\footnote{Ch. 575, 52 Stat. 840 (1938) (repealed by Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-1330 (1988)).} and ultimately repealed by the Bankruptcy Reform Act of 1978.\footnote{11 U.S.C. §§ 101-1330 (1988) [hereinafter "Bankruptcy Code" or "Code"]. The Code was signed into law on 6 November 1978 and became effective on 1 October 1979.} The Bankruptcy Reform Act of 1978 was enacted to facilitate better administration of bankruptcies caused by our modernizing consumer society.\footnote{The legislative history of the Bankruptcy Code recites: The major purpose of this bill is the modernization of the bankruptcy laws. The substantive law of bankruptcy and the current bankruptcy system were designed in 1898, and underwent the last significant overhaul in 1938, nearly 40 years ago. Since that time there have been vast changes in the law of debtor-creditor relations, including the wide-spread adoption of the Uniform Commercial Code in the early 1960's and the vast spread of consumer credit. S. REP. NO. 989, supra note 16, at 2-3, reprinted in 1978 U.S.C.C.A.N. at 5788.} As currently constituted, the Bankruptcy Code is organized into
eight separate chapters. Chapters 1, 3, and 5 contain definitions and general rules of administration that apply equally to all four of the operative chapters. Chapter 7 prescribes an orderly procedure by which a bankruptcy trustee liquidates all nonexempt estate property and distributes the proceeds to creditors. Once the Chapter 7 process is completed, the debtor receives a discharge from most unpaid debts and is given a "fresh start." Chapter 9 allows certain municipalities to adjust their debts, and Chapter 12 provides relief for family farmers with regular annual income. Chapter 11 is rehabilitative in nature and is designed for qualified businesses that wish to continue operating while concurrently repaying creditors through a confirmed plan of reorganization. The last chapter of the Code, Chapter 13, is discussed in the next section.

B. Chapter 13: Adjustments of Debts of an Individual with Regular Income

1. History

Although statutory relief for financially troubled wage earners has been available since 1867, Congress determined that the Bankruptcy Act's wage earners' plan was woefully inadequate and that far too many debtors were being forced into straight bankruptcy liquidation. In response to this and

21. 11 U.S.C. § 103(a) ("Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title.").
22. Debtors are entitled to exempt certain types and amounts of property from bankruptcy court control. See generally 11 U.S.C. § 522.
25. Chapter 11 is composed of Chapters X, XI, and XII of the former Bankruptcy Act. Note that chapters under the Act were designated by Roman numerals, while chapters under the Code are designated by Arabic numerals. Warren & Westbrook, supra note 10, at 193.
28. Id. This, according to the U.S. Supreme Court, was undesirable. The Court
other concerns, Congress passed the Chandler Act of 1938, which significantly enhanced the protections accorded to wage earners who wished to restructure their debts and use future income to avoid ultimate liquidation. The following excerpt illustrates the purpose for Chapter XIII of the 1898 Act, as amended by the Chandler Act of 1938:

"Chapter XIII provides a highly desirable method for dealing with the financial difficulties of individuals. It creates an equitable and feasible way for the honest and conscientious debtor to pay off his debts rather than having them discharged in bankruptcy."

Despite this optimism, the 1973 Commission on the Bankruptcy Laws of the United States determined that Chapter XIII of the Bankruptcy Act was "seriously defective" and one of the "least understood and most erratically applied of all federal statutes dealing with [bankruptcy]." Consequently, Chapter

wrote, "In [wage earners'] proceedings, everyone [loses]—the creditors by receiving a mere fraction of their claims, the debtor by bearing thereafter the stigma of having been adjudged a bankrupt." Id. at 395.


We think there can be no doubt . . . that a procedure by which a debtor who is financially involved and unable to meet his debts as they mature, over a period of time, works out of his involvement and pays his debts in full is good for his creditors and good for him.


31. Id. at 12, reprinted in 1978 U.S.C.C.A.N. at 5798-99. The legislative history indicates that Chapter XIII of the Act was seriously defective in five respects:

First, it does not permit some individuals with regular income to qualify, such as small business owners or social welfare program recipients, because their principal incomes do not come from wages, salary, or commissions. Second, while the court can grant a hardship discharge, where for example the debtor becomes totally disabled, three years must elapse first. Third, secured creditors are dealt with erratically, tediously, and uncertainly, resulting from a hodgepodge of state and federal statutory provisions, bankruptcy and local rules, many conflicting reported cases and varied local customs. Fourth, accommodation co-debtors in consumer finance are usually inexperienced relatives or coworkers, and present law does not provide a reasonable restraint on collection from them while the debtor's case is pending. Fifth, formal creditor voting by literally counting written acceptances has unnecessarily imposed substantial expense for time, paper and uncertainty upon all concerned with only doubtful or marginal benefits.

Id. at 13, reprinted in 1978 U.S.C.C.A.N. at 5799.
XIII was repealed and replaced by Chapter 13 of the Bankruptcy Code. Chapter 13 provides regular wage earners a simple and effective alternative to Chapter 7 liquidation. It permits qualified debtors to keep their assets, restructure their debt, and repay their obligations under court supervision and protection, over an extended period of time. Moreover, Chapter 13 enables wage earners to avoid the stigma of bankruptcy and to enjoy "temporary freedom . . . from garnishments, attachments and other harassment by creditors."

2. Relevant provisions of the current statute

Chapter 13 of the Bankruptcy Code is for those debtors who "are able to keep up with their obligations in normal times, but [who] do not prepare for emergencies or unexpected events such as a serious illness in a family or a job lay-off." It enables wage earners to keep their assets while pledging future earnings to satisfy current creditor demands. Section 109(e) of the Code defines qualified wage earners as those who have "regular income" and whose total debt is within certain statutorily prescribed limits.

