THE EFFECTS OF CHAPTER 13 PLAN CONFIRMATION AND CASE CONVERSION ON PROPERTY

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INTRODUCTION

The courts are deeply divided on the status of property of the estate after a Chapter 13 plan has been confirmed. The status of property after confirmation dramatically affects not only the prospects for successful plan completion, but also the Chapter 13 trustee's administrative duties and burdens. The contexts in which the issue has been addressed vary considerably. To a limited extent, these varying contexts explain the diversity in the approaches taken to resolve the question as well as the resolution of the question itself.

Pre-petition creditors who have not been paid as promised in the plan have argued that collection efforts against the collateral securing the claim may proceed without permission of the bankruptcy court because plan confirmation transforms a pre-petition claim into a post-petition claim and property of the estate into property of the debtor. Former spouses of debtors have insisted that after confirmation, efforts to collect pre-petition support debts may proceed because the automatic stay does not prevent the collection of support from property which is not property of the estate. Post-confirmation creditors of the debtor have contended that garnishment, levy, and execution efforts to collect post-confirmation claims are not affected by the automatic stay because at confirmation all property vests in the debtor. Finally, creditors of the debtor's creditors have attempted to garnish funds in the hands of the debtor or the Chapter 13 trustee, arguing that this activity does not violate the automatic stay because one of the effects of confirmation is to transform property of the estate into property of the debtor.

After a brief review of provisions in Title 11 of the United States Code ("Bankruptcy Code") relevant to the question whether the estate survives plan confirmation, Part I of this Article analyzes the leading cases raising the issue in the above contexts.1 This Article concludes that the debtor's property continues to retain its status as

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property of the estate after plan confirmation even absent a specific plan provision to that effect. This Article further argues that conclusions to the contrary are often a result of policy concerns that are better addressed in determining whether cause exists to lift the automatic stay and are the result of erroneously equating the vesting of property of the estate in the debtor with the demise of the estate and property of the estate.

Part II of this Article examines the status of post-petition property after a Chapter 13 case is converted to Chapter 7. The courts are as deeply divided regarding the issue whether post-petition property is property of the subsequent Chapter 7 case as they are divided on the status of such property after plan confirmation. Because claims arising after the filing of the Chapter 13 petition and before conversion to Chapter 7 are dischargeable in the converted case, the scope of the converted Chapter 7 estate, like the issues explored in Part I of this Article, affects not only the ability of the post-petition creditor to realize on its claim, but also the Chapter 7 distributive shares of pre- and post-petition creditors alike.

Under one approach, property of the estate in the converted Chapter 7 case is assessed as of the date the Chapter 13 petition was filed and as if the case was originally filed as a Chapter 7 case on that day. Consequently, most property acquired after the Chapter 13 case was filed is not property of the Chapter 7 estate. Thus, this view is compatible both with the theory that plan confirmation transforms property of the Chapter 13 estate into property of the debtor as well as with the theory that confirmation has no such effect because in either event post-petition property is not property of the subsequent Chapter 7 estate.

According to the second theory, the question whether property is property of the converted Chapter 7 estate is asked as of the date the case is converted from Chapter 13 to Chapter 7. As a result, post-petition property, at least if it is characterized as property of the debtor, becomes part of the subsequent Chapter 7 estate. The analysis is much more troublesome if property of the Chapter 13 estate retains its status as such after plan confirmation.

The third and best approach assesses the scope of property of the estate in the converted Chapter 7 case as of the date the original Chapter 13 petition was filed. Under this approach, unlike the first approach, section 1306(a)\(^2\) of the Bankruptcy Code continues to operate up to the date of case conversion. As long as post-Chapter 13 petition assets are characterized as property of the Chapter 13 estate rather than as property of the debtor, these assets become part of the

subsequent Chapter 7 estate. Thus, the third approach is the most compatible with the view advocated in Part I of the Article that plan confirmation does not affect a change in the status of property of the Chapter 13 estate.

After a brief review of the Bankruptcy Code provisions relevant to the question of the scope of property of a Chapter 7 estate following conversion from a Chapter 13 case, Part II of the Article discusses the leading cases addressing the issue. The Article concludes that post-petition property is properly included in the subsequent Chapter 7 estate under the third approach, but that legislative clarification on the issue is badly needed. Only by characterizing post-petition property as property of the subsequent Chapter 7 estate are the debtor's post-petition creditors fairly treated.

I. THE EFFECTS OF PLAN CONFIRMATION ON PROPERTY OF THE ESTATE IN CHAPTER 13 CASES

A. THE BANKRUPTCY CODE

Property of the estate in a Chapter 13 case is defined by sections 541 and 1306 of the Bankruptcy Code. As set forth in these sections,

3. 11 U.S.C. §§ 541, 1306(a) (Supp. 1992). Section 541 provides:
   (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:
      (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) 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, devise, or inheritance;
         (B) as a result of a property settlement agreement with the debtor’s spouse, or of an interlocutory or final divorce decree, or
         (C) as a 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.
   (b) Property of the estate does not include —
the Chapter 13 debtor's estate is composed of all the debtor's interests in property that would be included in either a Chapter 7 or 11 case.\(^4\) However, unlike either a Chapter 7 or 11 case, the debtor's estate in Chapter 13 also includes the debtor's interests in post-petition property, including wages, acquired after the case is filed but "before the case is closed, dismissed, or converted to a case under Chapter 7, 11, or 12 . . . whichever occurs first."\(^5\) Under section 1306(b) the debtor remains in possession of all property of the estate unless the

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;
(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case; or
(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution.

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law —
(A) that restricts or conditions transfer of such interest by the debtor; or
(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

Id.

4. Id. § 541. See supra note 3. Section 1306(a) provides:

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.


5. Id.
The status of property of the estate after confirmation of the debtor's Chapter 13 plan is ambiguous as a result of the language of section 1327(b). Section 1327(b) provides that one effect of plan confirmation is to vest all property of the estate in the debtor unless the plan or the order confirming the plan provides to the contrary. Assuming there is no plan provision on point, the question arises whether property of the estate, so expansively defined in section 1306, ceases to exist and is transformed into property of the debtor after confirmation of the Chapter 13 plan. Three kinds of property are potentially at issue in this regard: (1) property owned by the debtor at the time the case is filed, (2) property acquired by the debtor before plan confirmation, and (3) property acquired by the debtor after the plan confirmation. Property owned by the debtor at the time the Chapter 13 case commences is referred to throughout this Article as pre-petition property. Property acquired after the petition is filed and before confirmation, as well as property acquired after confirmation, is referred to as post-petition property. The term post-confirmation property refers to all three forms of property after a plan has been confirmed.

The scope of property of the estate is directly linked to many of the protections afforded by the automatic stay. The stay enjoins any activity to obtain possession of, or to exercise control over, property

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6. 11 U.S.C. § 1306(b). Section 1306(b) provides: "Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate." Id.
7. Id. § 1327(b). Section 1327(b) provides: "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." Id.
8. Id.
9. Id. § 362(a). Section 362(a) provides:
   § 362. Automatic Stay
   (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of—
   (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
   (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
   (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
   (4) any act to create, perfect, or enforce any lien against property of the estate;
   (5) any act to create, perfect, or enforce against property of the
of the estate. Actions to enforce pre-petition claims against property of the estate are similarly prohibited. Lien creation, enforcement, or perfection efforts directed at property of the estate are also stayed. One exception to the automatic stay, the collection of alimony, maintenance, or support, also depends on the scope of property of the estate. As long as the action is one to collect a nondischargeable support obligation, it may proceed without an order lifting the stay if it is directed at property that is not property of the estate. Finally, the stay of acts against property of the estate continues until the property is no longer property of the estate.

The stay against acts directed at the debtor or property of the debtor terminates upon the case’s closing, dismissal, or discharge, whichever event occurs first.

Certain administrative duties of the Chapter 13 trustee relate to property of the estate. The trustee is authorized to obtain, through deposit or investment, the maximum reasonable net return on “the money of the estate for which the trustee serves.” The trustee is required to pay any remaining property of the estate into the court ninety days after final distribution of the payments due creditors under the plan. Finally, the trustee is directed to “make a final report and file a final account of the administration of the estate with the court and with the United States Trustee.”

The status of post-confirmation property has been examined in a variety of contexts. Sections B through E of Part I of this Article analyze the leading cases in each context to illuminate the policy issues and practical concerns animating the decisions. In each context, this Article attempts to provide an approach to the status of post-confir-

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10. Id. § 362(a)(3).
11. Id. § 362(a)(2)-(3).
12. Id. § 362(a)(4).
13. Id. § 362(b)(2).
14. Id.
15. Id. § 362(c)(1).
16. Id. § 362(c)(2).
17. Id. § 345(a).
18. Id. §§ 347(a), 1326.
19. Id. §§ 704(9), 1302(b)(1).
CHAPTER 13 PROPERTY

mation property which is less factually bound and which nevertheless incorporates the legitimate policy concerns behind the decisions.

B. CREDITORS WHOSE CLAIMS ARE PROVIDED FOR BY THE PLAN

The automatic stay prevents pre-petition creditors from taking any action to collect, assess, or recover a pre-petition claim against the debtor, the debtor's property, or property of the estate. Pre-petition creditors are similarly enjoined from creating, perfecting, or enforcing a lien against property of the estate or property of the debtor to the extent the lien secures a pre-petition claim.

Repayment provisions regarding pre-petition claims are, of course, the stuff of which Chapter 13 plans are made. These creditors are bound by the provisions of a confirmed plan whether or not they accept the plan.

The status of post-confirmation property typically does not concern the pre-petition creditor because such a creditor is usually prevented from taking any action against the debtor, the debtor's property, or property of the estate by reason of the automatic stay and section 1327(a). However, some pre-petition secured creditors have argued that plan confirmation effects a metamorphosis of a pre-petition claim into a post-petition claim, at least insofar as defaults under the plan are concerned. This position, when combined with the view that plan confirmation (absent a plan provision to the contrary) transforms property of the estate into property of the debtor, allows the secured creditor to immediately enforce all state court remedies without first obtaining permission from the bankruptcy court. This result follows because the automatic stay terminates with respect to property of the estate when it is no longer property of the estate, and only pre-petition claim enforcement against the debtor and the debtor's property is enjoined under the terms of section 362(a).

This argument was successfully advanced by the secured mortgagee in In re Nicholson. In Nicholson, the United States Bankruptcy Court for the Western District of Colorado held that the mortgagee was not stayed from foreclosing on the debtor's residence upon de-

20. Id. § 362(a)(1), (3), (4), (6).
21. Id. § 362(a)(4)-(5).
22. Id. § 1327(a). Section 1327(a) provides: "The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." Id.
23. See supra notes 20-21 and accompanying text.
24. 11 U.S.C. § 362(a)(1), (5)-(6); id. § 362(c)(1).
fault under the terms of the confirmed Chapter 13 plan because its claim was transformed into a post-petition claim by virtue of plan confirmation. As such, the foreclosure action was not an act designed to collect or enforce a pre-petition claim. The court noted that because foreclosure was based on the defaults under the plan, it could not have been commenced before the case was filed. Finally, the court in Nicholson ruled that the automatic stay provisions enjoining acts to exercise control over or obtain possession of property of the estate did not prevent foreclosure because the effect of confirmation under section 1327(b) was to vest all property of the estate in the debtor. The court in Nicholson equated vesting property of the estate in the debtor with the demise of the status of the debtor's post-confirmation property as property of the estate and its simultaneous re-transformation into property of the debtor. As a result, the court held that the stay did not prohibit the mortgage foreclosure because it was an act designed to collect a post-petition claim from property of the debtor.

The majority of courts reject the argument that confirmation transmogrifies pre-petition claims into post-petition claims. These courts reason that pre-petition creditors should not be allowed to determine unilaterally that the debtor has defaulted in the promised performance under the plan and to proceed as if a bankruptcy petition was never filed. The pre-petition creditor must either petition the bankruptcy court for relief from the stay or move for conversion or dismissal of the Chapter 13 case.

Not all of these courts, however, necessarily disagree with the view of the court in Nicholson regarding the effects of confirmation on property of the estate. Rather, some courts reason that the creditor's act is one designed to collect a pre-petition claim against prop-
A default under the terms of a confirmed plan ostentatiously signals that the debtor's rehabilitation is in jeopardy or was, perhaps, doomed from the start. Naturally, in such circumstances, a creditor will attempt to opt out of Chapter 13 at the earliest available opportunity. A creditor simply cannot be expected to have the rehabilitative goals of Chapter 13 in mind when the debtor fails to pay as promised. Only the Chapter 13 trustee and the bankruptcy court are so situated that the rehabilitative goals of Chapter 13 can be addressed in light of the debtor's failure to pay as promised in the plan. The bankruptcy court, assisted by the Chapter 13 trustee, must evaluate the debtor's prospects for financial rehabilitation even more critically at this stage because the debtor has now demonstrated an inability to live within the restrictions of a Chapter 13 plan.

However, the default may not be indicative of a chronic spendthrift style of living. It may be that the players (the debtor, the creditors, the trustee, or the court) have been unrealistic in arriving at the amount of the debtor's income that can be devoted to the plan payments. It may be that the default is the result of an emergency that is unlikely to repeat itself. Only the bankruptcy court, assisted by the Chapter 13 trustee, can resolve these issues in the context of the rehabilitative goals of Chapter 13. The court should decide whether the rehabilitation is hopeless and the case should be dismissed or converted, or whether rehabilitation can be achieved with or without a modification of the plan.

These issues are best addressed in the context of a motion to lift the stay or a motion to dismiss or convert the case. In short, default under the terms of a confirmed Chapter 13 plan should be addressed in the context of a collective proceeding in which the rights of creditors, the debtor's aspirations and ability, and the goals of Chapter 13 are each addressed. Allowing creditors to determine unilaterally the outcome of a troubled Chapter 13 case addresses only the rights of creditors. Constructions of the Bankruptcy Code, such as that of the court in *Nicholson*, that facilitate a unilateral determination by creditors of both the fact of default and the debtor's rehabilitation prospects should be avoided. Property of the Chapter 13 estate can be construed to survive confirmation without sacrificing the legitimate rights of creditors where the debtor has failed to pay as promised in the plan.

