No. 72613-7-I

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION I

BENJAMIN C. ARP,

Appellant,

v.

JAMES H. RILEY and "JANE DOE" RILEY, husband and wife and the marital community composed thereof; and SIERRA CONSTRUCTION CO. INC., a Washington State Corporation,

Respondents.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

Judicial estoppel is an equitable remedy that should be sparingly granted. But here, the doctrine was used to achieve inequity. Ben Arp was necessarily and properly stopped in traffic on the highway when James Riley – admittedly in the course and scope of his employment with Sierra Construction Co. Inc. -- collided into Arp's car at roughly 60 m.p.h. Riley was talking on his cell phone. Arp was severely injured, including short-term memory loss.

Although Arp had paid over $150,000 to his Chapter 13 bankruptcy creditors at that point, his memory loss caused him to forget to make a few payments, totaling $2,875. When the Trustee moved to dismiss his bankruptcy, Arp disclosed the collision and his injuries to the Trustee, who forgave Arp's late payments, accepted his final payoff, and closed the bankruptcy.

When Arp then retained counsel and sued Riley and Sierra, they asserted judicial estoppel to avoid their obvious liability for his severe injuries. Although the trial court granted summary judgment on this issue, there is nothing in the plain language of the Bankruptcy Code that supports that ruling. On the contrary, at least two apposite Washington cases reach the opposite conclusion. Riley and Sierra's arguments to the trial court are meritless. The Court should reverse.

ASSIGNMENTS OF ERROR

1. The trial court erred in granting summary judgment to Riley and Sierra applying judicial estoppel and finding that Arp lacked "standing" to bring his personal injury claim. CP 372-75.

2. The trial court erred in denying Arp's motion for summary judgment, refusing to dismiss Riley's judicial estoppel and "standing" claims. CP 375.

3. The trial court erred in denying reconsideration. CP 437-38.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in imposing a duty to more fully disclose a post-confirmation claim, where the plain language of the Bankruptcy Code and of the confirmation order are to the contrary?

2. Did the trial court err in granting summary judgment, where Arp was not required to disclose his potential claim against Riley and Sierra under oft-cited and remarkably similar Washington precedent?

3. Did the trial court err in granting summary judgment, where Arp was not required to disclose his potential claim against Riley and Sierra under the most recent and apposite Washington precedent?

4. In light of the above errors, did the trial court err in granting summary judgment that Arp lacked standing to sue Riley and Sierra?

STATEMENT OF THE CASE

A. Prior to the collision that gave rise to these proceedings, Benjamin Arp and his wife divorced, and he filed for Chapter 13 bankruptcy to forestall the wife's Chapter 7.

Benjamin Arp and his wife separated in January 2008. CP 273. The divorce proceedings took a financial toll, as did a lawsuit involving an easement on Arp's property. CP 360. When Arp learned that his wife planned to file a Chapter 7 bankruptcy (without consulting Arp), he filed a petition for Chapter 13 bankruptcy protection to avoid a Chapter 7. CP 67, 273, 373.

The bankruptcy court confirmed Arp's wage-earner plan on December 17, 2009. CP 102, 373. The confirmation order required Arp to inform the Trustee of any change in circumstances and any additional income. CP 114,[1] 373. But "during the pendency of the plan hereby confirmed, all property of the estate, as defined by 11 U.S.C. 1306(a), shall remain vested in the debtor." App. A.

B. Almost a year after Arp's Chapter 13 plan was confirmed, James Riley (while in the course and scope of his employment) rear-ended Arp, striking him at about 60 miles-per-hour while Arp was at a complete stop.

On October 5, 2010 – almost a year after his bankruptcy plan was confirmed – Arp sustained a traumatic brain injury and other

[1] A copy of this confirmation order is attached as Appendix A.

serious physical injuries when he was rear-ended by a large SUV traveling at about 60 m.p.h. or more. CP 353, 354-55. Arp was driving his older model Honda Accord along Interstate 405 in the Kennydale Hill area, which is known for congested and dangerous traffic conditions. CP 353-54. Traffic often suddenly and rapidly decelerates from highway speeds to much slower speeds or a complete stop. *Id.* On the day of the collision, Arp came to a complete stop along with the traffic ahead of him. *Id.*

James Riley, a construction project manager for Sierra Construction Company, was traveling Southbound on I-405 from his employer's home office in Woodinville to an 11:00 business meeting in Tacoma. CP 352. It is undisputed that Riley was in the course and scope of his employment. CP 351 n.1. Riley was running late. CP 352. He drove his Yukon Denali SUV at 60 m.p.h. or more, focused on getting to his meeting on time. CP 352, 354-55.