A Chapter 13 case is commenced by filing a voluntary

32. Although Chapter 13 is statutorily limited to individual debtors, legislative history indicates that small sole proprietorships may also file for Chapter 13 protection. See H.R. REP. NO. 595, 95th Cong., 2d Sess. 6 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 5968 (Chapter 13 . . . is limited exclusively to individuals, but permits small sole proprietorships to use the chapter.).
38. 11 U.S.C. § 109(e) (1988) reads:

Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000, or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000 may be a debtor under Chapter 13 of [the Bankruptcy Code].
bankruptcy petition under Chapter 13. Within fifteen days after filing the petition, the debtor must propose a plan of repayment detailing the amount of the debt to be repaid and the terms of repayment. After giving adequate notice, the court conducts a hearing to determine whether the plan complies with the minimum statutory standards. If it does, it is confirmed. A confirmed plan is usually completed in three years; nevertheless, it may be extended to five years upon court approval. When the plan is successfully completed, the debtor is deemed "rehabilitated" and is discharged from those debts that gave rise to the initial bankruptcy.

a. Property of the estate. The composition of a Chapter 13 estate is generally undisputed. Sections 541 and 1306 of the Code are applied conjunctively to define the estate property, which is created by operation of law at the time the bankruptcy

   A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter. The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.

40. 11 U.S.C. § 1322 governs the contents of the plan. It requires that the debtor submit "all or such portion of the future earnings or other future income of the debtor" to the "supervision and control of the trustee as is necessary for the execution of the plan." 11 U.S.C. § 1322(a)(1) (1988).

41. BANKR. R. 3015(b): "The debtor may file a chapter 13 plan with the petition. If a plan is not filed with the petition, it shall be filed within 15 days thereafter, and such time shall not be further extended except for cause shown and on notice as the court may direct."

42. 11 U.S.C. §§ 1324-1325 (1988). Section 1324 states that "after notice, the court shall hold a hearing on confirmation of the plan. A party in interest may object to confirmation of the plan."

43. A plan may never exceed five years in duration. 11 U.S.C. § 1322(c) (1988).

44. 11 U.S.C. § 1328(a) (1988). There are few debts that cannot be discharged by a Chapter 13 bankruptcy. See 11 U.S.C. § 1328(a)(1)-(3); infra note 127 and accompanying text.
petition is filed. Section 541, as the defining provision for each of the operative chapters, sets forth the broad rule that estate property consists of all legal and equitable interests the debtor has in property—both tangible and intangible—at the commencement of the case.\(^{45}\) However, this section generally excludes from the estate acquisitions of post-petition property, including the debtor’s earnings from “services performed . . . after the commencement of the case.”\(^{46}\) Nonetheless, certain post-petition interests in property do become part of a § 541-defined estate,\(^ {47}\) such as property acquired by the estate.\(^ {48}\)


(a) The commencement of a case . . . creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

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

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

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

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

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

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

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

(A) by bequest, device, or inheritance;

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

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

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

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

Moreover, the U.S. Supreme Court has held that § 541(a) should be broadly construed to include almost all pre-petition property. See United States v. Whiting Pools, Inc., 462 U.S. 198, 205 (1983).


47. For example, bequests, devices, inheritances, property settlements, and life insurance proceeds that are acquired within 180 days after the commencement of
In contrast to § 541’s generally rigid demarcation of pre- and post-petition property, § 1306 of the Code makes the Chapter 13 estate elastic and continually expandable until the case is closed, dismissed, or converted. Section 1306 enlarges the Chapter 13 estate by declaring:

(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.

Thus, the statutory language makes it abundantly clear that before a case is converted from Chapter 13 to Chapter 7, the property of the Chapter 13 estate includes all § 541 property acquired by the debtor, both pre- and post-petition.

b. Conversion from Chapter 13 to Chapter 7. A Chapter 13 case may be converted to a Chapter 7 case at any time. Additionally, the right of a voluntary conversion is nonwaivable; yet if appropriate, creditors may force conversion upon a recalcitrant debtor. Section 348 of the Code governs the effects of the case become part of a § 541 defined estate. See 11 U.S.C. § 541(a)(5)(A)-(C).

50. 11 U.S.C. § 1307(a) (1988) (“The debtor may convert a case under this chapter to a case under chapter 7 of this title at any time.”).
51. 11 U.S.C. § 1307(c) sets forth those circumstances for which conversion would be appropriate:

Except as provided in subsection (e) of this section, on request of a party in interest or the United States Trustee and after notice and a 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 interests of creditors and the estate, for cause, including—
(1) unreasonable delay by the debtor that is prejudicial to creditors;
(2) nonpayment of any fees and charges required under chapter 123 of title 28;
(3) failure to file a plan timely under section 1321 of this title;
(4) failure to commence making timely payments under section 1326 of this title;
(5) denial of confirmation of a plan under section 1325 of this title and denial of a request made for additional time for filing another
conversion. Subsection (a) specifies that

(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 [and] . . . does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief.  

Section 348(a) initially appears clear and unambiguous. Nonetheless, it has engendered considerable controversy, and in large part, its meaning controls the character of post-petition, post-conversion property of a new Chapter 7 estate.

III. THE CONTROVERSY

A Chapter 13 estate includes post-petition acquisitions of property and will generally be broader than a Chapter 7 estate. When a Chapter 13 case is converted to Chapter 7, however, the Code is glaringly silent concerning the proper composition of the post-conversion estate. Some courts have interpreted the Code to mean that the entire Chapter 13 estate, including its post-petition property, survives conversion and becomes part of the new Chapter 7 estate. Conversely, a strict, mechanistic interpretation of the Code has led other courts to conclude that upon conversion, the old Chapter 13 estate is somehow constricted in scope and that the new Chapter 7 estate includes only that property in which the debtor had an in-

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53. See supra part II.B.2.a.
55. See supra note 5.
terest at the date of the original Chapter 13 filing.\footnote{56}

A. The Language of the Statute

Any inquiry into statutory construction must begin with the express language of the statute itself.\footnote{57} Following this mandate, a number of courts have focused on the strict language of the Code and concluded that the post-petition, pre-conversion Chapter 13 property is excluded from the new Chapter 7 estate. An analysis of the "structural" argument used by these courts reveals a recurring and deceptively simple structure.