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C. PRE-PETITION SUPPORT CREDITORS

The issue of status of property of the estate also arises in the context of support creditors when the support obligor is in bankruptcy. Pre-petition support creditors have the benefit of an exception to the automatic stay which authorizes the collection of support obligations from property that is not property of the estate.36 Despite the controversy about the kinds of actions or proceedings covered by this exception to the automatic stay, the exception clearly allows the pre-petition support creditor almost immediately to commence or continue collection proceedings directed at the Chapter 7 or 11 debtor's post-petition wages and other property acquired post-petition because this property is not property of the estate in Chapter 7 and Chapter 11 cases.37 Furthermore, this nondischargeable obligation may be collected from the debtor's exempt property as well as from the debtor personally.38

Payment and collection of pre-petition support is more complex in the Chapter 13 context. Some courts have held or simply assumed that Chapter 13 plans may provide for repayment of support obligations at least if repayment in full is proposed or other conditions are met.39

38. 11 U.S.C. §§ 522(c), 523(a)(5), 524(a).
39. In re Warner, 115 B.R. 233, 242-43 (Bankr. C.D. Cal. 1989) (ruling that past due support may be included in Chapter 13 plan only if bankruptcy intervention and benefits to be achieved under plan outweigh detrimental impact of intervention in area traditionally left to states); In re Storberg, 94 B.R. 144, 147-48 (Bankr. D. Minn. 1988) (confirming plan proposing 100% repayment of past due support); In re Davidson, 72 B.R. 384, 389 (Bankr. D. Colo. 1987) (holding that full repayment of support through Chapter 13 plan is permissible only with consent of support creditor); In re Stewart, 52 B.R. 281, 282-83 (Bankr. W.D.N.Y. 1985) (assuming that Chapter 13 plan may provide for repayment of child support arrears, but holding that an unsecured support claim may not be classified separately from other unsecured claims, and that an unsecured support claim may not be separately classified); Combs v. Combs (In re Combs), 34 B.R. 597, 601 (Bankr. S.D. Ohio 1983) (holding spousal support arrearages may be included in Chapter 13 plan but confirmation denied because plan must propose 100% repayment of past due and current support debts); Moore v. Moore (In re Moore), 22 B.R. 200, 201-02 (Bankr. M.D. Fla. 1982) (denying ex-spouse's request to lift stay to enforce spousal support award against Chapter 13 debtor whose amended plan would propose full repayment of obligation); Sak v. Sak (In re Sak), 21 B.R. 305, 308 (Bankr. E.D.N.Y. 1982) (agreeing with cases suggesting that plan may provide for 100% repayment of past due support); In re Lanham, 13 B.R. 45, 47 (Bankr. C.D. Ill. 1981) (holding that past due child support claim for which full repayment within reasonable time is proposed is properly included in Chapter 13 plan); In re Adams, 12 B.R. 540, 543 (Bankr. D. Utah 1981) (concluding that the best solution to dealing with the problem of support arrears is for Chapter 13 plan to provide for full payment of support obliga-
In *In re Adams*, perhaps the earliest case to address support claims in Chapter 13 as well as the fate of property of the estate after confirmation, the United States Bankruptcy Court for the District of Utah stated that the optimal solution for dealing with support arrearages is for the Chapter 13 plan to provide full payment of the obligation. This conclusion followed logically from the court's view of the effect of confirmation on property of the estate. On confirmation, the court held that all property not devoted to making the plan payments is transformed into property of the debtor. Therefore, the court in *Adams* held that because the debtor's plan did not provide for payment of the support debt, the support exception to the automatic stay authorized the support creditor to garnish the portion of the debtor's post-petition wages not devoted to making plan payments. Several other courts, addressing a variety of issues raised by the support creditor in the Chapter 13 context, have adopted this view of the effect of confirmation on property of the estate.

Under the court's interpretation in *Adams*, the language of section 1327(b) compels this result: "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." By devoting a percentage of wages (or other property) to the plan, the plan has "otherwise provided." Thus, these wages (or other property) retain the status of property of the estate. Under this theory, the debtor's nondisposable income, exempt property, and nonexempt property not devoted to plan payments lose the status of property of the estate after confirmation. This property is then vulnerable to the collection of pre-petition support unless the claim is fully provided for by the plan.

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40. *In re Curtis*, 2 B.R. 43, 45 (Bankr. W.D. Mo. 1979) (concluding that Chapter 13 plan which designated separate classification and 10% repayment of other unsecured claims did not unfairly discriminate between claims).
42. Id.
43. Id.
44. *Storberg*, 94 B.R. at 147 (stating that plan confirmation revests all property of the estate in the debtor); *In re Davidson*, 72 B.R. at 389-90 (stating that vesting of all property of the estate in the debtor occurs upon plan confirmation); *In re Johnson*, 36 B.R. 958, 959 (Bankr. D. Utah 1983) (stating that property of the estate becomes property of the debtor upon confirmation); *Sak*, 21 B.R. at 307 (vesting, upon confirmation, all property of the estate in the debtor); *Bernstein v. Nagel* (*In re Bernstein*), 20 B.R. 595, 598 (Bankr. M.D. Fla. 1982) (vesting property of estate in debtor upon confirmation).
45. 11 U.S.C. § 1327(b) (emphasis added).
46. Id.
47. *See Adams*, 12 B.R. at 543.
48. *See 11 U.S.C. § 1327(b)*. Not all courts agree that general payment provisions in a plan are sufficient to prevent property of the estate from becoming property of the
If Chapter 13 plans may include provisions for full payment of past-due support, then section 1327(c) apparently prevents further action by the support creditor to collect past due support at a rate faster than that provided by the plan.\textsuperscript{49} That section provides that property vesting in the debtor under section 1327(b) vests in the debtor free and clear of any claim provided for by the plan.\textsuperscript{50}

However, a number of other courts have held that a Chapter 13 plan may not include payment provisions for support claims. This ruling is based on the perception that including support debts in a Chapter 13 plan would amount to an unwarranted assumption of jurisdiction by a federal court, requiring the federal courts to police domestic obligations and perhaps shelter a Chapter 13 debtor from support when due.\textsuperscript{51} Including plan payment provisions for past due support obligations is viewed as “invit[ing] a federal bankruptcy court to alter or modify a state court decision regarding the payment and discharge of the overdue [support] debt.”\textsuperscript{52} Therefore, because domestic relations is an area traditionally left to the states, these courts characterize federal policy as one of noninterference with and exclusive state control over the remedies for nonpayment of support.\textsuperscript{53}

Because support claims may be collected from property which is not property of the estate, the scope of property of the estate is sometimes discussed in these cases.\textsuperscript{54} However, in a recent case, the Bankruptcy Appellate Panel of the United States Court of Appeals for the Ninth Circuit held that it was unnecessary to decide the question of the scope of property of the estate after confirmation on the ground that the true issue before it was whether federal courts through the bankruptcy laws will intervene in domestic relations matters.\textsuperscript{55} The Ninth Circuit Bankruptcy Appellate Panel perceptively understood

debtor on confirmation. Some courts hold that specific plan language or court orders are required to prevent the transformation. See, e.g., Storberg, 94 B.R. at 147-48 (noting that the court’s form Chapter 13 plan contained specific language that property of the estate did not vest in the debtor); Denn v. Aarestad \textit{(In re Denn)}, 37 B.R. 33, 36 (Bankr. D. Minn. 1983) (holding that Chapter 13 plan expressly vested post-petition wages in the estate).

\textsuperscript{49} 11 U.S.C. § 1327(c). Section 1327(c) provides: “(c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.” \textit{Id.}\ See Lanham, 13 B.R. at 47 (noting that debtor’s agreement to provide payments greater than that in the plan does not bind the estate).

\textsuperscript{50} 11 U.S.C. § 1327(c).

\textsuperscript{51} Caswell v. Lang \textit{(In re Caswell)}, 757 F.2d 608, 609 (4th Cir. 1985).

\textsuperscript{52} \textit{Id.} at 610.

\textsuperscript{53} \textit{Id.;}\ Pacana v. Pacana-Siler \textit{(In re Pacana)}, 125 B.R. 19, 24 (Bankr. 9th Cir. 1991); \textit{In re Davidson}, 72 B.R. 384, 391 (Bankr. D. Colo. 1987); McCray v. McCray \textit{(In re McCray)}, 62 B.R. 11, 12 (Bankr. D. Colo. 1986).

\textsuperscript{54} Davidson, 72 Bankr. at 390-91; McCray, 62 B.R. at 12.

\textsuperscript{55} Pacana, 125 B.R. at 22-23.
that although the scope of property of the estate is frequently addressed, the essential question in these cases is whether a pre-petition support creditor’s rights are so vital and important that they must be allowed to trump the rights of all other creditors.\textsuperscript{56}

The author has argued elsewhere that although extremely important, the pre-petition support creditor’s rights should not eclipse the rights of all other creditors and that such claims are properly included in Chapter 13 plans.\textsuperscript{57} However, whatever the view taken regarding the permissibility of Chapter 13 payment provisions for past due support, it is clear that the support creditor must and should be paid. Payment can be accomplished by a variety of mechanisms. First, the debtor could be allowed to repay the support debt in full under the terms of the plan. The support creditor would be required to accept payment as proposed without attempting to augment these payments by resort to other collection actions. Second, the debtor could be prohibited from including support repayment provisions in the Chapter 13 plan. The court then could lift the stay to allow the support creditor to collect the amounts due. Collection of pre-petition support outside a plan also may be facilitated by characterizing the effect of confirmation as transforming property of the estate (in whole or in part) into property of the debtor. This would allow the support creditor to collect these claims because the support creditor is allowed to collect support from property which is not property of the estate. However, resolution of the question whether property of the estate survives confirmation, absent a plan provision explicitly on point, is really peripheral to the central issue of how best to facilitate payment of past due support. As the Ninth Circuit recognized, the resolution of this question should not be driven by the secondary question of the scope of property of the estate after confirmation. It is perfectly possible to protect the rights of the pre-petition support creditor even if property of the estate survives confirmation of a Chapter 13 plan.

\section*{D. Post-Confirmation Creditors}

A debt that arises after the Chapter 13 plan is confirmed can be collected against the debtor personally or against the debtor’s property because the automatic stay prevents such collection activity only when it is based on a pre-petition claim.\textsuperscript{58} However, property of the estate is insulated from acts designed to enforce or collect both post-

\begin{footnotesize}
56. \textit{Id.} at 24.
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petition and pre-petition claims. Therefore, absent relief from the automatic stay, the post-confirmation creditor's ability to enforce and collect the claim is affected dramatically by the status of property of the estate after plan confirmation.

The post-confirmation creditor's rights to participate in the payments made under the Chapter 13 plan are quite limited. Participation is limited to governmental units whose tax claims become payable while the Chapter 13 case is pending and to some post-petition creditors that extend consumer credit necessary to the debtor's performance under the plan.

If the post-petition claimant is not allowed to participate in the payments made under the plan and property of the estate is construed broadly (including pre- and post-petition property after confirmation and before discharge, conversion, or dismissal), payment depends on the debtor's voluntary cooperation or on relief from the automatic stay and, thereafter, on involuntary collection remedies under state law. If property of the estate is narrowly construed (as evaporating completely or as including only the property from which plan payments are made), payment of post-confirmation debt depends on the debtor's voluntary action or on the creditor's resort to involuntary collection remedies without the necessity of an order lifting the automatic stay.

If a Chapter 13 case is converted to Chapter 7, most claims which arise post-confirmation and before case conversion are treated as though they arose before the original Chapter 13 petition was filed. These claims thus are transformed into ordinary dischargeable obligations, unless the claim qualified as an administrative expense, in which case it retains its status as such even after conversion. The fact that post-confirmation claims are subject to discharge along with pre-petition claims in the event of conversion to Chapter 7 makes the issue of the scope of property of the estate especially vital to such creditors.

If post-confirmation debt is incurred beyond the debtor's ability

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59. Id. § 362(a)(3)-(4).
60. Id.
61. Id. § 1305(a), (c). Debtors whose debts are incurred either with the prior approval of the trustee or without such approval under circumstances in which the creditor neither knew nor should have known that the trustee's prior approval was practicable are allowed to participate. Id. If such a creditor participates in the previously confirmed plan, its claim is treated as a pre-petition claim. Id. § 1305(b). The balance of the claim not paid under the plan, if any, is discharged along with pre-petition claims unless prior approval of the trustee was practicable and was not obtained. Id. § 1328(a), (d). However, post-petition claims that are not allowed and that do not participate in the plan are not discharged. Id. § 1328(c).
62. Id. § 348(d).
63. Id.
to repay, successful plan completion is jeopardized under either view of property of the estate after plan confirmation. However, the ease of resorting to involuntary collection remedies varies considerably. It is reasonable to assume that the sooner post-confirmation property may be seized to satisfy the debt, the more likely the post-confirmation creditor will receive full payment before the Chapter 13 is dismissed or converted to Chapter 7. The cases confronting this problem appear implicitly to balance the rehabilitation goals of Chapter 13 against the rights of and risks confronting the post-confirmation creditor.\textsuperscript{64} As might be expected, the courts strike these balances differently.\textsuperscript{65}

\textit{In re Mason},\textsuperscript{66} decided by the United States Bankruptcy Court for the District of Oregon, is one of the cases most frequently cited for the proposition that property of the estate ceases to exist on confirmation and is transformed into property of the debtor.\textsuperscript{67} In \textit{Mason}, a post-confirmation creditor obtained a judgment against the Chapter 13 debtor and successfully garnished the debtor's wages in an effort to collect the judgment.\textsuperscript{68} The debtor filed a complaint to recover the garnished funds, contending that the automatic stay prohibited the garnishment because his post-petition wages were property of the estate.\textsuperscript{69}

The court held that the post-confirmation creditor did not violate the automatic stay when it garnished the debtor's wages because the wages lost their status as property of the estate after confirmation.\textsuperscript{70} The court in \textit{Mason} equated "vesting" property of the estate in the debtor under section 1327(b) with the demise of property of the Chapter 13 estate and the simultaneous creation of property of the debtor.\textsuperscript{71} Under this interpretation, "vesting" means that title, along with the absolute right of control and disposition of property that was formerly property of the estate, is now lodged in the debtor. The Court stated:

While the debtor has the obligation to comply with the plan and failure to do so could result in dismissal or conversion to chapter 7, the debtor nevertheless may use, sell or lease the

\textsuperscript{64} See infra notes 66-95 and accompanying text.  
\textsuperscript{68} Id. at 499.  
\textsuperscript{69} Id.  
\textsuperscript{70} Id. at 501.  
\textsuperscript{71} Id. at 500.
property within or outside the ordinary course of business without the necessity of notice and a hearing or order of the bankruptcy court. The debtor’s right of control of the property is the same as if no bankruptcy case had ever been filed except to the extent that the plan or order confirming the plan provides otherwise. Post-confirmation creditors may deal with the debtor as if no bankruptcy were pending.\textsuperscript{72}

This approach to the question of the status of property of the estate after confirmation has been adopted by a number of courts.\textsuperscript{73}

The court in \textit{Mason} justified its conclusion by implicitly balancing the goals of rehabilitation, the rights of pre-petition creditors, and the rights of post-confirmation creditors. The court stated that:

When a post-petition debt is the result of an accident or misfortune beyond the debtor’s control, it would be inequitable to require the non-volunteer, post-petition creditor to delay collection of his damages. Unlike the pre-petition creditor, the post-petition creditor has no opportunity to object to confirmation of the plan.\textsuperscript{74}

The court then noted that a debtor can protect himself against unexpected negligence or medical claims by procuring insurance, the cost of which should be reflected in his budget, or may modify the plan to accommodate payment of unexpected needs such as a replacement automobile.\textsuperscript{75}

The rationale of the court in \textit{Mason} in allowing the post-confirmation creditor to collect its claim from the debtor’s post-petition wages is arguably inconsistent with its holding. In the course of its opinion, the court in \textit{Mason} revealed facts suggesting that the debtor was a rehabilitative risk.\textsuperscript{76} The debt at issue was not incurred with the trustee’s prior approval as required by the plan; the creditor had not been advised that the debtor was in bankruptcy; and the debt was evidently not the result of a medical or other emergency.\textsuperscript{77} Furthermore, the debtor had not attempted to modify the plan to accommodate payment of the post-confirmation debt.\textsuperscript{78} In the court’s view,

\textsuperscript{72} Id.
\textsuperscript{73} See \textit{Lambright}, 125 B.R. at 735 (holding that, upon confirmation, property of estate becomes vested in debtor); \textit{In re Petruccelli}, 113 B.R. 5, 15 (Bankr. S.D. Cal. 1990) (holding that confirmation vests property of the estate in the debtor); \textit{Winchester v. Watson (In re Winchester)}, 46 B.R. 492, 495 (Bankr. 9th Cir. 1984) (noting that confirmation revests property in debtor). \textit{See also In re Walker}, 84 B.R. 888, 888 (Bankr. D.D.C. 1988) (noting that property not provided for in plan vests in debtor after confirmation); \textit{In re Dickey}, 64 B.R. 3, 4 (Bankr. E.D. Va. 1985) (holding that, upon confirmation, all property revests in the debtor and the estate is terminated).
\textsuperscript{74} \textit{Mason}, 45 B.R. at 501.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
the equities clearly favored the post-confirmation creditor.\textsuperscript{79}

However, only because the debtor filed a complaint seeking return of the garnished funds did these facts come to the court’s attention.\textsuperscript{80} Indeed, the rule the court adopted ensures that such facts (or facts tipping the balance of equities in the debtor’s favor) are unlikely to come to its attention in the future because the post-confirmation creditor is authorized to enforce its claim immediately without permission of the bankruptcy court.\textsuperscript{81} The weakness in this approach is that it assumes that if the debtor has defaulted in the payment of post-confirmation debts, then \textit{ipso facto} the equities favor immediate enforcement of the post-confirmation creditor’s collection remedies. There may be circumstances in which the equities favor the debtor and in which payment to the post-confirmation creditor can be structured so as to allow the debtor’s continued financial rehabilitation effort. Unfortunately, a holding that property of the estate ceases to exist as such after plan confirmation precludes a case-by-case balancing of the equities and analysis of the debtor’s rehabilitative prospects.