Riley made two Bluetooth phone calls while driving, one starting at 10:10 and the next at 10:21. CP 353. The second call ended no earlier than 10:31. *Id.* The collision occurred at approximately 10:30 a.m. CP 352.

Arp saw Riley's SUV approaching from behind, traveling at high speed. CP 353. Arp was boxed in by other cars on all sides,

unable to escape. *Id.* Without ever braking, Riley slammed into Arp traveling 60 m.p.h. or more. CP 353, 354-55. The impact was so great that Riley's SUV pushed Arp's car into the car in front of him, severely damaging both cars. CP 354.

C. Arp sustained serious physical injuries, including a traumatic brain injury that affected his memory and dramatically changed his life.

As a result of the impact, Arp's head rapidly accelerated and decelerated, a common occurrence in a rear-end whiplash-type collision. CP 355. Both the front and back of Arp's skull also struck stationary objects in the car, leaving lacerations and contusions on his head. *Id.* Arp was very confused at the scene, and had no memory of hitting the car in front of him. *Id.*

Arp was taken to Harborview. *Id.* The CAT scan was not revealing, but other films revealed a fracture to the right tibia and several rib fractures. CP 397.[2] Arp was released later that day. *Id.*

After the accident, Arp followed up with doctors at Pacific Medical. CP 356. Arp's injuries include the following (CP 357, 359):

- Vertigo
- Multiple contusions and lacerations
- Neck, cervical, and low-back injuries;

[2] Some evidence cited here was raised in Arp's motion for reconsideration.

- Multiple rib fractures;
- Nagging chest-wall pain;
- A shoulder injury including a rotator cuff tear;
- Tibial stress fractures;
- A right tibia fracture;
- Hip and upper-thigh nerve damage;
- Left foot and ankle dysfunction;
- Bilateral knee pain;
- Swallowing problems; and
- Right thumb weakness and discomfort.

Arp also immediately suffered from numerous mental and emotional problems, including difficulty with memory, concentration, and attention; emotional lability; difficulty with coordination and balance; irritability and anger bursts; a continuous, loud ringing in his ears; anxiety and depression. CP 357. In January 2012, a brain MRI revealed hemorrhaging and other intra cranial abnormalities. CP 358. These brain injuries corresponded with Arp's decreased functioning, including diminished executive function; emotional lability; difficulties with multitasking, distraction, and spatial awareness; and serious memory loss. CP 358-59. Arp's doctors were prepared to testify that Arp's intracranial abnormalities and micro-hemorrhaging are a traumatic brain injury caused by the collision. CP 359, 398, 401.

These injuries dramatically changed Arp's life. At the time of the accident, Arp was in good physical shape. CP 356. Arp was an avid hiker and mountain climber, having climbed Mt. McKinley. CP 356, 402. He was adventurous and loved challenges. CP 356.

Arp worked as a database administrator for Boeing, where he routinely received excellent performance reviews. *Id.* Before joining Boeing, Arp was a research scientist for 23 years at the University of Washington. *Id.* For ten years, Arp worked alongside renowned immunology researcher Ursula Storb, M.D., who described Arp as brilliant, adaptable, creative, and innovative. *Id.*

Arp is now concerned that he may never mountain climb again. CP 402. Arp continues to experience pain, particularly related to his fractured tibia and back injuries. *Id.* He has an ongoing "radio fuzz" sound in his ears, shortness of breath, and balance issues that impair his ability to walk. CP 397, 402.

When Arp tried hiking in summer 2011, the downhill climb was excruciatingly painful. CP 402. For the most part, his physical activity is now limited to walking. *Id.*

Arp also has significant difficulties at work, which he now finds very tiring. CP 357, 358. Following the collision, Arp has areas of significant difficulty and weakness, the greatest being in memory and

complex-attention measures. CP 406. Arp, who used to have a near-photographic memory, has significantly reduced immediate memory for both auditory and visual information. CP 357, 406. His delayed recall of information is also reduced, and his auditory and visual working memory is below expectation. CP 406.