Section 1306(a) states that

\begin{enumerate}
\item Property of the estate includes, in addition to the property specified in section 541 of this title—
\item 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 . . . .\footnote{58}
\end{enumerate}

Although \S\ 1306(a) enlarges and redefines property of the Chapter 13 bankruptcy estate, it becomes inapplicable when a case is converted to Chapter 7.\footnote{59} Consequently, \S\ 541(a)\footnote{60} becomes the sole statutory provision used to define property of the post-conversion Chapter 7 estate.\footnote{61} Because \S\ 541(a)(1)

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\begin{itemize}
\item \textit{See supra} note 6.
\item Craig W. Dallon, Comment, \textit{Chapter 11 Bankruptcy: Is a Consumer Debtor Eligible?}, 1990 B.Y.U. L. REV. 1027, 1028. Mr. Dallon noted that the U.S. Supreme Court has written, "The starting point in every case involving construction of a statute is the language itself." \textit{Id.} at 1028 n.6 (citing Watt v. Alaska, 451 U.S. 259, 265 (1981) (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring)); see also Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 469 (1989) (Kennedy, J., concurring) ("There is a ready starting point, which ought to serve also as a sufficient stopping point, for this kind of analysis: the plain language of the statute.").
\item \textit{11 U.S.C. \S\ 1306(a)} (1988).
\item Section 1306 is deemed inapplicable pursuant to the language of \S\ 103(h): "Chapter 13 of this title applies only in a case under such chapter." \textit{11 U.S.C. \S\ 103(h)} (1988). In other words, the provisions of Chapter 13 do not apply when a case is converted from Chapter 13.
\item \textit{See supra} note 45 for the text of \S\ 541(a).
\item The bankruptcy court in Blood v. Wineburg (\textit{In re Marshall}), 79 B.R. 147 (Bankr. N.D.N.Y. 1987), looked at the inapplicability of \S\ 1306 upon conversion and wrote, "The operation of Code \S\ 1306 re-defined the property as property of the bankruptcy estate during the course of the Debtor's Chapter 13 case. However, the continuing effect of Code \S\ 1306 ceased as of the Debtor's voluntary conversion of the case . . . [as] the section applies only to Chapter 13 cases." \textit{Id.} at 150; see also
\end{itemize}
specifically limits the estate to pre-petition property, the effects of conversion take on a heightened significance. Section 348, which specifically governs the effects of conversion from one chapter to another, provides that conversion “does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief.”

According to the “structural” argument, the post-conversion Chapter 7 estate is defined as it would have been at the original commencement of the case, and all property acquired after that date is excluded from the new estate. In essence, the resulting Chapter 7 estate relates back to the date the case was first commenced and is treated as if originally filed at that time. Thus, the converted case under Chapter 7 is viewed as never having been in Chapter 13.

In the oft-cited In re Lennon, Judge Cotton summarized the argument:

[Upon the commencement of the Chapter 13 case, a Chapter 13 estate is created that encompasses the Section 541 specification of property of the estate as altered by Section 1306. The Section 1306 alteration, to include the debtor’s future earnings and property acquired after commencement of the case, is applicable only in the Chapter 13 context. When a case is converted from Chapter 13 to Chapter 7, the Chapter 13 estate, any plan, and the case terminate. A new Chapter 7 estate is created which relates back under Section 348(a) to the date of the commencement (filing) of the original Chapter 13 case.]

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In re Bullock, 41 B.R. 637, 641 (Bankr. E.D. Pa. 1984) (“Due to § 348(a), on conversion of a case from chapter 13 to chapter 7 the case is deemed commenced as of the date of the original petition as a chapter 7 proceeding and consequently, the chapter 13 estate, as defined by § 1306, is deemed never to have existed.”). 62. 11 U.S.C. § 348(a) (1988).


64. See Tucker v. Hendren (In re Tucker), 133 B.R. 819, 820 (Bankr. W.D. Tex. 1991) (“Upon conversion, a case should be treated as if it had been filed under the chapter to which it is converted.”). Consequently, since the estate has been converted to Chapter 7, § 1306 does not apply to, nor have any effect upon, the determination of what constitutes property of the estate. The estate, therefore, is determined only under 11 U.S.C. § 541 as of the date of the original petition for bankruptcy.

13 petition. Pursuant to Section 103(h) the provisions of Chapter 13 no longer apply. Therefore, property of this converted Chapter 7 estate must then be determined under Section 541 which is unaltered by Section 1306 or any other section of the Bankruptcy Code.\(^\text{66}\)

Despite its persuasiveness, the foregoing statutory argument is not definitive. An examination of § 348 reveals nothing about the composition of a converted Chapter 7 estate.\(^\text{67}\) In fact, "[l]ike the pieces of a mosaic, [§ 348] must be viewed along with the other statutory provisions of which it is intimately a part, in order to properly understand the entire creation."\(^\text{68}\) A careful reading of § 348 suggests that it was indeed intended as a source of continuity, and not a source of disruption. Accordingly, § 348 should leave matters as they existed on the date of conversion.\(^\text{69}\)

If § 348 is viewed as a source of continuity, "the plain language of § 541 easily becomes susceptible to the conclusion that the bankruptcy estate, following conversion from Chapter 13 to Chapter 7, is the Chapter 13 bankruptcy estate."\(^\text{70}\) The estate, even when defined solely by § 541, is not static; it is enlarged by certain post-petition acquisitions, including property the "estate acquires after the commencement of the case."\(^\text{71}\) In other words, the estate consists of the debtor's pre-petition property as well as all post-petition property it acquires after the