Consider the situation in \textit{In re Schewe},\textsuperscript{82} where the debtors filed a complaint alleging that eviction proceedings to oust them from their leased mobile home lot violated the automatic stay.\textsuperscript{83} In holding that the automatic stay prevented the eviction proceedings, the United States Bankruptcy Court for the Western District of Michigan observed:

\begin{quote}
When a debtor is a wage earner, the continued further occupancy of his residential premises may be essential to earning his income and carrying out the terms of the ... confirmed plan. ... If the residential property is not protected by the automatic stay, a creditor may, without prior bankruptcy court approval, seek to summarily evict a debtor. ... [T]he Debtors might be substantially harmed if they are erroneously compelled to relocate their mobile home and their family without contested facts and legal issues being first considered by this bankruptcy court.\textsuperscript{84}
\end{quote}

The analysis of the court in \textit{Schewe} explicitly recognizes that by requiring the post-confirmation creditor to seek relief from the automatic stay before resorting to involuntary collection remedies, the court not only may determine the underlying facts of the dispute, but

\begin{itemize}
\item \textsuperscript{79} Id.
\item \textsuperscript{80} Id. at 499.
\item \textsuperscript{81} Id. at 501.
\item \textsuperscript{82} 94 B.R. 938 (Bankr. W.D. Mich. 1989).
\item \textsuperscript{84} Id. at 945-46.
\end{itemize}
also may assess the effects of the default and the creditor's proposed remedy on the debtor's rehabilitation effort.85

The same approach was taken by the United States Bankruptcy Court for the Eastern District of Pennsylvania in In re Clark.86 In Clark, a post-confirmation judgment lien creditor moved to lift the stay in order to execute on the debtor's residence, which the debtor had contracted to sell.87 The lien creditor argued that the execution was not stayed because after confirmation the home became property of the debtor and lost its status as property of the estate.88 Like the court in Schewe, the court in Clark rejected this argument and adopted the position advanced by the competing line of authority.89 Under this view, the specificity of the language of section 1306(a) (property of the estate retains its status as such until the case is closed, dismissed, or converted to another chapter) eclipses the murkier language of section 1327(b) (property of the estate vests in the debtor on confirmation unless otherwise provided). In other words, the relevant events in determining the status of property as property of the estate are case closing, dismissal, or conversion rather than plan confirmation.90 "Vesting" simply means that ownership, possession, and control of property of the estate returns to the debtor but is limited to the extent that it is committed to successful plan performance.91 This interpretation of the status of property of the estate is sometimes bolstered by other references to the Bankruptcy Code requiring the Chapter 13 trustee to administer various matters pertaining to the "estate."92 The court in Clark was persuaded that if Congress meant to terminate the status of property as property of the estate at confirmation, it would have done so in terms clearer than "the metaphysical concept" of vesting.93

85. Id. The court in Schewe stated: "In Chapter 13 cases, the automatic stay allows a debtor the time to propose, confirm and consummate a confirmed plan involving property of the estate. If a creditor has cause to seek modification of the automatic stay, the creditor may file a motion for prompt determination by the court. The court is under strict time constraints to hear and decide motions to modify the automatic stay." Id.
88. Id. at 748.
89. Id. at 750. See, e.g., Riddle v. Aneiro (In re Aneiro), 72 B.R. 424, 428-29 (Bankr. S.D. 1987) (holding that § 1327(b) does not transform property of the estate into property of the debtor); In re Root, 61 B.R. 984, 985 (Bankr. D. Colo. 1986) (stating that the estate consists of property and future earnings of debtor dedicated to fulfillment of Chapter 13 plan).
90. Aneiro, 72 B.R. at 428-29; Clark, 71 B.R. at 749-50.
91. See Aneiro, 72 B.R. at 429-30 (revesting does not convert property of the estate into property of the debtor). See also In re Wanderlich, 36 B.R. 710, 715 (Bankr. W.D.N.Y. 1984) (adopting a similar interpretation of 11 U.S.C. §§ 1306(a) and 1327(b)).
92. See Root, 61 B.R. at 985.
93. Clark, 71 B.R. at 749.
After holding that the post-confirmation judgment lien creditor's efforts to execute on the debtor's house were stayed because the house retained its status as property of the estate, the court in *Clark* engaged in a balancing of interests analysis. The court stated:

We believe that a party standing in the shoes of the Movant should have a relatively slight burden to overcome to obtain relief from the automatic stay prospectively. Otherwise, as we indicated above, a post-petition creditor, even one holding, as here, a valid judgment against a debtor, would be unfairly frozen in place until the debtor, in leisurely fashion, completes his Plan payments and is discharged. The equities in favor of the Movant here are few, in our view, but one of them is that it is unfair for the Debtor, having been "revested" with his "property of the estate," to be able to sell his most valuable asset, his residential realty, but the Movant, at the same time, to be unable to touch it. In sum, the prospect of the Debtor's selling his property out from under the Movant is, in our view, sufficient "cause" to justify prospective relief from the automatic stay, per 11 U.S.C. § 362(d)(1).  

However, rather than simply lifting the automatic stay, the court in *Clark* afforded the debtor an opportunity to file an amended plan to provide for the claim of the post-confirmation creditor. If the debtor failed to amend the plan within ten days of the court's order, the creditor was authorized to enforce its judgment lien.

The approach taken in *Clark* and *Scheve* to the problem of the status of property of the estate in the context of the unpaid post-confirmation creditor best facilitates equitable outcomes consistent with the goals of Chapter 13. By requiring the post-confirmation creditor to seek relief from the automatic stay before resorting to its collection remedies, the bankruptcy court not only may determine the underlying facts, but also may assess whether the debtor is genuinely devoted to financial rehabilitation or is abusing the protection afforded by the automatic stay. Furthermore, the court can evaluate the effect the collection remedy will have on the debtor's ability to comply with the plan as well as any harmful effects the automatic stay may have on the post-confirmation creditor's ultimate ability to collect the debt. Finally, the court may consider whether the plan might be modified to facilitate payment of the debt either inside or outside the plan.

In addition to facilitating equitable outcomes consistent with the
purposes of Chapter 13, the position that property of the estate retains its status as such until case closing, dismissal, or conversion is the better interpretation of sections 1306(a) and 1327(b) of the Bankruptcy Code.96 The language of section 1327(b) vesting property of the estate in the debtor simply clarifies that it is the debtor, as opposed to creditors or the Chapter 13 trustee, who, subject to the provisions and terms of the confirmed plan, has title to and possession of the property of the estate. Under section 541(a), the question of who has possession of or legal title to property does not determine whether the property is property of the estate.97 There is no apparent reason why legal title to or possession of property should determine the outcome of the inquiry after confirmation of a Chapter 13 plan. Furthermore, the refusal to view vesting property of the estate in the debtor as compatible with retention of the property's status as property of the estate renders meaningless the language of section 1306(a) describing all post-petition property as property of the estate until case closing, dismissal, or conversion.98

E. CREDITORS OF THE DEBTOR'S CREDITORS

Perhaps the context most troublesome to Chapter 13 trustees involves a creditor's garnishment of funds in the Chapter 13 trustee's possession. Creditors argue that this action does not violate the stay because the funds are not property of the estate. In Laughlin v. United States Internal Revenue Service,99 the Internal Revenue Service ("IRS") served a notice of levy upon funds payable to a named
attorney on the Chapter 13 trustee for the District of Nebraska. Because the levy did not designate which, if any, Chapter 13 debtors owed fees to the attorney, the trustee made a manual search of the 1700 cases she was administering at the time. Two Chapter 13 cases were found in which confirmed plans provided for payments to the attorney.

The Chapter 13 trustee then moved to enforce the automatic stay. The United States Bankruptcy Court for the District of Nebraska rejected the trustee's argument that the IRS levy violated the automatic stay because the funds she had administered constituted property of the estate. The bankruptcy court reasoned that the effect of section 1327(b) was to transform property of the estate into property of the debtor. As a result, the automatic stay did not protect the funds in the hands of the Chapter 13 trustee.

The trustee appealed the bankruptcy court decision to the United States District Court for the District of Nebraska. The district court upheld the bankruptcy court's decision, reasoning that any interpretation of section 1327(a) other than that of the bankruptcy court would render the vesting language of section 1327(b) meaningless. The trustee appealed to the United States Court of Appeals for the Eighth Circuit.

Unfortunately, the Eighth Circuit did not address the question of the status of property of the estate after plan confirmation. Instead, it framed the issue of whether the IRS violated the automatic stay as one determined by an analysis of the purposes of the automatic stay. Conceptualizing the purposes of the stay as harmonizing the interests of both debtor and creditors, although preserving the debtor's assets for repayment, the Eighth Circuit concluded that the "IRS levy no more interfered with the purposes of the automatic stay under these circumstances than it would have had the notice of levy been served upon the bank in which the estate checks were deposited [by the attorney]."

100. Laughlin v. United States Internal Revenue Serv., 912 F.2d 197, 198 (8th Cir. 1990), cert. denied, 111 S. Ct. 1073 (1991).
101. Id. at 198.
102. Id.
104. Id.
105. Id.
106. Laughlin, 98 B.R. at 496. The court did not explain why the language of § 1306(a) was not rendered meaningless as a result of its interpretation. See id. See supra notes 97-98 and accompanying text.
107. Laughlin, 912 F.2d at 198 n.4.
108. Id. at 198.
109. Id.
Aside from the negative implications of this unfortunate construction of the automatic stay provisions of the Bankruptcy Code, the Eighth Circuit’s refusal to reach the question of the scope of property of the estate after confirmation is troublesome if only because it leaves the question unsettled and the results in other contexts unpredictable.

Equally troublesome is the decision of the United States Bankruptcy Court for the District of Colorado in In re Root.110 In Root, the IRS, in an effort to collect taxes owed by the debtor’s attorney, levied on funds in the hands of the debtor and demanded payment of all monies the debtor had agreed to pay the attorney through the Chapter 13 plan.111 Although the attorney had already been paid in full by the Chapter 13 trustee, the court nevertheless considered whether the IRS levy on the debtor’s wages violated the automatic stay.112 The court in Root held that property of the estate continues to exist after confirmation to the extent it is either necessary for the execution of the plan or is so designated in the plan.113 Because there was no proof that the IRS attempted to levy on the portion of the wages necessary to make the Chapter 13 plan payments, the court held that the IRS had not violated the stay.114 The court in Root nevertheless admonished the IRS for serving the notice of levy on the Chapter 13 debtor. Specifically, the court stated:

Such action by the IRS, however, causes nothing but anguish to the Debtor and confusion to the Debtor, the Trustee, and the Court. In this case, the Debtor initially thought the IRS was seeking payment of the Debtor’s taxes which had been provided for in the Plan. Had the Trustee not already paid Debtor’s attorney, what should the Debtor have done? He is under a court order to pay the Trustee, and yet the IRS demands that it be paid. The Trustee is left completely in the dark, and if the Debtor withholds payment from the Trustee, the Trustee will move to dismiss the case for failure of the Debtor to perform under the plan. This, in turn causes more docketing, scheduling, and hearing time in this Court until the matter is resolved. As an agency of the federal government, the IRS should, at the time of such levy, fully inform the Debtor (an innocent third party in this type of procedure) whether it is seeking property of the debtor or property of the estate. Better still, if the debtor’s attorney

112. Id.
113. Id. This view of property of the estate after confirmation was first articulated by the court in Adams and has been followed by a number of courts in the pre-petition support creditor context. See supra notes 40-48 and accompanying text.
has not yet been paid, the IRS should simply levy upon the
Chapter 13 Trustee. This way the Debtor is spared the anxi-
ety of being caught between conflicting governmental or-
ders, and the Trustee is aware of the facts and will not
initiate needless litigation in this Court. This Court cannot
direct the IRS to follow any particular procedure, but if the
IRS would prosecute its rights with a spirit of cooperation
rather than as blind zealots, a lot of taxpayers money could
be saved.\footnote{115}

Beyond the fact that this admonition may have led the IRS to
serve the notice of levy on the Chapter 13 trustee in Laughlin, the
court’s advice to the IRS is troubling. According to the court’s inter-
pretation of property of the estate, the funds paid by the debtor to
the trustee for plan payments are property of the estate because they
are necessary to the execution of the plan.\footnote{116} It would logically fol-
low that the levy on these funds in the hands of the trustee would
violate the automatic stay. Therefore, the suggestion by the court in
Root that the IRS levy on the funds held by the Chapter 13 trustee is
inconsistent with its analysis of property of the estate after confirma-
tion. Certainly, a levy on the trustee will have the salutary effect of
informing the trustee of the situation, particularly with regard to the
creditor’s unwillingness to garnish its own debtor’s bank accounts
once the Chapter 13 trustee disburses plan payments. Nevertheless,
as an action directed at property of the estate, the levy would appear
to violate the automatic stay and may even qualify as an action
designed to collect or recover a pre-petition claim.\footnote{117}

More importantly, such activity imposes excessive additional ad-
ministrative burdens on the Chapter 13 trustee. As such, interpreta-
tions of the Bankruptcy Code which facilitate such collection activity
by creditors of the debtor’s creditors without the necessity of a bank-
ruptcy court order lifting the stay should be avoided. This is not to
say that relief from the stay would not be appropriate on a proper
showing of special circumstances by such a creditor. However, absent
a showing of exigent circumstances justifying the interruption of the
orderly payment and distribution of plan payments and the addi-
tional burdens imposed on the trustee, the IRS (or any other creditor
of one of the debtor’s creditors) is not justified in complicating and
burdening the rehabilitative process. Holdings, such as those of the
bankruptcy and district courts in Laughlin, that property in the

\footnote{115. \textit{Id.} at 985-86.}
\footnote{116. \textit{Id.} at 985.}
\footnote{117. Evidently the argument that a levy on funds in the hands of the debtor or the
Chapter 13 trustee amounted to an action to collect or recover a pre-petition debt (the
fees owed by the debtor to the attorney) was not made in either \textit{Laughlin} or \textit{Root}. \textit{See}
11 U.S.C. \S 362(a)(1), (6).}
hands of the Chapter 13 trustee after confirmation is not property of the estate, make it unnecessary for these creditors to demonstrate the circumstances that justify the burdens imposed on the debtor, the trustee, and the system itself.

II. THE EFFECTS OF CONVERSION ON PRE-PETITION AND POST-PETITION PROPERTY

The debtor's inability to conform to the rigors of Chapter 13 often leads to conversion of the case to Chapter 7 either before or after a plan is confirmed. The Chapter 13 debtor has an absolute right to convert the case to Chapter 7 at any time.\textsuperscript{118} Conversion also may

\begin{itemize}
\item[(d)] Except as provided in subsection (e) of this section, at any time before the confirmation of a plan under section 1325 of this title, 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 11 or 12 of this title.
\item[(e)] The court may not convert a case under this chapter to a case under chapter 7, 11, or 12 of this title if the debtor is a farmer, unless the debtor requests such conversion.
\end{itemize}

\textsuperscript{118} 11 U.S.C. § 1307(a). Section 1307 provides:
(a) The debtor may convert a case under this chapter to a case under chapter 7 of this title at any time. Any waiver of the right to convert under this subsection is unenforceable.
(b) On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.
(c) 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 plan or a modification of a plan;
   (6) material default by the debtor with respect to a term of a confirmed plan;
   (7) revocation of the order of confirmation under section 1330 of this title and denial of confirmation of a modified plan under section 1329 of this title; [or]
   (8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan;
   (9) only on request of the United States trustee, failure of the debtor to file, within fifteen days, or such additional time as the court may allow, after the filing of the petition commencing such case, the information required by paragraph (1) of section 521; or
   (10) only on request of the United States trustee, failure to timely file the information required by paragraph (2) of section 521.
occur if a party in interest or the United States trustee establishes cause for conversion of the case after notice and hearing. Because claims that arise after the original Chapter 13 petition is filed and before conversion of the case to Chapter 7 are not only subject to discharge in the Chapter 7 case, but also are entitled to share in any Chapter 7 distribution of assets, the scope of property of the subsequent Chapter 7 estate obviously can affect the distributive shares of both pre-petition and post-petition creditors.