Arp's complex attention measures are also significantly reduced. *Id.* Although his basic processing speed is intact, Arp is now slower on more complex tasks. *Id.* And while his abstract reasoning remains strong, other aspects of executive functioning are slightly below expectation. *Id.*

Arp's deficits are debilitating at work and in daily life. CP 357-58. After a meeting, Arp forgets what was said. CP 357. He misplaces things, forgets appointments and making them, and forgets important dates. CP 358. He will start a task, but get distracted and forget what he is doing. CP 357. He has trouble proofreading, makes spelling errors, omits words, and inadvertently inserts words that are unrelated to what he intends to say. *Id.* He forgets what he is doing, forgets visual material, and even forgets faces. *Id.* For the first time ever, Arp started receiving negative performance reviews. CP 358.

Arp was diagnosed with cognitive disorder NOS, and adjustment disorder NOS with depression and anxiety. CP 407. Arp reported feeling sad and discouraged, as well as extremely agitated, restless, and irritable. CP 406. His energy decreased and his fatigue increased. *Id.* He cries more often than he used to, is self-critical, derives little pleasure from things he used to enjoy, and "feels that he has failed." *Id.* Things have become so difficult that Arp no longer feels thankful he survived the collision. CP 402.

D. Due to the extensive injuries and memory loss he sustained, and after paying over $150,000 on his Chapter 13 wage-earner plan, Arp forgot to make $2,875 in payments, and the Trustee moved to dismiss his bankruptcy; but Arp successfully obtained permission to pay off the remainder and obtained a discharge.

As a result of the memory loss caused by the collision, Arp forgot to make some of his bankruptcy payments. CP 116, 118. In November 2011, the bankruptcy Trustee moved to dismiss Arp's bankruptcy based on his failure to make payments. CP 109, 373. In January 2012, Arp responded to the motion to dismiss, explaining that he forgot to make some bankruptcy payments because he suffered from short-term memory loss caused by a traumatic brain injury resulting from the October collision. CP 116-18. Arp disclosed

the date of the collision, stated that he was not at fault, and briefly explained his brain injuries. *Id.*[3]

By this time, Arp already had paid over $154,336.42 to his creditors under his Chapter 13 plan, having forgotten payments totaling only $2,875. App. B, CP 116-17. Arp informed the Trustee that he had made arrangements to borrow money from his sister so that he could pay the balance owing in one payment. App. B., CP 116-17, 118. He asked for permission to do so, explaining that his brain injury explained his recent lack of payment. App. B, CP 117.

The Trustee struck his motion to dismiss just over a week after receiving Arp's response. CP 109-10. In March 2012, the bankruptcy court granted Arp a discharge. CP 111. In April, Arp's Chapter 13 bankruptcy was paid off and closed. CP 111-12.

E. <u>Procedural History</u>: the trial court dismissed Arp's personal injury claim, ruling that he was required to disclose it more fully during his bankruptcy proceedings, so he was judicially estopped and lacked standing.

Arp filed suit against Riley in November 2012, later amending his complaint to add Riley's employer, Sierra Construction. CP 1-3, 9-12, 374. Sixteen months later (April 23, 2014) Sierra amended its

[3] A copy of Arp's response to the motion to dismiss is in Appendix B.

affirmative defenses to include judicial estoppel and lack of standing. CP 22, 24-26, 374. Riley did the same in June. CP 246-49, 327, 374.

In May 2014, Arp moved for summary judgment to dismiss defendant Sierra's and Riley's affirmative defenses on judicial estoppel and standing. CP 28-35. Defendants cross-moved for summary judgment that Arp's claims were judicially estopped, and/or that Arp lacked standing to sue. CP 126-42, 251-59.