66. Id. at 135.
67. One court has written:
It is one thing to recognize that conversion does not affect the date upon which the case was commenced. It is quite another thing, however, to draw from this principle the doctrine that the case will be treated as though it had always proceeded under Chapter 7. Section 348(a) merely specifies that the date of the petition, commencement, and order for relief are unchanged. Its provisions do not mandate or necessarily imply "that upon conversion a case is to be treated in all respects as if it had originally been filed under the chapter to which it has been converted."
68. Id. at 612-13.
69. In re Lybrook, 951 F.2d 136, 137 (7th Cir. 1991) ("An equally good alternative from a purely semantic perspective is that conversion from Chapter 13 to Chapter 7 does not affect the bankrupt[cy] estate but merely assures the continuity of the case for purposes of filing fees, preferences, statutes of limitations, and so forth.").
70. In re Lybrook, 107 B.R. at 613.
commencement of the case. Therefore, when §§ 541(a)(7) and 1306 are read together, it is reasonable to conclude that all post-petition Chapter 13 property is acquired by the estate rather than by the debtor; as such, it would clearly be brought into the Chapter 7 estate pursuant to § 541(a)(7). This plain and simple interpretation does not require a "strained or contorted interpretation of the consequences of conversion." Unfortunately, the direct statutory language is unclear, producing nothing more than a "semantic impasse" from which reconciliation between the competing interpretations is virtually impossible.

B. Reasonable Inferences from the Language of the Statute

In certain circumstances, the U.S. Supreme Court recognizes that courts may appropriately look beyond the precise language of the statute to ascertain legislative intent:

Where the literal reading of a statutory term would 'compel an odd result,' we must search for other evidence of congressional intent to lend the term its proper scope. 'The circumstances of the enactment of particular legislation,' for example, 'may persuade a court that Congress did not intend words of common meaning to have their literal effect....' Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention.

Specifically in a bankruptcy context, "when the plain meaning [does] not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' [the] Court has followed that purpose, rather than the literal words."
No provision in the Code unequivocally defines the character of a post-conversion Chapter 7 estate; nor does the legislative history provide any real guidance. To resolve the issue, then, courts armed with the power of equitable fiat have looked to other provisions of the Code and attempted to divine its overall purpose. The following statutory provisions support certain inferences regarding the unrecorded legislative intent of Chapter 13 as it relates to this issue.


Pursuant to § 1325(a)(4), the Chapter 13 debtor’s plan must be in the “best interests” of the Chapter 13 creditors. This requires that all creditors, whether secured or unsecured, receive at least as much as they would have if the debtor had originally filed a petition for Chapter 7 liquidation on the day the Chapter 13 plan was confirmed. Furthermore, if a debtor’s financial condition improves during the repayment phase of Chapter 13, he may be required to amend his confirmed plan in order to increase the amount of money received by his creditors. Thus, Chapter 13 creditors may reasonably

77. See Ford Motor Co. v. Holly (In re Holly), 109 B.R. 524, 526 (Bankr. S.D. Ga. 1989) ("I do not believe Congress intended that monies paid to a Chapter 13 Trustee pending confirmation which clearly is property of the Chapter 13 estate would be retroactively determined not to be property of the estate through a mechanical application of 11 U.S.C. Section 541."); In re Shattuck, 62 B.R. 14, 15 (Bankr. D. N.H. 1986) ("There is no obvious way to reconcile the conflicting statutory language" and the relevant “legislative history ... is of little help.").

78. O’Quinn v. Brewer (In re O’Quinn), 143 B.R. 408, 413 (Bankr. S.D. Miss. 1992) ("The Court must look to the overall purpose of the Bankruptcy Code, and attempt to balance the competing interests of the [debtors and the creditors of the estate.").

79. 11 U.S.C. § 1325(a)(4) (1988) (The court shall confirm the plan if “the 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.").

80. See Warren & Westbrook, supra note 10, at 322.

81. 11 U.S.C. § 1329 reads:

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

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan.

Examples of changed circumstances include increased income, significant inheritances, and winning a lottery. See Arnold v. Weast (In re Arnold), 869 F.2d 240 (4th Cir. 1989); In re Euerle, 70 B.R. 72 (Bankr. D.N.H. 1987); In re Koonce, 54 B.R. 643 (Bankr. D.S.C. 1985).
expect to receive a distribution based on "the debtor's circumstances and the composition of the bankruptcy as they [existed on the date of conversion], and not as they once were when the petition was filed." More, "[i]t makes little sense to recognize this expectancy so long as the case remains in Chapter 13 and then completely disregard it by excluding post-petition property from the bankruptcy estate upon conversion to Chapter 7."

2. 11 U.S.C. § 348(c)

Section 348(c) authorizes the Chapter 7 trustee to assume or reject executory contracts and leases, including those that arose during the pendency of the Chapter 13 case. These powers are only exercisable by the Chapter 7 trustee if post-petition, pre-conversion contracts and leases survive the conversion and become part of the new Chapter 7 estate; otherwise, § 348(c) is rendered superfluous. One court wrote:

Subsection (c) plainly authorizes the Chapter 7 trustee to assume or reject all pre-conversion executory contracts or unexpired leases of the Chapter 13 debtor, including those arising post-petition and even post-confirmation; an impossibility if those interests were not a part of the estate following confirmation.

3. 11 U.S.C. § 348(d)

Section 348(d) states that post-petition claims against the Chapter 13 estate shall be treated as if they had arisen immediately before the original petition date and are thus dischargeable in Chapter 13. It reads:

A claim against the estate or the debtor that arises after the

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82. See Robb v. Lybrook (In re Lybrook), 107 B.R. 611, 613-14 (Bankr. N.D. Ind. 1989) (citing In re Arnold, 869 F.2d at 242-43) ("Congress . . . intended . . . that the debtor repay his creditors to the extent of his capability during the Chapter 13 period . . . . When a debtor's financial fortunes improve, the creditors should share some of the wealth."); aff'd, 135 B.R. 321 (N.D. Ind. 1990), aff'd, 951 F.2d 136 (7th Cir. 1991).