After a brief look at the relevant sections of the Bankruptcy Code, the next several sections of this Article examine the strongly divergent approaches courts have adopted in determining whether assets the debtor acquires after the Chapter 13 case is commenced are property of the Chapter 7 estate in the event of conversion of the case to Chapter 7.

A. THE BANKRUPTCY CODE

A variety of conflicting theories have developed regarding the fate of assets held by various parties at the time a Chapter 13 case converts to Chapter 7. The diversity of the decisions is partly attributable to the difficulty of reconciling several sections of the Bankruptcy Code and partly to competing policy objectives advanced by these same provisions.

Section 1326(a)(1) of the Code requires the debtor to begin making proposed plan payments to the Chapter 13 trustee within thirty days after a plan is filed unless the court directs otherwise. Section 1326(a)(2) provides:

A payment made under this subsection shall be retained by the trustee until confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan. If a plan is not confirmed, the trustee shall return any such payment to the debtor, after deducting any unpaid claim allowed under section 503(b) of this title.

Because section 1326(a)(2) is sometimes highly significant to the
results in these cases, it is important to note that it became effective October 8, 1984, pursuant to the Bankruptcy Amendments and Federal Judgeship Act of 1984. Therefore, the filing date of some of the cases will determine whether the section applies; likewise, some of the cases might have been decided differently had section 1326(a)(2) applied.

Because Chapter 13 plans are frequently funded by a percentage of the debtor's post-petition wages, in the cases which are converted to Chapter 7 prior to plan confirmation it is clear that under section 1306(a) these funds and any other post-petition property are property of the Chapter 13 estate pursuant to section 1306(a). Furthermore, if the case had originally been commenced as a Chapter 7 proceeding, the post-petition wages would not be property of the Chapter 7 estate under section 541(a)(6), and other post-petition assets most likely would not be property of the Chapter 7 estate either.

In cases converted to Chapter 7 after plan confirmation, resolution of the question whether wages devoted to the plan as well as other pre- and post-petition property are property of the Chapter 13 estate depends on the court's view of the effect of confirmation on property of the Chapter 13 estate. Some courts view the wages in the hands of the Chapter 13 trustee as property of the Chapter 13 estate; to others, these funds are property of the debtor. Judicial views of the status of other pre- and post-petition property are similarly at odds.

The statutory waters become muddied when section 1326(a)(2) of the Bankruptcy Code is considered alongside section 348(a). Section 348(a) provides in relevant part:

Conversion of a case from a case under one chapter of this

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126. Id. § 1306(a). See supra note 4.
127. 11 U.S.C. § 541(a)(6). The only post-petition assets acquired by the debtor after Chapter 7 case commencement that are included in the Chapter 7 estate are interests in property that would have been property of the estate if they had been interests of the debtor in property on the date the petition was filed and that the debtor acquired or became entitled to acquire within 180 days thereafter
(a) by bequest, devise or inheritance;
(b) as a result of a property settlement agreement with the debtor's spouse, or
of an interlocutory or final divorce decree; or
(c) as a beneficiary of a life insurance policy or of a death benefit plan.
Id. § 541(a)(5). See supra note 3.
128. Part I of this Article explored the various views articulated by the courts regarding the status of such property after confirmation.
129. See supra notes 40-117 and accompanying text.
130. See supra notes 40-117 and accompanying text.
title to a case under another chapter of this title constitutes an order for relief under the chapter to which the case is converted, but . . . does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief.\textsuperscript{132}

With three exceptions not relevant here, the statute provides that the original Chapter 13 filing date continues to govern in the Chapter 7 case. However, it is less explicit about questions such as whether property of the estate in the Chapter 7 case should be re-analyzed as though the Chapter 13 case were originally filed as a Chapter 7 case.

Finally, section 103(h) of the Bankruptcy Code provides that "Chapter 13 of this title applies only in a case under such chapter."\textsuperscript{133} This language clearly suggests that the sweeping effects of section 1306(a) are inoperative after conversion of a Chapter 13 case to a case under Chapter 7, such that, for example, wages earned after conversion to Chapter 7 are clearly not property of the Chapter 7 estate.\textsuperscript{134} Unfortunately, section 103(h) is less explicit regarding such matters as the status of wages earned after the original Chapter 13 case was filed but before conversion of the case as property of the Chapter 7 estate.\textsuperscript{135}

The ultimate task in cases involving post-petition wages is easily stated: to distribute the wages to the person or persons with the best claim to the funds held by the Chapter 13 trustee. Determining who has the best claim is not as simple. Where post-petition wages are held by the Chapter 13 trustee after conversion, some courts have concluded that the funds are not property of the Chapter 7 estate and must be returned to the debtor. Although in agreement with the proposition that such wages are not property of the Chapter 7 estate, other courts order the trustee to distribute these funds to Chapter 13 creditors pursuant to the terms of the confirmed plan.\textsuperscript{136} Still other courts have concluded that both the debtor and the Chapter 7 trustee have valid claims to the funds because they are property of the Chapter 7 estate and are subject to the debtor's exemption claims.\textsuperscript{137} Finally, some courts do not allow the debtor to claim any part of the

\textsuperscript{132} Id. § 348(a).
\textsuperscript{133} Id. § 103(h).
\textsuperscript{134} Id. § 1306(a). See supra note 4.
\textsuperscript{135} 11 U.S.C. § 103(h).
\textsuperscript{137} In re Wanderlich, 36 B.R. 710, 715 (Bankr. W.D.N.Y. 1984) (stating that upon conversion, post-petition, preconfirmation property of a Chapter 13 debtor is property of Chapter 7 estate); In re Richardson, 20 B.R. 490, 492 (Bankr. W.D.N.Y. 1982) (noting that a debtor can keep undistributed wages).
funds as exempt. 138

Not all cases involve funds (presumably post-petition wages) in the Chapter 13 trustee's hands prior to plan confirmation. Occasionally, the post-petition asset is in the debtor's hands at the time of case conversion. For example, if the asset is one which the debtor becomes entitled to acquire by inheritance, devise, or bequest more than 180 days after the petition was filed, it is clear that the asset would not be property of the estate if the case originally had been commenced as a Chapter 7 case. 139 It is also clear that at least until conversion or dismissal of an unconfirmed Chapter 13 case, the asset is property of the Chapter 13 estate. 140 As Part I of this Article discussed, the status of post-petition and pre-petition property after confirmation is less clear. 141 Section 1326(a)(2) typically does not apply to these cases because, presumably, the post-petition asset has not been devoted to plan payments. 142 Thus, there are two potential outcomes where competing claims are made to such assets. First, the debtor may have the greatest claim to the asset on the ground that it is not property of the subsequent Chapter 7 estate. 143 Second, turnover to the Chapter 7 trustee might be ordered on the ground that such assets are property of the Chapter 7 estate. 144 Once again, the cases disagree regarding the debtor's right to claim such property as exempt. 145

In reaching these disparate results, the courts have developed and utilized equally disparate theories concerning the effect on pre-

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138. See e.g., Resendez v. Lindquist, 691 F.2d 397, 399 (8th Cir. 1982) (noting that undistributed funds become part of Chapter 7 estate).
141. See supra notes 40-117 and accompanying text.
142. 11 U.S.C. § 1326(a)(2). Section 1326(a) provides:
(1) Unless the court orders otherwise, the debtor shall commence making the payments proposed by a plan within 30 days after the plan is filed.
(2) A payment made under this subsection shall be retained by the trustee until confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan. If a plan is not confirmed, the trustee shall return any such payment to the debtor, after deducting any unpaid claim allowed under section 503(b) of this title.

Id.

143. See Arkison v. Swift (In re Swift), 81 B.R. 621, 623 (W.D. Wash. 1987) (stating that undistributed wages received by Chapter 13 trustee do not become part of Chapter 7 estate); In re Lennon, 65 B.R. 130, 138 (Bankr. N.D. Ga. 1986) (noting that undistributed payments made to Chapter 13 trustee never become property of Chapter 7 estate and must be returned to debtor).
144. See In re Schmetz, 114 B.R. 607, 612 (Bankr. N.D. Ind. 1990) (stating that undistributed payments become property of Chapter 7 estate).
145. Compare In re Lindberg, 735 F.2d 1087 (8th Cir. 1989) (stating that exemptions may be claimed as of date of conversion) with Resendez v. Lindquist, 691 F.2d 397 (8th Cir. 1982) (limiting debtor to exemptions originally claimed in Chapter 13 case).
and post-petition property of converting a Chapter 13 case to Chapter 7. The next section of the Article details these theories and the results the courts reach under each theory.

B. THE RETROACTIVE REASSESSMENT OF PROPERTY OF THE ESTATE APPROACH

This section of the Article analyzes cases holding that post-petition property held by either the Chapter 13 trustee or the debtor at the time of conversion is not property of the subsequent Chapter 7 estate.\(^{146}\)

In *In re Waugh*,\(^{147}\) the debtors sued to recover post-petition wages that the Chapter 13 trustee distributed after the order converting the case to Chapter 7 was entered.\(^{148}\) The court held that post-petition wages are not property of the Chapter 7 estate because section 348(a) requires property of the estate in the converted Chapter 7 estate to be analyzed as though the case were originally filed as a Chapter 7 case.\(^{149}\) Because these assets (post-petition wages devoted to the plan) would not have been property of the estate had the case originally been filed as a Chapter 7 case, they are not property of the estate upon conversion from Chapter 13 to Chapter 7.\(^ {150}\)

A great many courts agree that the conversion of a confirmed as well as an unconfirmed Chapter 13 case to Chapter 7 requires the issue of property of the Chapter 7 estate to be analyzed as though the case were originally filed under Chapter 7.\(^{151}\) Because most post-pe-

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146. As we will see, a holding that post-petition assets in the hands of the Chapter 13 trustee are not property of the estate in the converted Chapter 7 does not necessarily mean the assets (usually post-petition wages) will be returned to the debtor. On the contrary, many courts hold that 11 U.S.C. § 1326(a)(2) requires that the funds be distributed by the Chapter 13 trustee to Chapter 13 creditors pursuant to the terms of the confirmed plan. *See infra* text accompanying notes 173-92.


149. *Id.* at 397-98; 11 U.S.C. § 348(a).


151. *See, e.g.*, *In re Gorski*, 85 B.R. 155, 156 (Bankr. M.D. Fla. 1988) (observing that the Chapter 7 estate is determined by date of Chapter 13 filing); *Arkison v. Swift (In re Swift)*, 81 B.R. 621, 623 (Bankr. W.D. Wash. 1987) (determining Chapter 7 estate based on date of chapter 13 filing); *In re Redick*, 81 B.R. 881, 884 (Bankr. E.D. Mich. 1987) (stating that after conversion, Chapter 7 case deemed to have been commenced on date of Chapter 13 commencement); *McCullough v. Luna (In re Luna)*, 73 B.R. 999, 1004 (N.D. Ill. 1987) (noting that Chapter 7 petition was deemed to have been filed when Chapter 13 petition filed); *In re Lennon*, 65 B.R. 130, 135 (Bankr. N.D. Ga. 1986) (holding that Chapter 7 estate relates back to Chapter 13 estate); *In re Shattuck*, 62 B.R. 14, 15-16 (Bankr. D.N.H. 1986) (stating that it is not fair to penalize debtor by distributing monies which would have been after-acquired had he originally filed Chapter 7); *In re Lepper*, 58 B.R. 896, 902 (Bankr. D. Md. 1986) (holding that the date of Chapter 13 filing is date for determining property of Chapter 7 estate); *In re Peters*, 44 B.R. 68, 71 (Bankr. M.D. Tenn. 1984) (treating date of commencement of Chapter 13 estate
tition assets, including post-petition wages, are not property of the estate in a Chapter 7 case, it follows that such wages awaiting distribution to Chapter 13 creditors by the Chapter 13 trustee (along with any other post-petition assets in the hands of the debtor) are not property of the Chapter 7 estate after conversion from a Chapter 13 case. In these cases, the language of section 348(a) (requiring that the date of the filing of the petition, the commencement of the case, and order for relief remain unchanged by the fact of a later conversion) dictates that the issue of property of the estate be visited anew and from a Chapter 7 perspective. Thus, the provisions of the Bankruptcy Code enlarging the Chapter 13 estate beyond the scope of the estate in Chapter 7 cases become, in effect, retroactively inoperative upon conversion to Chapter 7.

This retroactive reassessment of the scope of property of the estate is arguably required in light of section 103(h), providing that the provisions of Chapter 13 apply only in a Chapter 13 case. When a case is converted to Chapter 7, it is arguably inappropriate to assess the question of property of the estate in light of the provisions of a chapter no longer applicable to the case.

Under this approach, the property of the Chapter 7 estate is limited in the main to assets in which the debtor had an interest on the date the Chapter 13 case was originally commenced. Thus, if both pre- and post-petition property remained property of the Chapter 13 estate even after plan confirmation, as some courts have held, only the post-petition property of the estate (for the most part) would retroactively lose its status as such upon conversion to Chapter 7. On the other hand, if confirmation effects a metamorphosis and transforms some or all of the pre- and post-petition estate property into property of the debtor, then conversion would require reclassifying "property of the debtor" into two principal categories: those assets in which the debtor had an interest when the Chapter 13 was originally filed and those assets the debtor acquired subsequently which would not be included in an originally commenced Chapter 7 case. The for-

as date of commencement of Chapter 7 estate); In re Bullock, 41 B.R. 637, 639 (Bankr. E.D. Pa. 1984) (stating that the date of conversion relates back to original order for relief); In re McFadden, 37 B.R. 520, 521 (Bankr. M.D. Penn. 1984) (noting that conversion relates back to original filing of Chapter 13); Hannan v. Kirschenbaum (In re Hannan), 24 B.R. 691 (Bankr. E.D.N.Y. 1982) (noting that property of Chapter 7 estate is determined by date of Chapter 13 filing).

152. See supra note 151.


154. Id. § 1306(a). See supra note 4.


156. See supra notes 82-98 and accompanying text.
mer group is property of the subsequent Chapter 7 estate; the latter group is not.

At least one court has observed that even if section 1327(b) is read as transforming property of the Chapter 13 estate into property of the debtor, converting a confirmed Chapter 13 case to Chapter 7 will not allow the debtor to successfully immunize pre-petition “property of the debtor” from creditors holding claims in the subsequent Chapter 7. Upon conversion, section 1327(b), like section 1306(a), would be rendered retroactively inapplicable by virtue of sections 348(a) and 103(h). Property of the Chapter 7 estate then is reassessed based on the assumption that the case was originally filed under Chapter 7. Only the debtor's interests in property as of the original Chapter 13 filing date will be characterized as property of the Chapter 7 estate.

Under this theory, section 348(a) is read literally with the result that wages and other post-petition property that, at least until confirmation, were property of the estate are retroactively withdrawn from the estate when the case is converted to Chapter 7. Some courts adopting this view of property of the estate in the converted case have argued that it is consistent with Congress's intent to encourage debtors to file for Chapter 13 relief rather than Chapter 7 relief. Section 348(a) is cited as a legislative incentive to debtors to opt for Chapter 13 relief because, by treating the date of commencement of the Chapter 13 case as the date of commencement of the Chapter 7 case after conversion, the debtor is not penalized for originally pursuing a Chapter 13 case. If he or she is unable to successfully complete a Chapter 13 plan, the debtor is treated as though the case were originally filed under Chapter 7.