The trial court granted the defendants' motions, ruling as a matter of law that Arp's personal injury claim, which had not then been filed, was an asset of the bankruptcy estate as defined by 11 USC 1306(a)(1).[4] CP 374. The court ruled that Arp had a duty to disclose this post-petition asset in his bankruptcy action and that Arp's response to the Trustee's motion to dismiss disclosing the collision and his injuries was not sufficient notice. CP 374-75. Thus, the court dismissed Arp's personal injury claims with prejudice, ruling that he was judicially estopped and lacked standing. CP 375.

Arp moved for reconsideration. CP 377-88. The court denied Arp's motion. CP 437-38. Arp timely appealed. CP 439-49.

[4] Copies of all cited statutes and rules are attached to this brief.

ARGUMENT

A. The standard of review is de novo.

On review of a summary judgment, appellate courts apply CR 56 *de novo*. *See, e.g.*, ***Utter ex rel. State v. Bldg. Indus. Ass'n of Wash.***, __ Wn.2d __, ¶ 11, 341 P.3d 953 (2015). They take the facts and reasonable inferences in the light most favorable to the responding party. *Id.* Summary judgment is appropriate if no genuine issues of material fact exist and the movant is entitled to judgment as a matter of law. *Id.* Interpretation of statutes is a question of law reviewed *de novo*. *Id.* at ¶ 10.

B. The trial court erred because Arp was not required to disclose his potential claim under the plain language of the Bankruptcy Code.

Under the plain language of the Bankruptcy Code,[5] Arp was not required to schedule his post-confirmation claims against Riley, et al. Only a limited amount of property acquired post-petition must be disclosed (*i.e.*, the bankruptcy schedules must be amended only under limited circumstances, none of which applies here), and there is no requirement to amend the schedules post-confirmation. The trial court therefore erred in applying judicial estoppel.

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[5] For a brief overview of the Chapter 13 process, *see* CP 31-32.

"The commencement of a case under . . . this title creates an estate." 11 U.S.C. § 541(a). That estate is composed of property defined in § 541(a), including essentially all non-exempt property of the debtor at the outset of the case, and the following property of the estate acquired after the debtor has commenced a bankruptcy case:

> (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[6] –
>
> (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.
>
> . . .
>
> (7) Any interest in property that the estate acquires after the commencement of the case.

11 U.S.C. § 541(a)(5) & (7) (underlining added). Neither of these provisions (nor the rest of paragraph of § 541(a)) applies in the circumstances of this case.

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[6] Riley and Sierra correctly pointed out below that many cases have held that the 180-day time limitation in §541(a)(5) does not apply in Chapter 13 cases due to § 1306, discussed *infra*. CP 138-40.

Under § 541(a)(5), a debtor must amend his schedules only if he receives an inheritance, a settlement or final dissolution order in a family law case, or life insurance or other death benefit. The substantive requirements of § 541(a)(5) are not met with regard to Arp's potential lawsuit.

Under 11 U.S.C. Rule 1007(h), "If, *as provided by § 541(a)(5)* . . . the debtor acquires or becomes entitled to acquire any interest in property, the debtor shall within 10 days . . . file a supplemental schedule in the . . . chapter 13 individual debt adjustment case." As discussed above, § 541(a)(5) applies to a limited list of property not relevant here. Arp had no duty to amend his schedules under the plain language of these provisions.

Under § 541(a)(7), only an interest in property that *the estate acquires* after commencement of the case must be scheduled. But here, Arp's wage-earner plan was confirmed on December 17, 2009, almost a year before the collision. CP 102; 112. The effect of that confirmation order is that (a) Arp and his creditors are bound by the terms of the plan, (b) all property of the estate is vested in Arp, and (c) Arp holds the estate property free and clear, subject to bankruptcy court jurisdiction, all as set forth in 11 U.S.C. § 1327:

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

In short, after the confirmation, Arp holds all property of the estate free and clear. Section 1327(b) & (c) also provide that all property is vested in Arp, "except as otherwise provided in the plan or in the order confirming the plan." But here, the order confirming Arp's plan states that all property remains vested in Arp:

> . . . the Court does hereby ORDER:
>
> . . .
>
> 6. That during the pendency of the plan hereby confirmed, all property of the estate, as defined by 11 U.S.C. 1306(a), shall remain vested in the debtor . . . .