83. Id. at 614.

84. 11 U.S.C. § 348(c) (1988) reads: "Section 365(d), dealing with executory contracts and unexpired leases of this title appl[ies] in a case that has been converted under section 706, 1112, 1307, or 1208 of this title, as if the conversion order were the order for relief."

order for relief but before conversion in a case that is converted under section 1112, 1307, or 1208 of this title... shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition.86

According to at least one court, this "provide[s] debtors with an inducement to attempt to reorganize under Chapter 13 since post-petition claims could be discharged upon a failed reorganization."87 By analogy then, it may be argued that the post-conversion Chapter 7 estate should be constituted in a manner that encourages debtors to first seek Chapter 13 rehabilitation and protection. Therefore, § 348(d) is arguably an incentive for debtors to choose Chapter 13 over Chapter 7.

Yet given the Code as a whole, it seems incongruent that its drafters would have enacted this provision if they did not also intend that property acquired by the debtor during the Chapter 13 bankruptcy be available to pay those post-petition claims. Chapter 13 creditors are guaranteed to receive at least as much as they would have had their debtors chosen Chapter 7 liquidation. If post-petition claims are satisfied by pre-petition resources, the distribution to pre-petition creditors will likely be decreased; the size of the estate has remained the same but the number and amount of claims has quite possibly increased. It is only reasonable that debtors be required to place post-petition property in the Chapter 7 estate if they are going to be relieved from the liability of post-petition claims.88 Because Chapter 13 creditors risk deterioration of their claims during bankruptcy, they "should also have the opportunity to share any benefits which might flow from an improvement"89 in their debtor experiences during the case.

4. Bankruptcy Rule 1019(5)

Bankruptcy Rule 1019(5) requires the Chapter 13 trustee to turn the entire Chapter 13 estate over to the Chapter 7

88. The Wanderlich court states that "subdivision (d) hardly would elect to treat post-petition creditors of the Chapter 13 debtor as being pre-petition claimants after conversion to Chapter 7, if post-petition cash deposits or property which the debtor acquired as a result of credit transactions were not to be included in the debtor's Chapter 7 estate." 36 B.R. at 714.
trustee upon conversion. It reads:

[When a chapter 13 case has been converted to a chapter 7 case and] after qualification of, or assumption of duties by the chapter 7 trustee, any debtor in possession or trustee previously acting in the . . . Chapter 13 case shall, forthwith, unless otherwise ordered, turn over to the chapter 7 trustee all records and property of the estate in the possession or control of the debtor in possession or trustee.\textsuperscript{90}

While the Rule contains minimal substantive content, it quite possibly envisions a transfer of the entire Chapter 13 estate from the Chapter 13 trustee to the Chapter 7 trustee. There is no other administrative mechanism in the Code by which Chapter 13 property that is excluded from the new Chapter 7 may be “returned” to the debtor.

5. 11 U.S.C. §§ 361-362

The filing of a Chapter 13 petition triggers an automatic stay against virtually all creditor collection and lien enforcement attempts.\textsuperscript{91} Because Chapter 13 debtors are entitled, at least initially, to keep their assets and satisfy their debts out of future income, the stay is extremely important for those debtors who are capable of confirming and completing a plan, but who are in jeopardy of losing their assets to secured creditors. The stay, however, is not absolute; secured creditors may obtain relief if they meet certain statutorily prescribed conditions.\textsuperscript{92} In determining whether a particular secured creditor is entitled to relief from the stay, a court usually examines the debtor’s equity in the property and the extent to which the property is needed for rehabilitation.\textsuperscript{93}

Additionally, two other issues are considered by courts in determining whether to grant a secured creditor relief from the stay.\textsuperscript{94} First, courts consider whether the debtor’s proposed repayment plan “adequately protects” the secured creditor’s collateral.\textsuperscript{95} Though “adequate protection” is difficult to define

\begin{footnotes}
\item[90] \textit{Bankr. R.} 1019(5) (emphasis added).
\item[95] \textit{Warren & Westbrook}, supra note 10, at 303.
\end{footnotes}
precisely, its general meaning is clear: a secured creditor's claim, as ascertained by the collateral's value at the time the petition is first filed, may never be diminished. A Chapter 7 liquidation provides a useful illustration. When a Chapter 7 petition is filed, fully secured creditors are able to obtain relief from the stay by repossessing the collateral in satisfaction of the debts they are owed. In contrast, a Chapter 13 fully secured creditor is unable to seize its collateral in satisfaction of the debt it is owed; the creditor must simply stand by while the debtor continues to use the collateral, which often results in damage, depreciation, or general collateral devaluation. Because of these troubling possibilities, the Code requires Chapter 13 debtors to adequately protect the value of their secured creditors' collateral.

Second, courts consider whether the debtor is able to furnish "adequate payment" to the creditors during the repayment period of the proposed plan. Section 1325(a)(5)(B)(ii) of the Bankruptcy Code states that the debtor's proposed plan must provide for payment to secured creditors (throughout the duration of the repayment period) equal to the present value of their claims as they existed at the time the plan was confirmed, plus interest. Thus, while "adequate protection" is concerned with declining collateral values, "adequate payment" focuses on the amount a secured party should receive when its debtor is successful in making all payments called for by the plan. In short, a court may lift the automatic stay and allow secured creditors to repossess their collateral if the court doubts the debtor's ability to fulfill either of these two requirements.

98. This becomes important when the debtor defaults on the Chapter 13 plan and the secured creditor's only remedy is to seize the collateral. Methods of adequately protecting collateral are found in 11 U.S.C. § 361.
100. Simply explained, present value means that because a dollar can be used to create additional value, it is worth more today than it will be tomorrow. Present value is generally calculated by discounting the future payment by the rate of return available to the investor over the specified period.
101. 11 U.S.C. § 1325(a)(5)(B)(ii) (1988) ("[The court shall confirm the plan if, with respect to each allowed secured claim] the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim.").
102. Id.
Chapter 7 debtors are required to relinquish ownership and control of their nonexempt property to the Chapter 7 trustee. In contrast, Chapter 13 debtors continue to own and control their property because they "adequately protect" the collateral by immediately making payments to the Chapter 13 trustee.\textsuperscript{103} In most Chapter 13 cases, post-petition payments to the Chapter 13 trustee represent the only "adequate protection" secured creditors receive from their debtors.\textsuperscript{104} As such, it seems patently unfair to stay the collection efforts of creditors, under the guise of adequately protecting their collateral's value, while at the same time allowing debtors to use, deplete, or potentially damage the collateral. This is particularly applicable, for example, when the "adequate protection" given to creditors is returned to the debtors once the case is converted to Chapter 7.