Depending on the disposition of the post-petition property, these courts sometimes cite the Bankruptcy Code's legislative history as

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158. 11 U.S.C. §§ 103(h), 348(a), 1306(a), 1327(b). See supra notes 4, 7.


160. See, e.g., In re Boggs, 137 B.R. 408, 411 (Bankr. W.D. Wash. 1992) (observing the congressional policy of encouraging debtors to pay debts furthered if debtors are not penalized for filing Chapter 13); Luna, 73 B.R. at 1003 (wanting to encourage debtors to file Chapter 13); Lepper, 58 B.R. at 902 (noting that the date of filing Chapter 13 estate is date of determining Chapter 7 estate); Lennon, 65 B.R. at 135 (stating that, upon conversion, Chapter 7 estate relates back to Chapter 13 filing); Shattuck, 62 B.R. at 18 (wanting to encourage debtors to re-pay debts by filing Chapter 13); Peters, 44 B.R. at 71 (holding that the debtor was not to be penalized for originally choosing Chapter 13 if, after conversion, Chapter 7 estate relates back to Chapter 13 filing).
support for this policy argument.\textsuperscript{161} An examination of the legislative history, however, reveals that section 348(a) is not cited as a specific example of the statutory incentives deliberately provided by Congress to encourage financial rehabilitation under Chapter 13.\textsuperscript{162}

In a number of cases in which courts have held that post-petition property is not property of the estate upon conversion of a confirmed Chapter 13 case to Chapter 7, the courts have ordered post-petition property not already in the debtor's possession returned to the debtor.\textsuperscript{163} For example, in \textit{In re Luna},\textsuperscript{164} the Chapter 13 trustee distributed funds to creditors after the debtor converted her confirmed Chapter 13 case to Chapter 7.\textsuperscript{165} The trustee argued that Chapter 13 plan confirmation gave to creditors a vested right in the post-petition wages in the trustee's hands even after conversion to Chapter 7.\textsuperscript{166} However, the court in \textit{Luna} could not reconcile the trustee's position with section 348(e), which terminates the trustee's authority upon conversion of the Chapter 13 case to Chapter 7; therefore, the court held that "a creditor's right to payment vests not at the time of confirmation, but at the time of distribution by a Trustee authorized to act under the Code."\textsuperscript{167} Because the Chapter 13 creditors were not entitled to the assets, the court next addressed the question whether the debtor or the Chapter 7 trustee was entitled to the assets. Holding that section 348(a) required the issue of property of the Chapter 7 estate to be analyzed as if the case were originally filed as a Chapter 7 on the date the Chapter 13 petition was filed, the court in \textit{Luna} concluded that the debtor's post-petition wages were not property of the Chapter 7 estate and ordered the Chapter 13 trustee to return them to the debtor.\textsuperscript{168}

The return of post-petition wages to the debtor, as well as the debtor's retention of non-wage post-petition property, generates almost no debate in the unconfirmed cases holding that post-petition property is not property of the estate in the subsequent Chapter 7

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\textsuperscript{161} \textit{See}, \textit{e.g.}, \textit{Luna}, 73 B.R. at 1003 (observing that legislative history revealed clear congressional intent to encourage debtors to file Chapter 13); \textit{Lepper}, 58 B.R. at 902 (legislative history encourages filing Chapter 13 over Chapter 7); \textit{Peters}, 44 B.R. at 71 (noting that the legislative history shows that Congress encouraged debtors to file Chapter 7); \textit{McFadden}, 37 B.R. at 522 (returning post-petition wages to the debtor who originally filed Chapter 13).


\textsuperscript{163} \textit{See infra} notes 164-71 and accompanying text.

\textsuperscript{164} 73 B.R. 999 (N.D. Ill. 1987).

\textsuperscript{165} \textit{Luna v. Luna}, (\textit{In re Luna}); 73 B.R. 999, 1001 (N.D. Ill. 1987).

\textsuperscript{166} \textit{Id}.


case.\textsuperscript{169} This is probably attributable in part to the fact that section 1326(a)(2) directs the Chapter 13 trustee to return post-petition wages to the debtor if a plan is not confirmed and in part to the very fact that these are cases in which plans have not been confirmed.\textsuperscript{170} Therefore, comparatively little time has elapsed between case commencement and case conversion, and the resulting prejudice to Chapter 13 unsecured creditors is perhaps comparatively small. In addition, there is no real factual or statutory basis on which to build an argument that Chapter 13 unsecured creditors have a right to post-petition wages either through voluntary payment to the trustee or plan confirmation.\textsuperscript{171}

However, not all of the confirmed cases which adopt this approach to property of the estate after case conversion agree that post-petition property in the hands of the Chapter 13 trustee at the time of conversion should necessarily be turned over to the debtor simply because it is not property of the Chapter 7 estate.\textsuperscript{172} For example, the court in \textit{Waugh} did not order return of the post-petition wages to the debtors. Rather, the court ruled that "[section] 1326 treats property received by the chapter 13 trustee pursuant to a confirmed chapter 13 plan as a trust for beneficiaries of the plan." The court also held that although conversion "terminates the chapter 13 estate and trust, . . . it does not revoke what was lawfully ordered under the

\textsuperscript{169} Gorski, 85 B.R. at 157 (noting that the Bankruptcy Code requires trustee to return post-petition wages to debtor when Chapter 13 plan is not confirmed); Swift, 81 B.R. at 622-23 (noting that wages returned to debtor where unconfirmed case was converted to Chapter 7); Hannan, 24 B.R. at 692-93 (awarding proceeds of post-petition negligence cause of action to debtor). The 1984 Amendments were not applicable in several unconfirmed cases in which post-petition property was held not to be property of the subsequent Chapter 7 and was properly returned to the debtor. See Lennon, 65 B.R. at 138 (returning post-petition wages to debtor); Shattuck, 62 B.R. at 16 (returning post-petition wages to debtor); Hannan, 24 B.R. at 693 (awarding post-petition wages and other post-petition assets to debtor).

\textsuperscript{170} 11 U.S.C. § 1326(a)(2).

\textsuperscript{171} However, an argument can be made, based on § 1326(a)(2), that part of the property should be diverted to secured creditors (who receive no payment on account of their claims pending plan confirmation) as administrative expense claims under section 503(b). In the event of conversion prior to plan confirmation, § 1326(a)(2) directs the trustee to return post-petition wages to the debtor after "deducting any unpaid claim allowed under section 503(b) of this title." 11 U.S.C. § 1326(a)(2). See supra note 142. Several courts have held that, in such circumstances, secured creditors have administrative expense claims because the adequate protection provided them in the form of the plan's proposed treatment of their claims was inadequate. In re Schmelz, 114 B.R. 607, 612 (Bankr. N.D. Ind. 1990); Ford Motor Credit Co. v. Holly (In re Holly), 109 B.R. 524, 525 (Bankr. S.D. Ga. 1989). Under § 507(b), a creditor has an administrative expense claim under § 503(b) with priority over all other expenses of administration. 11 U.S.C. §§ 503(b), 507(a)(1), 507(b).

\textsuperscript{172} Id. §§ 103(h), 348(a). For a discussion of cases in which the Chapter 13 trustee has been ordered to turnover post-petition wages in the Chapter 13 trustee's possession to the debtor, see supra notes 164-71 and accompanying text.
Accordingly, the Chapter 13 trustee properly distributed the assets according to the terms of the confirmed plan.174

The distribution to Chapter 13 creditors by the court in Waugh apparently hinged on the applicability of the 1984 amendment to section 1326(a)(2), directing the trustee to disburse funds in his or her possession to creditors pursuant to the terms of a confirmed plan.175 This appears to be critical in several other reported decisions as well.176

Although the court in In re Redick177 agreed with the analysis and decision of the court in Waugh that the debtor's post-petition wages are not property of the estate upon conversion of a confirmed Chapter 13 case to Chapter 7, the court in Redick did not rely on section 1326(a)(2) in justifying a distribution of these monies to Chapter 13 creditors.178 In Redick, nineteen cases were consolidated.179 The amended version of section 1326(a)(2) did not apply to fifteen of these cases because they were filed before the effective date of the 1984 Amendments.180

In each case, after a Chapter 13 plan had been confirmed, the case was converted to Chapter 7. In each case, the Chapter 13 trustee held undistributed funds collected from post-petition wages for distribution to creditors under the plans. The common issue was whether

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174. Id.
176. See In re O'Quinn, 143 B.R. 408, 410-11 (Bankr. S.D. Miss. 1992); In re Gallo- way, 134 B.R. 602, 603 (Bankr. W.D. Ky. 1991); In re Halpenny, 125 B.R. 814, 816 (Bankr. D. Haw. 1991); In re Miledge, 94 B.R. 218, 220 (Bankr. M.D. Ga. 1988); Ledford v. Burns (In re Burns), 90 B.R. 301, 303 (Bankr. S.D. Ohio 1988). Although none of these courts overtly declared §§ 541 and 1306 irrelevant, none of these courts expressly analyzed those statutes when determining whether the Chapter 7 trustee, the debtor, or the Chapter 13 creditors were entitled to the post-petition wages in the Chapter 13 trustee's hands when the cases were converted to Chapter 7. Instead, each relied on § 1326 and held that pursuant to that section the creditor's rights to payment vested on receipt of the payments by the Chapter 13 trustee. Other courts go even further and suggest that the issue is completely controlled by the fact of plan confirmation. In re Leach, 101 B.R. 710, 713 (Bankr. E.D. Okla. 1989) (noting that the Bankruptcy Code imposes a right of a creditor to expect payment pursuant to a confirmed Chapter 12 plan regardless of when such payments are made to the Chapter 12 trustee, so long as they were earned by the debtor pre-conversion). See also In re de Vos, 76 B.R. 157, 159 n.9 (N.D. Cal. 1987) (returning post-petition wages to debtor on conversion from Chapter 13 to Chapter 7, but noting that had the 1984 amendment to 11 U.S.C. § 1326 applied to the case, the court would have ordered wages distributed to Chapter 13 creditors).
179. Redick, 81 B.R. at 882.
the undistributed funds should be returned to the debtors, turned over to the Chapter 7 trustees, or distributed to Chapter 13 creditors according to the confirmed plans. 181

The court in Redick first determined that the plain meaning of sections 348(a), 541(a), and 1306(a) requires the original Chapter 13 filing date to control the determination of the scope of property of the subsequent Chapter 7 estate. 182 Accordingly, the court held that the post-petition wages in the hands of the various trustees were not property of the estate when the cases converted to Chapter 7. 183 The court observed next that the Chapter 13 trustee's argument that "returning undistributed wages to the debtor instead of his or her creditors is inequitable is far from frivolous," and that there was "no compelling reason why debtors should receive funds that, in all probability, they never knew were theirs, and which played no part in their decision to convert to Chapter 7." 184 The outcome settled, the court then fashioned a theory to accommodate the disbursement of the funds held by the Chapter 13 trustee to Chapter 13 creditors. Noting that case law conflicts regarding the point at which creditors' rights vest in undistributed funds in the Chapter 13 trustee's possession and that section 348(e) of the Bankruptcy Code arguably divests the Chapter 13 trustee of the authority to distribute funds to Chapter 13 creditors once conversion has occurred, the court in Redick held that as custodian of the funds for the Chapter 13 creditors, the Chapter 13 trustee nevertheless has the authority to distribute the funds to creditors even after conversion of the case. 185 The court reasoned that the very day the debtor delivered the wages to the trustee, creditors could have obtained an order compelling the trustee to distribute the wages to them to avoid just this situation. 186 Consequently, once the debtor has voluntarily parted with his or her wages and delivered them to the custody of the trustee, the unsecured Chapter 13 creditors have a vested right to receive the payments promised in the plan. 187 Sections 1306(b) and 1327(b) provided further support because:

182. Id. at 884; 11 U.S.C. §§ 348(a), 541(a), 1306(a). See supra notes 3, 4.
183. Redick, 81 B.R. at 887.
184. Id. at 885.
185. Id. at 885-87; 11 U.S.C. § 348(e).
186. Redick, 81 B.R. at 887.
187. Id.
pursuant to a confirmed plan. It is logical to infer that Congress intended that any payments actually made to the trustee pursuant to a confirmed plan would be placed in the trustee’s possession and vested in the creditors provided for by such plan. The creditors’ right to payment matures at the time each payment is made to the trustee pursuant to the confirmed plan.188

Thus, unlike the decision in Waugh, the decision in Redick to distribute the post-petition wages to the Chapter 13 creditors is based primarily on the fact that the funds were voluntarily paid by the debtor to the Chapter 13 trustee pursuant to a confirmed plan rather than on the applicability and language of section 1326(a)(2) or on the fact of plan confirmation alone.189

Distributing the assets to Chapter 13 creditors is sometimes justified on grounds of fairness to pre-petition unsecured creditors. Chapter 13 cases, it is argued, sometimes proceed “for some time without any payments being made to general unsecured creditors. Eventually, upon conversion, these creditors must share an estate which has not grown — or worse, depreciated — during the course of the Chapter 13 proceeding, and must share that ‘pie’ with more creditors.”190 The possibility that the pre-petition creditors must divide the pie with more creditors results because under section 348(d) claims which arise between the time the case is filed under Chapter 13 and converted to Chapter 7 are treated as if they arose before the Chapter 13 case was filed.191 The asset pie available for distribution to creditors in the Chapter 7 case may be smaller than if the case had originally been filed under Chapter 7 not only because of depreciation before case conversion, but also because the debtor may have dis-

188. Id. at 885 (quoting Lennon, 65 B.R. at 136). The decisions in both Redick and Lennon thus raise the question whether in the absence of a conversion to Chapter 7, a Chapter 13 creditor could prevent one of the debtor’s post-petition creditors from garnishing funds held by the trustee on the grounds that the Chapter 13 creditors hold title to the funds, not the trustee. This argument may not be necessary, however, if post-petition property devoted to the plan remains property of the estate until conversion because the automatic stay prevents pre- or post-petition creditors from enforcing claims against property of the estate. 11 U.S.C. § 362(a)(2)-(4), 1306(b), 1327(b). See supra notes 6, 7, 9.

189. 11 U.S.C. § 1326(a)(2). Cases such as In re Leach, 101 B.R. 710, 712-13 (Bankr. E.D. Okla. 1989), and Lennon, 65 B.R. at 136-38, stress the fact that plan confirmation and the status of the wages as post-petition wages (rather than payment by the debtor to the Chapter 13 trustee or § 1326(a)(2) itself) justifies distributions to Chapter 13 creditors on conversion to Chapter 7. Some cases stress both the fact of confirmation and voluntary payment to the trustee as the basis for distributing the funds to Chapter 13 creditors. In re Radebaugh, 125 B.R. 797, 798 (Bankr. W.D. Mo. 1991). See supra note 142.

190. Redick, 81 B.R. at 885.

posed of assets in the course of the Chapter 13 case.\textsuperscript{192}

Other courts, such as the court in \textit{In re Boggs},\textsuperscript{193} in justifying disbursement of post-petition wages to the debtor, have rejected this argument by observing that:

\[\text{since § 1325(a) requires a finding that the holder of each allowed unsecured claim will receive not less than the holder would receive under Chapter 7 to confirm a plan, it is not self-evident that the dilution effect of treating pre-conversion creditors as pre-petition creditors in the converted Chapter 7 necessarily inflicts a net loss on actual pre-petition creditors. Those creditors have had the benefit of distribution from debtors' wage contributions, which would not have been available to them under Chapter 7.}\textsuperscript{194}

Furthermore, not all courts agree that Congress intended that section 1326(a)(2) be applied in a conversion context.\textsuperscript{195} Some courts contend that Congress merely intended to specify "when plan payments are to begin, the disposition of funds in the event no plan is confirmed, and who is to handle the funds."\textsuperscript{196}

C. \textbf{Post-Petition Property as Property of the Chapter 7 Estate}

A number of courts have held that property acquired by the debtor after the Chapter 13 case was filed is property of the subsequent Chapter 7 estate.\textsuperscript{197} However, this same conclusion can be reached by using very different theories: the date of conversion theory and the source of continuity theory.