In \textit{In re Holly},\textsuperscript{105} the Chapter 13 trustee held post-petition, pre-conversion payments made by the debtor pursuant to his plan of restructured payments. After considering whether the plan payments should be returned to the debtor, the court observed that "[e]ach secured creditor's interest in its collateral [was] impaired to the extent that it . . . received no payment and [was] prevented from foreclosing its security interest by the automatic stay of 11 U.S.C. section 362(a)."\textsuperscript{106} It follows,

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\textsuperscript{103} See 11 U.S.C. \S 1326(a) (1988). The debtor must file a plan of restructured debt payments within 15 days of filing the Chapter 13 petition. See \textit{Bankr. R. 3015-03}. Regardless of whether the plan has been confirmed, the debtor must begin making plan payments within 30 days after the petition has been filed. In the event that the plan is not confirmed, the Chapter 13 trustee is required to return the plan payments to the debtor. 11 U.S.C. \S 1326(a)(1)-(2) (1988).

\textsuperscript{104} According to one court:

In many and maybe most of the chapter 13 cases . . . cash payments through the trustee pursuant to the plan represent the \textit{only} "adequate protection" provided for creditors with secured claims . . . . [M]otions by secured claimants to lift the automatic stay of \S 362(a) for lack of adequate protection have been and will be denied in that the claimants have been provided adequate protection by way of cash payments through the trustee.

Giving the undistributed funds, upon dismissal or conversion, to someone other than the creditors provided for by the plan would be unfair to those creditors, and particularly to the secured creditors who have been promised these funds and who have relied on them for the protection afforded them under \S 361(1) of the Code.


\textsuperscript{106} \textit{Id.} at 525.
\end{flushleft}
then, that when "'adequate protection' proves to be inadequate, all affected secured creditors are entitled to alternative compensation . . . . They are entitled to a pro-rata satisfaction of those claims out of the monies which the Debtor has paid to the Trustee." The court refused to believe that Congress intended Chapter 13 property to cease being estate property simply because of a "mechanical application of 11 U.S.C. § 541." In sum, "adequate" protection and payment for Chapter 13 creditors depend, at least in part, on the nature and ever-increasing size of the post-petition estate. If post-conversion Chapter 7 estates are limited to pre-petition property, adequate protection and payment may be illusory concepts.

IV. ANALYSIS OF THE CONTROVERSY

The issue of whether post-petition, pre-conversion Chapter 13 property becomes part of the new Chapter 7 estate appears convoluted, and the conflicting decisions seem irreconcilable. Nevertheless, it is imperative that the issue be resolved, if only to comply with the constitutional mandate for uniformity. The structural argument that § 541 expressly limits the post-conversion Chapter 7 estate to pre-petition property is somewhat compelling. However, the structural argument fails to account for its result—that the Chapter 13 estate magically ceases to exist when a Chapter 13 case is converted to Chapter 7. In reality, the Code does not specify the composition of the post-conversion estate; in fact, if anything, the Code implies that the post-conversion Chapter 7 estate is not limited to pre-petition property. Recent decisions from the courts of appeals have corroborated this position, holding that post-conversion Chapter 7 estates include all property of the pre-conversion Chapter 13 estate.

A. The Recent Cases

Courts frequently rely upon In re Lybrook for the proposition that the entire Chapter 13 estate survives conversion to

106. Id. In re Barbee, 82 B.R. 470 (Bankr. N.D. Ill. 1988), came to the same conclusion. The court found that "section 1326(a) is clearly intended to provide a fund out of which the costs of a failed Chapter 13 case can be paid. It in effect shifts the risk of failure from the trustee to the debtor." Id. at 473.


Chapter 7. In *In re Lybrook*, the debtors received an inheritance of more than $70,000 after they filed their petition for Chapter 13 relief, but before the case was converted to Chapter 7. While the inheritance was unquestionably part of the original Chapter 13 estate, there was some question as to whether it continued to be part of the bankruptcy estate following conversion to Chapter 7. After a detailed analysis of Code construction and policy, the bankruptcy court held that the inheritance was part of the new Chapter 7 estate.

On appeal, the debtors relinquished their statutory interpretation argument and attempted to shield the inheritance from their creditors on policy grounds. The debtors argued that Congress’s desire to encourage the use of Chapter 13, in lieu of Chapter 7, would be “undermined” if their post-petition inheritance was not excluded from the new Chapter 7 estate. The debtors referred to the legislative history of Chapter 13, which indicates that Chapter 13 is designed as the ideal alternative to Chapter 7 liquidation. Judge Posner, though, was unconvinced:

> [I]t is not clear that the Lybrooks’ position would on balance encourage rather than discourage this alternative. Their position makes an initial filing under Chapter 13 less risky, all right, but it also encourages conversions from Chapter 13 to Chapter 7. In the end, as many or more personal bankruptcies may end up in Chapter 7 as would be the case if property once it was included in the Chapter 13 estate remained in the bankrupt estate following conversion.

We are more impressed... that a rule of once in, always in is necessary to discourage strategic, opportunistic behavior that hurts creditors without advancing any legitimate interest of debtors. A debtor who lacks confidence that he can actually work his way out of his financial hole by payments under a

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110. *Id.* The debtors received the inheritance more than 180 days after the original petition, thereby eliminating the possibility that it would have been part of an originally filed Chapter 7 bankruptcy estate. See 11 U.S.C. § 541(a)(5)(A) (1988).

111. *In re Lybrook*, 107 B.R. at 615.

112. 951 F.2d at 136-37.

113. *See* H.R. REP. NO. 595, at 116, *reprinted in* 1978 U.S.C.C.A.N. at 6076-80; *see also In re Lennon*, 65 B.R. 130, 132 (Bankr. N.D. Ga. 1986) (“The statutory scheme of the Bankruptcy Code reflects a congressional intent to make attractive and encourage greater use, which must be voluntary, of Chapter 13 rehabilitation and creditor payment, rather than Chapter 7 liquidation with little or no creditor payment. When Congress enacted Chapter 13, it demonstrated its concern over the failure of old Chapter XII of the Bankruptcy Act to encourage consumer debtor use of the chapter for creditor payment as opposed to straight liquidation.”).
Chapter 13 plan will nevertheless have an incentive to proceed under that chapter as long as he can, holding his creditors at bay and thus staving off the evil day when they seize his assets. For he knows that if his position deteriorates further that it is the creditors who will bear the loss, while if he should get lucky and win a lottery or a legal judgment, or inherit money (after 180 days have passed since the filing of the petition), he will be able to keep his windfall by the simple expedient of converting to Chapter 7.\footnote{951 F.2d at 137-38.}

The Tenth Circuit's subsequent decision in \textit{In re Calder},\footnote{973 F.2d 862 (10th Cir. 1992).} which relies on \textit{In re Lybrook}, provides further support for this conclusion. Calder was an experienced bankruptcy attorney who originally filed a petition for relief under Chapter 7 in 1986. His case was converted to Chapter 13 in 1989, and then reconverted to Chapter 7 in 1990. Calder appealed the district court's decision to include approximately $60,000 of post-petition, pre-conversion wages in the reconverted Chapter 7 estate.

While conceding that the money was properly included in the Chapter 13 estate, Calder argued on appeal that the property of the new Chapter 7 estate should be determined as of the date of his original petition in bankruptcy.\footnote{Id. at 864.} After reviewing the interplay between §§ 541, 1306, and 348, the Tenth Circuit held that "a proper reading of § 348 indicates that it is not a source of disruption but, instead, preserves the continuity of the bankruptcy proceedings."\footnote{Id. at 866 (quoting Robb v. Lybrook (In re Lybrook), 107 B.R. 611, 613 (Bankr. N.D. Ind. 1989), aff'd, 135 B.R. 321 (N.D. Ind. 1990), aff'd, 951 F.2d 136 (7th Cir. 1991).} The court based its decision, at least in part, on the statutory language of §§ 1306 and 541(a)(7). Section 1306 makes it clear, reasoned the court, that after-acquired property and the debtor's post-petition earnings are included in the Chapter 13 estate. When the case is converted to Chapter 7, § 541(a)(7) includes in the post-conversion estate "[a]ny interest in property that the estate acquires after the commencement of the case." Reading these two provisions together, the Court concluded that "all property in plaintiff's Chapter 13 estate—including any funds included pursuant to § 1306—are part of the postconversion Chapter 7 estate."\footnote{Id.}
In sum, the Seventh and Tenth Circuits, relying respectively on policy grounds and statutory construction, determined that all Chapter 13 estate property should be included in post-conversion Chapter 7 estates.

B. Further Policy Considerations

Some courts have suggested that depriving debtors of their post-petition, pre-conversion property may discourage them from attempting Chapter 13 rehabilitations.\(^{119}\) In essence, these courts argue that it is incongruent to encourage the use of Chapter 13 over Chapter 7 liquidation, yet penalize debtors who first attempted and failed at Chapter 13 rehabilitation. These courts argue that debtors are penalized when their post-petition property survives conversion and becomes part of the new Chapter 7 estate because that same property would have been excluded from bankruptcy court control had the debtors initially filed a petition under Chapter 7. The bankruptcy court in *Hannan v. Kirshenbaum (In re Hannan)*\(^{120}\) wrote the following about the propensity conversion may have to penalize debtors:

When a Chapter 13 plan does not work out, the debtor has the privilege of converting to Chapter 7, and when he exercises that right, no reason of policy suggests itself why the creditors [and the debtor] should not be put back in precisely the same position as they would been had the debtor never sought to repay his debts by filing under Chapter 13.\(^{121}\)

The foregoing argument fails to take into account the Code's numerous incentives to choose Chapter 13 over Chapter 7. For example, Chapter 13 debtors are able to keep property that is encumbered by preexisting security interests, often by

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119. *E.g.*, *Hannan v. Kirshenbaum (In re Hannan)*, 24 B.R. 691 (Bankr. E.D.N.Y. 1982); *In re Shattuck*, 62 B.R. 14, 15-16 (Bankr. D.N.H. 1986) (deciding that it was within the public interest to encourage good faith Chapter 13 rehabilitations, and as such, "it would not be fair to penalize [the debtors] by disposing of monies which clearly would have been [excluded from the estate had it been originally filed under Chapter 7."); *Tucker v. Hendren (In re Tucker)*, 133 B.R. 819, 821 (Bankr. W.D. Tex. 1991) ("Under § 1326(a)(2) the Debtors could have obtained their plan payments at any time prior to conversion since no plan was confirmed. No statutory reason exists why the result should be any different when the demand for return of the plan payments is made after conversion to Chapter 7.").

120. 24 B.R. 691 (Bankr. E.D.N.Y. 1982).

121. *Id.* at 692.
making lower monthly payments to their creditors.\textsuperscript{122} It simply does not follow that prospective Chapter 13 debtors, if given the choice of losing their assets immediately or possibly losing them later, would choose to lose them immediately by filing under Chapter 7.

Furthermore, debtors who own their own homes have an incentive to file under Chapter 13 rather than Chapter 7.\textsuperscript{123} Under Chapter 13, courts have traditionally allowed debtors to satisfy arrears within a reasonable time and lower their mortgage balance through a controversial technique called "lien stripping."\textsuperscript{124} On the other hand, Chapter 7 debtors with equity\textsuperscript{125} in their homes are statutorily required to use that equity to satisfy their debts, often culminating in the loss of their home. But possibly most important of all, Congress provided a much broader discharge from debts in cases under Chapter 13 than it did in cases under Chapter 7. Of the 12 nondischargeable debts of Chapter 7,\textsuperscript{126} only three are nondischargeable in a Chapter 13 case.\textsuperscript{127} Therefore, while debtors may risk losing some after-acquired property, this risk alone will not dissuade them from filing under Chapter 13.