1. \textit{The Date of Conversion Theory}

In a somewhat confused line of cases, the United States Court of Appeals for the Eighth Circuit has held that upon conversion of a Chapter 13 case to Chapter 7, property of the estate in the Chapter 7 case is determined as of the date of case conversion.\textsuperscript{198} In other words, section 541(a) questions are redetermined "as of the commencement" of the converted Chapter 7 case rather than as of the

\textsuperscript{192} \textit{Redick}, 81 B.R. at 885; \textit{Lepper}, 58 B.R. at 901 n.6.
\textsuperscript{193} \textit{Boggs}, 137 B.R. at 410.
\textsuperscript{194} \textit{Boggs}, 137 B.R. at 410. Only in a few of the older decisions do the courts appear willing to require pre-petition creditors who have received payments through the plan to disgorge those payments and return them to the debtor once the case is converted to Chapter 7. \textit{E.g.}, \textit{Bullock}, 41 B.R. at 640.
\textsuperscript{195} \textit{Boggs}, 137 B.R. at 410; 11 U.S.C. § 1326(a)(2).
\textsuperscript{196} \textit{Boggs}, 137 B.R. at 410.
\textsuperscript{197} \textit{See infra} notes 198-286 and accompanying text.
\textsuperscript{198} \textit{See Armstrong v. Lindberg (In re Lindberg)}, 735 F.2d 1087, 1090-91 (8th Cir.), \textit{cert. denied}, 469 U.S. 1073 (1984); \textit{Resendez v. Lindquist}, 691 F.2d 397, 400 (8th Cir. 1983).
commencement of the original Chapter 13 case.\textsuperscript{199} Thus, "all legal or equitable interests of the debtor in property" as of the commencement of the converted case (the date of conversion) are property of the Chapter 7 estate.\textsuperscript{200} As a result, any pre-Chapter 13 petition property as well as all post-Chapter 13 petition property in which the debtor has an interest on the date of conversion is property of the estate.\textsuperscript{201}

In \textit{In re Lindberg},\textsuperscript{202} after conversion of their Chapter 13 case to Chapter 7, the debtors sought to amend their exemption schedule to exempt a farm rather than the home that they originally claimed as exempt in the Chapter 13 case.\textsuperscript{203} Because the debtors owned both properties at the time the original Chapter 13 case was commenced, arguably the only real issue facing the court in \textit{Lindberg} was whether exemption schedules may be amended upon conversion to Chapter 7.\textsuperscript{204} Nevertheless, the court addressed both questions and held that only if the conversion date "controls what is property of the estate and what exemptions may be claimed can the debtor make full use of exemption laws."\textsuperscript{205} The court's rationale for the first of its holdings — that property of the estate is determined as of the date of conversion — consists merely of the questionable observation that the "bankruptcy courts are in general agreement that in a case converted from chapter 13 to chapter 7, the property of the estate consists of all property in which the debtor has an interest on the date of conversion."\textsuperscript{206} The balance of the opinion is devoted to justifying the decision that the debtor may amend the claim of exemptions upon case conversion based on the fresh start policy and the equities of the case.\textsuperscript{207}

Interestingly, the court in \textit{Lindberg} did not cite an earlier Eighth

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\item \textsuperscript{199} 11 U.S.C. § 541(a). \textit{See supra} notes 3, 146-96 and accompanying text.
\item \textsuperscript{200} 11 U.S.C. § 541(a)(1).
\item \textsuperscript{201} \textit{Lindberg}, 735 F.2d at 1090.
\item \textsuperscript{202} 735 F.2d 1087 (8th Cir. 1984).
\item \textsuperscript{203} \textit{Linberg}, 735 F.2d at 1088.
\item \textsuperscript{204} Because both properties can be characterized as pre-Chapter 13 assets, they would have been property of the Chapter 7 estate even under the theory that § 541(a) issues are redetermined as of the Chapter 13 filing date, but as if the case were originally commenced as a Chapter 7 case. \textit{See supra} notes 146-96 and accompanying text. \textit{But see Stinson}, 27 B.R. at 20 (suggesting that unless date of conversion is chosen as controlling issue of property of Chapter 7 estate, debtor would be revested with title to nonexempt property of the Chapter 13 estate and could thus immunize it from the claims of creditors by converting the case to Chapter 7). For a case refuting these concerns, \textit{see Lepper}, 58 B.R. 896, 902 (Bankr. D. Md. 1986).
\item \textsuperscript{205} \textit{Lindberg}, 735 F.2d at 1090.
\item \textsuperscript{206} \textit{Id}.
\item \textsuperscript{207} \textit{Id.} at 1090-91. A refusal to allow an amended claim of exemptions was viewed as in conflict with one of the Bankruptcy Code's primary goals — providing the honest debtor with a fresh start through claiming assets as exempt. \textit{Id.} at 1090. The equities of the case compelling the adoption of the date of conversion rule for claiming exemp-
Circuit decision, *Resendez v. Lindquist*, which dealt with the identical issue — whether the date of conversion or the date of the original Chapter 13 petition governed the debtor's exemption claims after case conversion. In *Resendez*, the Eighth Circuit held that section 542(a) required the Chapter 13 trustee to turnover post-petition wages in his hands to the Chapter 7 trustee once the debtor converted the case to Chapter 7. Although the court's observation that "[i]t is also established that when there is a conversion, the debtors are deemed to have filed a Chapter 7 case at the time the Chapter 13 case was filed" suggests that the post-petition assets at issue would not be property of the Chapter 7 estate, the court in *Resendez* assumed without explanation or analysis that the assets were properly included in the Chapter 7 estate. In addition, the court held that because the debtor had voluntarily made the wage payments to the trustee, "it would be unfair to permit the monies to be now claimed as exempt under Chapter 7." In contrast to *Lindberg*, the *Resendez* decision thus confusingly holds that property of the estate in a converted Chapter 7 is redetermined as of the date the Chapter 13 case was originally filed. This suggests that post-petition property is not property of the Chapter 7 estate. However, the court in *Resendez* simultaneously held that the post-petition wages held by the Chapter 13 trustee must be turned over to the Chapter 7 trustee as property of the Chapter 7 estate and that the debtor's claim of exemptions could not be amended upon case conversion. If oversight led the court in *Lindberg* and a Nebraska bankruptcy court in a later decision, *In re Tworek*, to overlook *Resendez* as controlling circuit court authority on the effect of conversion on property of the estate and exemption claims, it was a happy accident indeed.

At issue in *Tworek* was an inheritance received by the debtor

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208. 691 F.2d 397 (8th Cir. 1982).
209. *Resendez v. Lindquist*, 691 F.2d 397, 398-99 (8th Cir. 1982). In fact, the *Lindberg* panel stated, "The question of whether the date of filing the chapter 13 petition or the date of conversion to chapter 7 determines what exemptions may be claimed has not been answered by any of the circuit or district courts." *Lindberg*, 735 F.2d at 1088.
210. *Resendez*, 691 F.2d at 399. See 11 U.S.C. § 542(a). That section provides in relevant part: "[A]n entity other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property." *Id.* Section 363 allows the trustee to use, sell, or lease property of the estate. 11 U.S.C. § 363(b)(1), (c)(1).
211. *Resendez*, 691 F.2d at 399. For another plausible interpretation of this statement, see infra notes 229-31 and accompanying text.
212. *Resendez*, 691 F.2d at 399.
213. *Id.*
Three and one-half years after the Chapter 13 petition was filed.\footnote{215} Seventeen months later, the debtor converted the case from Chapter 13 to Chapter 7. The Chapter 7 trustee claimed the inheritance as part of the Chapter 7 estate. The debtor argued that section 348(a) made the five-year old Chapter 13 filing date the effective date of the Chapter 7 case.\footnote{216} As a result, the inheritance could not be included in the Chapter 7 estate because more than 180 days had passed between filing and entitlement to the inheritance.\footnote{217}

In concluding that the inheritance became property of the Chapter 7 estate upon conversion from Chapter 13, the court in \textit{Tworek} relied on \textit{Lindberg} and adopted the date of conversion rule in determining the scope of property of the Chapter 7 estate.\footnote{218} The court in \textit{Tworek} held that the Chapter 7 estate “include[d] all property which was acquired by the debtor during the pendency of the predecessor Chapter 13 case” and that the inheritance was thus property of the Chapter 7 estate.\footnote{219}

The court in \textit{Tworek} attempted to reconcile its own decision and that of the Eighth Circuit in \textit{Lindberg} with another Eighth Circuit decision, \textit{Koch v. Myrvold}.\footnote{220} In \textit{Myrvold}, a Chapter 11 case converted to Chapter 7, the debtor became entitled to an inheritance more than 180 days after the Chapter 11 petition was filed.\footnote{221} In contrast to its decision in \textit{Lindberg}, the Eighth Circuit rejected the date of conversion as the basis for determining the property properly includable in the subsequent Chapter 7 estate and held that the inheritance was not property of the Chapter 7 estate.\footnote{222}

In so holding, the Eighth Circuit did not elaborate; however, the bankruptcy court in \textit{Myrvold} distinguished \textit{Lindberg} on the basis that there “is no provision in Chapter 11 comparable to § 1306 which expands the definition of estate property to include virtually all property acquired by a Chapter 13 debtor after commencement of the case but before conversion.”\footnote{223} The court stated, “Consequently, upon

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\item\footnote{215}{\textit{In re Tworek}, 107 B.R. 666, 666 (Bankr. D. Neb. 1989).}
\item\footnote{216}{\textit{Id.} at 666. See 11 U.S.C. § 348(a).}
\item\footnote{217}{\textit{Tworek}, 107 B.R. at 666. Under § 541(a)(5), property the debtor becomes entitled to acquire by bequest, inheritance, or devise within 180 days after the petition is filed is property of the estate. 11 U.S.C. § 541(a)(5). Property acquired in these ways after the 180 day post-petition period is not property of the estate in Chapter 7 or 11 cases but could be considered property of the estate in Chapter 12 or 13 cases because of the provisions of §§ 1207 and 1306. 11 U.S.C. §§ 1207, 1306.}
\item\footnote{218}{\textit{Tworek}, 107 B.R. at 667.}
\item\footnote{219}{\textit{Id.}}
\item\footnote{220}{784 F.2d 862 (8th Cir. 1986). See \textit{Tworek}, 107 B.R. at 667-68.}
\item\footnote{221}{\textit{Koch v. Myrvold}, 784 F.2d 862, 863 (8th Cir. 1986).}
\item\footnote{222}{\textit{Id.}}
\item\footnote{223}{\textit{Koch v. Myrvold (In re Myrvold)}, 44 B.R. 202, 204 (Bankr. D. Minn. 1984), aff’d, 784 F.2d 862 (8th Cir. 1986); see 11 U.S.C. § 1306. See supra notes 4, 6.}
\end{itemize}
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conversion of a case from Chapter 11 to 7, what constitutes property of the estate must be determined by § 541 in light of § 348(a).”224 Therefore, the inheritance at issue was never part of the Chapter 11 estate, and “[i]t did not become property of the estate by any other provision in § 541 after conversion either.”225

The bankruptcy court's decision in Myrvold thus suggests that Chapter 13 post-petition property is property of a converted Chapter 7 estate because it was once property of the estate in the Chapter 13 case. As a result, it is “property that the estate acquires after the commencement of the case” under section 541(a)(7).226 As such, the decision in Myrvold directly conflicts in several respects with the Eighth Circuit’s earlier decision in Lindberg. Under Lindberg, the date of conversion is the relevant date for analyzing the property of the Chapter 7 estate. Thus, all assets in which the debtor had a legal or equitable interest at conversion would be included in the Chapter 7 estate under section 541(a)(1).227 In a Chapter 11 conversion to Chapter 7 case, clearly post-Chapter 11 petition inheritance assets acquired under the circumstances in Myrvold would be analyzed as “interests of the debtor in property” as of the conversion date and, according to Lindberg, would be properly included in the Chapter 7 estate.228

The decision in Myrvold, however, may be consistent with Resendez. In Resendez, the Eighth Circuit observed that upon conversion, debtors are deemed to have filed a Chapter 7 case at the time the Chapter 13 case was filed and held that the debtor's post-petition wages were properly included in the Chapter 7 estate.229 Although it is perfectly possible that the court's holding is simply in direct conflict with its observation regarding the meaning of section 348(a), it is also possible that the court in Resendez interpreted section 348(a) such that section 1306(a) was allowed to operate up to the date of conversion.230 Under this theory, explored in Part II C.2 of this Article, all assets that were property of the Chapter 13 estate at the time of conversion become property of the estate.231 If so, the decision in Resendez and Myrvold are perfectly harmonious. Thus, it would be Lindberg that, although consistent in outcome, is not consistent with the rationales of either Resendez and Myrvold.

In attempting to reconcile Myrvold and Lindberg, the court in

224. Myrvold, 44 B.R. at 204-05.
225. Id. at 205.
229. Resendez, 691 F.2d at 399.
231. See infra notes 249-85 and accompanying text.
Tworek observed that unlike the inheritance in Myrvold, the inheritance at issue in Tworek was property of the Chapter 13 estate.\textsuperscript{232} Apparently recognizing that its characterization of the inheritance as property of the Chapter 13 estate directly contravened the Eighth Circuit's holding in Laughlin, the court in Tworek stated, "[T]hat case is not dispositive of the issue before the court, as property of a debtor's Chapter 7 estate after conversion from Chapter 13 . . . includes both property of the Chapter 13 estate and all property in which the debtor has an interest on the date of conversion."\textsuperscript{233} The court in Tworek did not further explain how, under the Lindberg date of conversion rule, property of the previous Chapter 13 estate (as opposed to property of the debtor on the date of conversion) becomes part of the Chapter 7 estate under section 541(a).\textsuperscript{234} The only potential statutory mechanism for accomplishing this is section 541(a)(7), which includes in the estate "[a]ny interest in property that the estate acquires after the commencement of the case."\textsuperscript{235} However, this section appears unable to sweep property of the Chapter 13 estate into the Chapter 7 estate because, under Lindberg, the date of the "commencement of the case" for section 541(a) purposes is deemed to be the date of conversion rather than the date the original Chapter 13 petition was filed.\textsuperscript{236} Consequently, only those interests in property that the estate acquires \textit{after the date of conversion} could become property of the Chapter 7 estate under this subsection of 541(a).\textsuperscript{237} As a result, the Tworek court's purported reconciliation of

\textsuperscript{232} Tworek, 107 B.R. at 667.

\textsuperscript{233} Id. (emphasis added) (quoting Lindberg, 735 F.2d at 1090). See Laughlin v. United States Internal Revenue Service, 912 F.2d 197 (8th Cir. 1990), cert. denied, 111 S. Ct. 1073 (1991) (noting that absent a plan provision to the contrary, plan confirmation transforms property of the estate to property of the debtor). At the time of the decision in Tworek, the Laughlin case had been decided only by the district court. See Laughlin v. United States Internal Revenue Service, 98 B.R. 494 (D. Neb. 1989). See supra notes 99-109 and accompanying text.

\textsuperscript{234} See Tworek, 107 B.R. at 667. See 11 U.S.C. § 541(a). Because § 541(a)(1) includes in the estate all interests of the debtor in property as of the "commencement of the case," and under Lindberg the case is viewed as commenced on the date of conversion to Chapter 7, the Lindberg date of conversion rule is compatible with the Laughlin holding that confirmation transforms property of the Chapter 13 estate into property of the debtor. Therefore, if a confirmed Chapter 13 case is subsequently converted to Chapter 7, all pre-petition and post-petition property of the debtor "is treated as part of the Chapter 7 estate." The tension between Laughlin and Lindberg begins to develop when one ponders the results in the conversion of an unconfirmed Chapter 13 case (in which presumably all property whether pre- or post-petition is property of the Chapter 13 estate) to Chapter 7. Unless the debtor is viewed as having a legal or equitable interest in this property on the date of conversion, some other provision of § 541(a) must be used to include this property in the Chapter 7 estate.

\textsuperscript{235} Id. § 541(a)(7).

\textsuperscript{236} Id. § 541(a).

\textsuperscript{237} Id. § 541(a)(7).
the Myrvold, Lindberg, and Laughlin decisions is more superficially than substantively successful.

The Eighth Circuit is not the only jurisdiction that has adopted the date of conversion approach to defining the scope of property of the estate in a converted Chapter 7. In In re Plata, a case recently decided by the United States Court of Appeals for the Ninth Circuit, a Chapter 12 case was converted to Chapter 7. Because of crop failure, the debtor was unable to fuel the reorganization as envisioned under the plan; however, at the time of the conversion, the Chapter 12 trustee held $14,000 of post-petition farm revenue not yet distributed to creditors. The debtor sought to exempt $8300 of that amount under section 522(d). The trustee argued that the creditors had a vested interest in the funds which could not be nullified by conversion from Chapter 12. The Ninth Circuit held that the debtors could claim exemptions in the post-petition property as of the conversion date and that Chapter 12 creditors do not acquire a vested right to undistributed funds until actual payment by the Chapter 12 trustee.

Although the Plata decision does not directly address the question of property of the estate in the Chapter 7 case, it is clear that the Chapter 7 trustee ultimately distributed the nonexempt portion of the post-petition funds to creditors in the Chapter 7 case. This, coupled with a Ninth Circuit Bankruptcy Appellate Panel decision directly to this effect, suggests that the Ninth Circuit has adopted the date of conversion approach for determining the scope of property of the estate where a Chapter 12 or 13 case is converted to Chapter 7.

The policy justifications supporting a date of conversion rule are well articulated by the court in In re Winchester. The court stated:

11 U.S.C. § 348 deals generally with the effect of conver-

238. 958 F.2d 918 (9th Cir. 1992).
239. Arkison v. Plata (In re Plata), 958 F.2d 918, 919 (9th Cir. 1992).
240. Id. at 920.
242. Plata, 958 F.2d at 920.
243. Id. at 922. The latter holding is consistent with an earlier Ninth Circuit decision, Nash v. Kester (In re Nash), 765 F.2d 1410 (9th Cir. 1985), in which a Chapter 13 case was dismissed rather than converted to Chapter 7. In Nash, the court squarely rejected the Chapter 13 trustee's argument that Chapter 13 creditors had a vested interest in the funds in the trustee's hands upon dismissal of the case and held the trustee accountable to the debtors for improper distribution of the funds to creditors after dismissal of the debtors' Chapter 13 case. Nash, 765 F.2d at 1415.
244. Plata, 958 F.2d at 920-21.
245. See Winchester v. Watson (In re Winchester), 46 B.R. 492, 495 (Bankr. 9th Cir. 1984).
246. 46 B.R. 492 (Bankr. 9th Cir. 1984).
tion. Section 348(a) states that: Conversion of a case from a case under one chapter of this title to a case under another chapter of this title . . . does not effect a change in . . . the commencement of the case . . .

This is significant because it is the "commencement of the case" which determines what property is property of the estate. 11 U.S.C. § 541. Thus, it is normally the date of filing of the original petition which determines property of the estate in the converted case. However, in Chapter 13 after-acquired property is also property of the estate. 11 U.S.C. § 1306(d). Therefore, it is only logical that property of the Chapter 7 estate in a converted Chapter 13 case should be determined on the date of conversion. Otherwise, the after-acquired property could not be included in the Chapter 7 estate. Once the property is revested in the debtor after confirmation, he can do anything with it so long as it is not subject to a lien provided for in the plan or order confirmation. 11 U.S.C. §§ 1327(b) and (c). Thus, during the course of a plan, which can last as long as five years, a debtor may sell, abandon, consume, or trade-in most of his assets. Combining this with the possibility of after-acquired property means that by the time of conversion the estate may have been changed completely in character and amount. This reasoning is consistent with § 348(d) which allows the debtor to discharge claims arising during the pendency of the Chapter 13 but before conversion. It is only reasonable that the debtor be required to place after-acquired property into the Chapter 7 estate if he is going to be relieved from liability of post-petition claims. Often it is the post-petition indebtedness which was used to acquire the after-acquired property.

The court in Tworek offered similar policy justifications for the date of conversion rule.247

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247. Id. The court in Winchester, like the courts in Lindberg and Tworek, failed to consider the implications of adopting the date of conversion rule in cases in which unconfirmed Chapter 13 cases are converted to Chapter 7. Accordingly, it does not satisfactorily explain how property of the Chapter 13 estate (as opposed to the debtor's property) becomes property of the estate in a subsequent Chapter 7 case. See supra note 98; see infra note 296. One possible way of including "property of the chapter 13 estate" as well as property revested in the debtor under § 1327(b) in the subsequent Chapter 7 case is to apply § 103(h). If that section is interpreted as "undoing" the previous effects of all provisions under Chapter 13 and, in effect, revesting all property of the estate in the debtor, § 541(a)(1) of the Bankruptcy Code would appear to include all pre- and post-Chapter 13 property in the Chapter 7 estate. See 11 U.S.C. §§ 103(h), 541(a)(1), 1327(b). In effect, this approach was taken by the Ninth Circuit in Plata. See Plata, 958 F.2d at 922. Unfortunately, the court in Tworek failed to see the availability of this argument and rejected the applicability of § 103(h). See Tworek, 107 B.R. 667-68.

2. The Source of Continuity Theory

Another theory also includes post-Chapter 13 petition property in the subsequent Chapter 7 estate. Unlike the date of conversion theory in which the language of section 348(a) is ignored, under this theory section 348(a) is given effect: the converted Chapter 7 is deemed to have been commenced as of the time the original Chapter 13 petition was filed. However, section 348(a) "does not purport to alter or modify the provisions or applicability of sections 541 and 1306." Section 348(a) does not operate as a "nullification act. It is not designed to change what has gone before but, rather, to leave matters as they exist on the date of conversion." Instead, section 1306(a) operates up to the date of conversion, and all assets that were property of the Chapter 13 estate at the time of conversion become property of the converted Chapter 7 estate.

The United States Court of Appeals for the Tenth Circuit in In re Calder recently adopted this approach. In Calder, the debtor was denied a discharge under Chapter 7, refiled under Chapter 13, and then converted the case back to Chapter 7. The debtor contended that the scope of the property of the Chapter 7 estate should be determined as of the date of the original Chapter 7 filing, three and one-half years earlier. However, during the course of the Chapter 13 proceedings, the debtor conceded that under section 1306(a), the funds in dispute were part of the Chapter 13 estate. Therefore, the Tenth Circuit characterized the issue as whether the property of the Chapter 13 estate, including the funds in dispute, became part of the converted Chapter 7 estate.

In arriving at its holding that the post-petition funds in dispute were property of the Chapter 7 estate, the Tenth Circuit criticized cases such as Lepper, in which the court concluded that post-petition property was not property of the subsequent Chapter 7 estate because at the point of conversion, section 103(h) renders section

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249. 11 U.S.C. § 348(a). That section provides that conversion does not alter "the date of the filing of the petition, the commencement of the case, or the order for relief." Id.


253. 973 F.2d 136 (10th Cir. 1992).


255. Id. at 864.

256. Id.


258. Calder, 973 F.2d at 864-65.
1306(a) retroactively inapplicable. The Tenth Circuit stated:

These courts reason that upon conversion, with § 1306 inapplicable, property of the estate is defined solely by § 541. . . . The flaw in this reasoning is that it ignores the effect of § 541(a)(7). During the pendency of the case in Chapter 13 — when § 1306 applies — § 1306 includes in "[p]roperty of the estate" after-acquired property and postpetition earnings from services performed by the debtor. 11 U.S.C. § 1306(a). Upon conversion to Chapter 7, § 541(a)(7) includes in the Chapter 7 estate "[a]ny interest in property that the estate acquires after the commencement of the case." 11 U.S.C. § 541(a)(7). Reading these two provisions together, we hold that all property in plaintiff's Chapter 13 estate — including any funds included pursuant to § 1306 — are part of the postconversion Chapter 7 estate.

The Tenth Circuit also relied heavily on In re Lybrook, a recent decision by the United States Court of Appeals for the Seventh Circuit. In Lybrook, the debtor's Chapter 13 plan was not confirmed, and the case was subsequently converted to Chapter 7; however, between the original filing date and case conversion, the debtor's father died, leaving the debtor $70,000. Although the inheritance was property of the Chapter 13 estate (the debtor became entitled to acquire this property more than 180 days after the Chapter 13 petition was filed), the inheritance would not have been property of the estate under section 541(a)(5)(A) had the original case been filed as a Chapter 7.

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259. Id. at 866; Lepper, 58 B.R. at 898. See 11 U.S.C. §§ 103(h), 1306(a). See supra note 4.

260. Calder, 973 F.2d at 866.

261. 951 F.2d 136 (7th Cir. 1991).

262. Id. See In re Lybrook, 951 F.2d 136 (7th Cir. 1991).

263. Lybrook, 951 F.2d at 137.

264. Id. at 136. See 11 U.S.C. § 541(a)(5)(A). Section 1306(a) would include this property as well as post-petition wages in the Chapter 13 estate. See id. § 1306(a). Because the case was converted to Chapter 7 before plan confirmation, there was no argument that it was property of the debtor rather than property of the Chapter 13 estate on the date of conversion to Chapter 7. This was also the case in Calder. See Calder, 973 F.2d at 864. Accordingly, neither decision addresses whether the effect of confirmation is to transmogrify property of the Chapter 13 estate into property of the debtor. Although one might argue that § 103(h) and the conversion itself operates to reverse the effects of § 1327(b), thus transforming "property of the debtor" into "property of the chapter 13 estate" under § 1306(a), the Calder and Lybrook decisions specifically hold that § 348(a) should not be interpreted as reversing "what has gone before but, rather, to leave matters as they exist on the date of conversion." Lybrook, 107 B.R. at 613; see 11 U.S.C. §§ 103(h), 348(a), 1306(a), 1327(b). It is difficult, therefore, to see precisely how such post-petition property could be viewed as property of the Chapter 7 estate because it is neither "an interest of the debtor in property" as of the date the Chapter 13 case was originally filed, nor an "interest in property that the estate acquires" after the original Chapter 13 case was commenced. 11 U.S.C. § 541(a)(1), (7). See supra notes 3, 4, 7, 98, 233, 247.
In holding that the inheritance was property of the estate in the converted Chapter 7, the Seventh Circuit rejected the debtor's argument that section 348(a) required the property of the estate issue to be analyzed as though the case were originally filed as a Chapter 7 on the date the Chapter 13 case was filed.\textsuperscript{265} The court stated:

We are more impressed by the bankruptcy judge's observation 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 Chapter 13 plan will nevertheless have an incentive to proceed under that chapter for 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 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 — and remember that the debtor can convert to that chapter from Chapter 13 at will. On the Lybrooks' interpretation, Chapter 13 shifts all downside risk to the creditors and all upside potential to the debtor.\textsuperscript{266}

Especially curious is the Seventh Circuit's use of two Eighth Circuit decisions, \textit{Resendez} and \textit{Lindberg}, as support for its position.\textsuperscript{267} Although these cases include post-petition assets in the converted Chapter 7 estate, the court in \textit{Lindberg} (at least) does so by adopting the date of conversion as the appropriate date for assessing the scope of property of the chapter 7 estate under section 541(a).\textsuperscript{268} By expressing its approval of the bankruptcy court's approach to the issue, the court in \textit{Lybrook} appeared to reach this result using an entirely different analytical framework.\textsuperscript{269} Rather than adopting a date of conversion approach, the bankruptcy court concluded that section 541(a)(7) includes in the converted Chapter 7 estate all property which becomes property of the estate in the course of the Chapter 13 case by virtue of section 1306(a).\textsuperscript{270} It becomes property of the subsequent Chapter 7 case because section 1306(a) continues to operate up to the date of conversion and, at that point, the entire Chapter 13 estate passes whole into the Chapter 7 estate as "an interest in prop-

\textsuperscript{265} \textit{Lybrook}, 951 F.2d at 137-38. \textit{See} \textit{11 U.S.C. § 348(a)}.
\textsuperscript{266} \textit{Lybrook}, 951 F.2d at 137-38.
\textsuperscript{267} \textit{See} \textit{id.} at 138.
\textsuperscript{268} \textit{See 11 U.S.C. § 541(a)}. \textit{See supra} notes 3, 202-07 and accompanying text.
\textsuperscript{269} \textit{Lybrook}, 951 F.2d at 137.
\textsuperscript{270} \textit{Lybrook}, 107 B.R. at 613. \textit{See} \textit{11 U.S.C. §§ 541(a)(7), 1306(a)}. 
erty” that the Chapter 13 and, later, the Chapter 7 “estate acquires after the commencement of the case.”

This is made possible by viewing section 348(a) as a “source of continuity” rather than as a “nullification” of “what has gone on before.” Thus, the date of commencement of the case remains the date the Chapter 13 case was originally filed as required by section 348(a). However, section 1306(a), as well as the other provisions of Chapter 13, continue to operate up to the date of conversion.

Presumably, then, section 103(h) makes the provisions of Chapter 13 prospectively inoperative only from the point of case conversion. In contrast, the date of conversion approach entirely ignores the mandate of section 348(a) that conversion of the case is not to affect the date the case was commenced, the order for relief, or the date the petition was filed.

Another interesting aspect of the bankruptcy court’s decision in Lybrook is the following footnote: “To the extent reported decisions have involved competing claims to funds in the possession of the Chapter 13 trustee, the issue would seem to have been laid to rest by the 1984 Amendments to the Bankruptcy Code. See 11 U.S.C. § 1326(a)(2).”

Section 1326(a)(2) provides:

A payment made under this subsection shall be retained by the trustee until confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan. If a plan is not confirmed, the trustee shall return any such payment to the debtor, after deducting any unpaid claim allowed under section 503(b) of this title.

Section 1326(a)(2) did not apply in Lybrook, an unconfirmed case, because the assets at issue were not post-petition wages, the usual kind of property devoted to plan payments, and thus the usual sort of property in the Chapter 13 trustee’s possession when Chapter 13 cases, confirmed or not, convert to Chapter 7. Had the assets

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275. 11 U.S.C. § 103(h). According to the view that § 348(a) requires property of the Chapter 7 estate to be reassessed as of the date the original Chapter 13 case was filed and as though it were originally filed as a Chapter 7 case, the effect of § 103(h) is to make § 1306(a) along with all other provisions of Chapter 13 retroactively ineffective. This appears to be the chief difference between these interpretations of the effect of converting a Chapter 13 case to Chapter 7. *See id.* §§ 103(h), 1306(a). *See supra* notes 4, 153-56 and accompanying text.
279. *Id.*
been post-petition wages in the trustee's hands when conversion occurred, the bankruptcy court in *Lybrook* surprisingly suggests the post-petition wages would have been returned to the debtor under section 1326(a)(2), despite their ostensible status as property of the estate. The second rather remarkable implication of this footnote is that section 1326(a)(2) is controlling in cases in which proposed plan payments are in the possession of the Chapter 13 trustee, awaiting distribution to creditors pursuant to a confirmed plan. In such cases, section 1326(a)(2) directs the trustee to distribute the funds in his or her possession in accordance with the plan if a plan is confirmed. This portion of the statute was inapplicable to *Lybrook* because the case was converted to Chapter 7 before plan confirmation. Nevertheless, given the inclination of the court in *Lybrook* to award funds in the Chapter 13 trustee's hands prior to confirmation to the debtor on conversion of the case to Chapter 7, even though these assets are apparently property of the Chapter 7 estate, it appears that the court in *Lybrook* would award these same assets to Chapter 13 creditors if the case were converted to Chapter 7 after confirmation of the plan.