Rather, it is far more likely that debtors will choose Chapter 13 over Chapter 7 because of the foregoing statutory incentives and because it allows them to keep property they would otherwise have to relinquish to the Chapter 7 trustee. Finally, if debtors are entitled to limit their converted estates to prepetition property, they may be encouraged to first file a Chapter 13 petition, and if convenient, later convert to Chapter 7. This incentive to convert from Chapter 13 to Chapter 7 is irrecconcilable with Congress's desire that debtors perform Chapter 13 rehabilitation.

\textsuperscript{123} WARREN & WESTBROOK, supra note 10, at 367. Approximately 52% of all debtors own their own homes. \textit{Id.}
\textsuperscript{124} \textit{Id.} 11 U.S.C. § 1322(b)(2) allows Chapter 13 debtors to reduce their oversecured debts to an amount commensurate with their collateral's value. In a move "fraught with controversy," some courts have allowed debtors to reduce their home mortgages in much the same way. WARREN & WESTBROOK, supra note 10, at 318.
\textsuperscript{125} Debtors are entitled to exempt the first $7,500 of equity pursuant to 11 U.S.C. § 522(d)(1) (1988).
Excluding post-petition property from the post-conversion Chapter 7 estate would "build a strange anomaly into the Bankruptcy Code." 128 Debtors would be able to use Chapter 13 for their own convenience, yet convert to Chapter 7 when Chapter 13 becomes unattractive. Two examples are illustrative. First, if a debtor's financial condition improves and the court orders a plan modification for the benefit of the debtor's creditors, the debtor may simply convert to Chapter 7 and retain the new property that motivated the court to order the modification. 129 Court orders are not issued merely to be flouted at the debtor's discretion.

Second, consider the hypothetical Chapter 13 debtor who wins one million dollars in the state lottery. As a result of his new wealth, the debtor incurs substantial post-petition debt and the bankruptcy court orders him to modify his Chapter 13 repayment plan for the benefit of his creditors. Not only can the debtor discharge his post-petition debts pursuant to §348(d), he may also convert his case to Chapter 7 and exclude his lottery winnings from the new Chapter 7 estate. This result is entirely indefensible.

Similarly, the scope of the debtor's discharge is the same whether the case is converted to Chapter 7 or dismissed and immediately followed by a subsequent Chapter 7 petition; in either case, claims are equally dischargeable regardless of when they arose. 130 Congress specifically intended this to be the case. 131 When the case is dismissed and a new petition is filed, the debtor's post-petition Chapter 13 property is unquestionably part of the new Chapter 7 estate. Otherwise, Chapter 13 debtors would have an incentive to convert their cases to Chapter 7, rather than having them dismissed. They could exclude post-petition property upon conversion, but be forced to include it in a newly refiled Chapter 7 case. The Seventh Circuit, in In re Northwest Engineering Co., 132 ruled that the Bankruptcy Code should be interpreted in a way that avoids the creation of strategic incentives. Consequently, debtors

129. Id. The right to a voluntary conversion is absolute. 11 U.S.C. § 1307(a) (1988).
132. 863 F.2d 1313, 1317-18 (7th Cir. 1988).
should not be encouraged to choose conversion over dismissal.

Even though the choice between conversion and dismissal will have no impact on the debtor's discharge, it has a tremendous impact on creditors. When the post-conversion estate is limited to pre-petition property, the amount of property available to satisfy claims may be substantially less. Debtors and creditors should enjoy the same results whether the case is converted from Chapter 13 to Chapter 7 or is dismissed from Chapter 13 and followed by a separate petition under Chapter 7. The discharge is the same; the price of that discharge should also be the same.

If a debtor fails to meet the standards of Chapter 13, the court may dismiss or convert his case, "whichever is in the best interests of creditors and the estate." This implies that there will be a difference between dismissal and conversion, and that one of the two will better serve the estate and its creditors. It is obviously in the best interests of creditors to define Chapter 7 estate property as of the conversion date. Likewise, it is obviously in the best interests of the estate to be converted instead of dismissed because only by conversion are post-petition claims discharged pursuant to § 348(d). When post-petition property is nonexistent or insignificant, it may be best to grant a dismissal.

Finally, the structural argument fails to consider the dual debtor-creditor nature of the Code. In most cases, there is no question that debtors are better off when their post-conversion estates are limited to pre-petition property. They keep and use pre-petition property while shielding post-petition property from creditor control. And, in the event their Chapter 13 case fails, they are treated as having initially filed a liquidation petition. Creditors, meanwhile, are forced to bear the costs of successful and unsuccessful Chapter 13 proceedings.

V. CONCLUSION

Federal law should treat similarly situated persons fairly; despite its merits, the Bankruptcy Code fails in this regard. The Code is susceptible to disparate applications, and as a result, similarly situated debtors whose cases are converted from Chapter 13 to Chapter 7 have been treated dissimilarly. The principle consideration behind the bankruptcy statute is

one of balance: debtors need time to fulfill their obligations or, in the alternative, to receive a fresh start; creditors reasonably expect to collect from their debtors, and if appropriate, to receive an increase in their financial return as their debtors' situations improve.

Congress enacted a statute that needs further refinement. The conclusion that the entire Chapter 13 estate survives conversion and becomes the Chapter 7 estate is consonant with other Code provisions and well within the policy considerations underlying bankruptcy legislation. After reviewing the Code's ambiguities and the equitable principles involved, thoughtful courts should follow the Seventh and Tenth Circuits and hold that post-conversion Chapter 7 estates are properly composed of the entire pre-conversion Chapter 13 estate.

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