In this way, the decision resembles those of the many courts which hold that Chapter 13 post-petition property is not property of the Chapter 7 estate and which direct payment of the wages to Chapter 13 creditors. In still other cases, the question of the post-petition assets' status as property of the Chapter 7 estate appears completely irrelevant to the court's decision to disburse the wages to the Chapter 13 creditors.

Neither the Seventh Circuit in *Lybrook* nor the Tenth Circuit in *Calder* expressed an opinion as to the probable disposition of funds in an unconfirmed or a confirmed case to which section 1326(a)(2) was applicable.

### D. Taking Stock of These Approaches

Each approach to the question of the effect of conversion on property in Chapter 13 cases carries with it significant advantages and disadvantages. The first approach, the retroactive reassessment of property of the estate, has the distinct advantage of ease of com-

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281. See id.
282. Id.
283. See *Lybrook*, 107 B.R. at 612 n.1.
284. See supra notes 172-92 and accompanying text.
285. See supra note 176. See also *In re Radebaugh*, 125 B.R. 797, 798 (Bankr. W.D. Mo. 1991) (stating that in a confirmed case, § 1326(a)(2) requires that post-petition wages, even though property of the converted Chapter 7 estate, be disbursed to Chapter 13 creditors).
prehension. It seeks to give effect to both section 103(h) and section 348(a) of the Bankruptcy Code by reassessing the property of the estate question as of the Chapter 13 filing date and as if the case were originally a Chapter 7 case.\(^{287}\) Determining the debtor's interests in property when the original Chapter 13 case was filed is straightforward. Thus, the scope of the Chapter 7 estate is quickly and easily determined. In excluding post-petition property from the Chapter 7 estate, this approach arguably facilitates the debtor's fresh start by refusing to penalize the debtor for attempting to reorganize rather than liquidating.\(^{288}\)

One of the advantages of the retroactive reassessment of property of the estate approach is that it is compatible with all of the competing views regarding the effect of confirmation on property of the Chapter 13 estate. The choice of the initial filing date as the relevant time for assessing property of the converted Chapter 7 estate makes the question of the status of post-petition property after confirmation as property of the estate or as property of the debtor irrelevant because in either event the property is typically excluded from the Chapter 7 estate.\(^{289}\) Thus, the retroactive reassessment approach offers the advantage of theoretical compatibility with all of the theories regarding the effect of confirmation on the Chapter 13 estate.

The date of conversion rule, like the retroactive reassessment of property of the estate theory, offers the advantage of ease of understanding and application. All interests of the debtor in property at the time of conversion of the case to Chapter 7 are properly included in the Chapter 7 estate. As long as the debtor has an interest in the asset when the Chapter 13 case is converted to Chapter 7, the asset will be available for distribution to pre-petition and post-petition creditors alike.\(^{290}\)

The date of conversion theory's principal weakness is that it

\(^{287}\) 11 U.S.C. §§ 103(h), 348(a).

\(^{288}\) This assumes that the post-petition assets are awarded to the debtor. Not all cases using this approach do so. See supra notes 172-92 and accompanying text.

\(^{289}\) See supra notes 153-56 and accompanying text.

\(^{290}\) If plan confirmation transforms property of the estate into property of the debtor, all such property becomes property of the subsequent Chapter 7 estate because it is an interest of the debtor in property at the time of case conversion. If the property retains the status of property of the Chapter 13 estate at the time of case conversion, § 103(h) can be employed to retroactively transform it into property of the debtor thereby bringing it into the Chapter 7 estate. See id. §§ 103(h), 541(a)(1). This assumes, of course, that the post-petition assets are neither exempt nor ordered disbursed to Chapter 13 creditors pursuant to § 1326(a)(2). See id. § 1326(a)(2). As yet, no case adopting the date of conversion theory has done so. Recall, however, that in a number of cases, § 1326(a)(2) has been interpreted as controlling the outcome of the case, and the entire issue of the status of property of the estate was ignored or expressly held irrelevant. Id. See supra notes 3, 142, 176.
completely ignores the language of section 348(a).\textsuperscript{291} It is difficult to argue that one has not changed the case's commencement date when using the date of conversion to assess the "interests of the debtor in property as of the commencement of the case."\textsuperscript{292}

Another serious weakness of the date of conversion rule is that it appears to be most compatible with the view that plan confirmation transforms property of the Chapter 13 estate into property of the debtor. This is because the date of conversion approach includes in the Chapter 7 estate all interests of the debtor in property as of the date the case is converted to Chapter 7. Thus, all property owned by the debtor at the time the Chapter 13 case was initiated as well as subsequently acquired property is included in the Chapter 7 estate. However, if the status of property of the Chapter 13 estate remains unaffected by plan confirmation as Part I of this Article argues, the date of conversion rule arguably cannot include this property in the subsequent Chapter 7 estate because property of the estate will consist primarily of property in which the debtor has an interest.\textsuperscript{293} Unless property in which the debtor has an interest on the date of conversion is read as including property of the Chapter 13 estate, property of the Chapter 13 estate is excluded from the Chapter 7 estate under section 541(a)(1).\textsuperscript{294} Furthermore, section 541(a)(7) will not bring this property into the Chapter 7 estate. Section 541(a)(7) includes in the Chapter 7 estate all property in which the estate has acquired an interest since the filing of the petition.\textsuperscript{295} Because the date of case conversion is treated, in effect, as the date of the initial case filing, the most sensible interpretation of this section is that it refers to property in which the Chapter 7 estate has acquired an interest after the date of conversion to Chapter 7, rather than after the filing of the Chapter 13 petition. Unless case conversion retroactively transforms property of the Chapter 13 estate into property of the debtor, it is difficult to see how property of the Chapter 13 estate can become property of the Chapter 7 estate under the date of conversion approach.\textsuperscript{296}

The source of continuity rule avoids the serious flaw of ignoring section 348(a) by focusing on the interactive effects of sections 103(h), 348(a), and 1306(a).\textsuperscript{297} An abstract and somewhat elusive interpretation of these sections supports the conclusion that the debtor's prop-

\textsuperscript{291} 11 U.S.C. § 348(a).
\textsuperscript{292} Id. § 541(a)(1).
\textsuperscript{293} Id.
\textsuperscript{294} Id. § 541(a)(7).
\textsuperscript{295} Id. § 541(a)(7).
\textsuperscript{296} Section 103(h) might be employed to retroactively transform property of the Chapter 13 estate into property of the debtor: Id. § 103(h). See supra note 290.
\textsuperscript{297} Id. §§ 103(h), 348(a), 1306(a). See supra note 4.
property interests at the time of the commencement of the Chapter 13 case, along with property of the Chapter 13 estate, are properly included in the converted Chapter 7 estate. Sections 348(a) and 103(h) leave matters as they exist on conversion.\footnote{11 U.S.C. \S\S 103(h), 348(a).} According to section 103(h), section 1306(a) becomes inoperative only at the point of conversion to Chapter 7.\footnote{Id. \S\S 103(h), 1306(a). See supra note 4.} In other words, section 1306(a) conversion does not retroactively nullify as it does under the first approach.\footnote{11 U.S.C. \S\S 103(h), 1306(a). See supra note 4.}

Once comprehended, this approach is not particularly difficult to apply. All interests of the debtor in property as of the commencement of the Chapter 13 case, along with all property of the Chapter 13 estate, become property of the Chapter 7 estate under sections 541(a)(1) and 541(a)(7).\footnote{11 U.S.C. \S\S 103(h), 1306(a). See supra note 4.}

The source of continuity rule is most compatible with the view that property of the Chapter 13 estate is not affected by plan confirmation. Property of the Chapter 13 estate becomes property of the converted Chapter 7 estate because it is property which the Chapter 7 estate acquires after the filing of the Chapter 13 petition under section 541(a)(7).\footnote{11 U.S.C. \S\S 103(h), 1306(a). See supra note 4.} This reading of section 541(a)(7) makes sense in the context of the source of continuity rule because under this approach, unlike the date of conversion rule, the date of the initial Chapter 13 filing continues to control the analysis of property of the subsequent Chapter 7 estate.\footnote{Id. \S 541(a)(7).} The source of continuity rule is much less compatible with the view that plan confirmation transmogrifies property of the Chapter 13 estate into property of the debtor because only property in which the debtor had an interest as of the commencement of the Chapter 13 case can become part of the subsequent Chapter 7 estate pursuant to section 541(a)(1).\footnote{See supra notes 249-52 and accompanying text.} Furthermore, it is difficult to see how section 541(a)(7) would bring into the Chapter 7 estate any post-Chapter 13 property that is characterized as property of the debtor rather than as property of the Chapter 13 estate.

One of the objectives of American bankruptcy law is to treat creditors with similar claims similarly and collectively. Cases in which post-petition wages are ordered disbursed to unsecured Chap-

\footnote{11 U.S.C. \S 541(a)(1).}
ter 13 creditors violate this policy by treating these creditors more favorably than post-petition creditors. The overwhelming majority of cases in which section 1326(a)(2) has been interpreted as controlling the disbursement of post-petition wages after conversion to Chapter 7 also adopt the view that post-petition assets are not property of the Chapter 7 estate under the retroactive reassessment of property of the estate theory. Under this line of authority, when unconfirmed cases convert to Chapter 7, undisbursed plan payments are returned to the debtor because they are not property of the Chapter 7 estate. Even if section 1326(a)(2) is not viewed as requiring this result, disbursement of post-petition wages to the debtor often “feels” like the right result because significant prejudice to Chapter 13 creditors seems unlikely during the relatively brief time between filing and conversion. Furthermore, it may seem especially unjust to penalize the debtor for initially attempting to reorganize rather than liquidating in these circumstances.

However, if the case has been confirmed before conversion, the equities arguably begin to favor the Chapter 13 creditors rather than the debtor. Accordingly, these cases award funds in the Chapter 13 trustee’s possession to Chapter 13 creditors rather than to the debtor by relying on a vesting analysis or the language of section 1326(a)(2).

It is probably more than mere coincidence that the majority of cases awarding undisbursed post-petition plan payments to Chapter 13 creditors also adopt the view that these assets are not property of the Chapter 7 estate. As a result, the Chapter 7 trustee is not even a potential recipient of these funds. It is not surprising that a court somewhat less captivated by the fresh start policy and faced with the option of returning these funds to the debtor or awarding them to Chapter 13 creditors might favor known Chapter 13 creditors over unknown and only potential post-petition creditors.

Thus far, no case adopting either the date of conversion or source of continuity approach has held directly that section 1326(a)(2) controls the issue of disbursement of assets of the Chapter 7 estate. However, in a small but growing group of decisions, the status of the

308. No cases have been found in which a vesting analysis or § 1326(a) has been used as the basis for deciding to whom to award post-petition funds which also adopts the date of conversion rule or source of continuity rule. A small body of case law either ignores the status of the assets as potential property of the Chapter 7 estate or declares the issue irrelevant in awarding such assets to Chapter 13 creditors or the debtor. See supra note 176.
post-petition asset as property of the estate (and thereby potentially awardable to the Chapter 7 trustee) simply has not been considered or has been declared irrelevant. Instead, these cases rely on section 1326(a)(2) or a vesting analysis in awarding funds in the hands of the trustee to Chapter 13 creditors where confirmed cases have been converted to Chapter 7 or to the debtor where unconfirmed cases are converted to Chapter 7.\footnote{11 U.S.C. § 1326(a)(2). See supra note 176.}

Of course, it is extremely questionable whether section 1326(a)(2) can or should apply after case conversion.\footnote{11 U.S.C. § 1326(a)(2). See supra notes 155, 195-96 and accompanying text.} Furthermore, in disbursing these wages to Chapter 13 creditors, these cases violate the principle of equal treatment for similar claims. Chapter 13 creditors have already had the benefit of pre-conversion payments under the plan and, under this line of authority, are also entitled to any plan payments not distributed at the time of conversion. The balance of these claims, as well as the claims of the post-petition creditor, is subject to discharge in the Chapter 7 case. In contrast, post-petition creditors have not participated in any plan payments. In many jurisdictions, post-petition creditors are also stayed from enforcing their claims during the pendency of the Chapter 13 proceeding because some or all of the pre- and post-petition property remains property of the Chapter 13 estate after plan confirmation.\footnote{In other jurisdictions, some or all of this property is transformed into property of the debtor at plan confirmation. To that extent, the post-petition creditor is not stayed from enforcing its claim during the Chapter 13 case. See supra notes 58-98 and accompanying text.} No apparent policy reason suggests itself for treating one group of dischargeable claims more favorably than the other.

Although section 348(a) is not a model of legislative clarity, the source of continuity rule best interprets the probable intentions of Congress. It is hard to imagine that Congress intended to exclude nonexempt post-petition assets from the converted Chapter 7 estate and to exclude post-petition creditors from participating in a distribution of those assets by the Chapter 7 trustee. Although the date of conversion rule also declares post-petition assets to be property of the subsequent Chapter 7 estate, it does so by ignoring the language of section 348(a).\footnote{11 U.S.C. § 348(a).} The source of continuity approach gives effect to the language of this section as well as that of sections 103(h) and 1306(a).\footnote{Id. §§ 103(h), 1306(a). See supra note 4.} As such, it is the better of the two approaches to the question of the status of Chapter 13 post-petition property in the event of conversion to Chapter 7.

The retroactive reassessment of property of the estate rule, as
applied to date, results in the award of post-petition assets to either
the debtor or Chapter 13 creditors. It seems unlikely that Congress
would have made post-petition claims subject to discharge without re-
quiring turnover of non-exempt post-petition assets. Awarding the
assets to Chapter 13 creditors rather than to the debtor favors Chap-
ter 13 creditors over post-petition creditors. For these reasons, the
retroactive reassessment of property of the estate approach (in ex-
cluding post-petition assets from the estate) is not the proper
approach.

Finally, a small but growing group of cases awards undisbursed
post-petition wages to Chapter 13 creditors under section 1326(a)(2)
and does not examine the issue of the status of these assets as prop-
erty of the converted estate.315 These cases not only fail to consider
section 348(a) of the Bankruptcy Code, but also continue to give ef-
fect to a confirmed Chapter 13 plan and the provisions of Chapter 13
after conversion to Chapter 7 in violation of section 103(h).316

Accordingly, through adoption of the source of continuity rule,
post-petition assets should be viewed as property of the converted
Chapter 7 estate and ordered turned over to the Chapter 7 trustee for
distribution to pre- and post-petition creditors after the debtor's ex-
emption claims have been honored.

CONCLUSION

Sections 1306(a) and 1327(b) of the Bankruptcy Code are not
models of legislative clarity. As a result, widely divergent views of
the status of property of the estate after confirmation of a Chapter 13
plan have developed in disparate contexts. The better-reasoned deci-
sions hold that property of the estate retains its character as such
after plan confirmation and do not allow the policy concerns arising
out of the factual context in which the issue has arisen to drive the
resolution of this question. These policy issues are best addressed in
the context of a motion to lift the automatic stay or to dismiss or con-
vert the case. In this way, the competing interests of debtors, credi-
tors, and the trustee as well as the objectives and goals of Chapter 13
itself can best be considered.

When read in conjunction with sections 103(h), 1306(a), and 1326,
section 348(a), is also not a model of legislative clarity. Accordingly,
widely divergent views exist regarding the status of property in
Chapter 13 cases after conversion to Chapter 7. The best approach
holds that property of the Chapter 13 estate as well as the property
in which the debtor had an interest when the Chapter 13 case was

316. Id. §§ 103(h), 348(a).
filed are property of the subsequent Chapter 7 estate. The better-reasoned cases order turnover of these assets to the Chapter 7 trustee for distribution to both pre- and post-petition creditors rather than preferring Chapter 13 creditors by disbursement of the assets to them.