App. A, CP 114. In turn, § 1306(a) further defines property of the estate as including, "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 . . . ." Thus, the confirmation order provides that even as to after-acquired

property, it "shall remain vested" in Arp. The confirmation order is thus consistent with § 1327 in vesting the property of the estate in Arp, which would include his after-acquired legal claims.

In sum, the plain language of the Bankruptcy Code provides that all of the property -- including Arp's post-confirmation cause of action – vests in Arp. As a result, he had no duty to amend his schedule to reflect that cause of action. The trial court erred in concluding otherwise and in applying judicial estoppel.

To avoid this plain language, Riley and Sierra cited ***Hamilton v. State Farm Fire & Cas. Co.***, 270 F.3d 778 (9th Cir. 2001), arguing that it required Arp to amend his bankruptcy schedules. CP 133. But ***Hamilton*** involved a pre-commencement dispute between an insured and his insurer, which the insured then failed to list when he subsequently filed a Chapter 7 bankruptcy. ***Hamilton*** says nothing about claims that arise post-confirmation. On the contrary, it expressly states that, "if the debtor has enough information . . . prior to confirmation to suggest that it may have a possible cause of action, then that is a known cause of action such that it must be disclosed." 270 F.3d at 782 (quoting ***In re Coastal Plains***, 179 F.3d 197, 208 (5th Cir. l999) (emphasis added)). And while a Chapter 7

debtor may have a duty to update his schedules, Arp did not, as explained *supra*. ***Hamilton*** is inapposite.

Riley and Sierra also cited the Fifth Circuit case relied upon in ***Hamilton***, ***Coastal*** (*supra*). CP 134. But again, ***Coastal*** concerned a pre-filing dispute with a creditor that was not listed in the debtor's initial schedules under Chapter 11, not a post-confirmation collision causing memory loss. 179 F.3d at 202-03. ***Coastal*** too is inapposite.

C. The trial court erred because Arp was not required to disclose his potential claim under oft-cited and remarkably similar Washington precedent.

One of the most-often-cited Washington cases on judicial estoppel is ***Johnson v. Si-Cor, Inc.***, 107 Wn. App. 902, 28 P.3d 832 (2001). It is remarkably on-point. It should control the outcome here.

There, a few weeks after he filed a Chapter 13 bankruptcy petition, Johnson allegedly suffered a broken tooth when biting into a breakfast sandwich at a McDonalds. 107 Wn. App. at 904. He never disclosed his personal injury claim in the bankruptcy. *Id.* at 905. After his Chapter 13 wage-earner plan was confirmed, he converted his case to a Chapter 7, which was closed as a "no asset" case; Johnson then brought suit against the restaurant's owner. *Id.*; *see also id.* at 912 ("We infer from the record that Mr. Johnson

confirmed a Chapter 13 wage earner plan"). The owner successfully invoked judicial estoppel, precluding Johnson's action. *Id.*

Division Three reversed. *Id.* at 912. Its analysis begins with the basics:

> Judicial estoppel precludes a party from gaining an advantage by taking one position and then seeking a second advantage by taking an incompatible position in a subsequent action. "The purposes of the doctrine are to preserve respect for judicial proceedings without the necessity of resort to the perjury statutes; to bar as evidence statements by a party which would be contrary to sworn testimony the party has given in prior judicial proceedings; and to avoid inconsistency, duplicity, and the waste of time." ***Seattle-First Nat'l Bank v. Marshall***, 31 Wn. App. 339, 343, 641 P.2d 1194 (1982).

107 Wn. App. at 906. It cites the six judicial-estoppel factors[7] from ***Markley v. Markley***, 31 Wn.2d 605, 198 P.2d 486 (1948) and ***Raymond v. Ingram***, 47 Wn. App. 781, 785, 737 P.2d 314 (1987). The court also discusses ***Sprague v. Sysco Corp***. 97 Wn. App. 169, 982 P. 2d 1202 (1999) and ***Witzel v. Tena***, 48 Wn.2d 628, 295 P.2d 1115 (1956), explaining some of the factors as addressed in those cases. 107 Wn. App. at 907-09.

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[7] As discussed *infra*, courts often use only three of these factors. *See, e.g.*, ***Arkison v. Ethan Allen, Inc.***, 160 Wn.2d 535, 160 P.3d 13 (2007) (citing ***New Hampshire v. Maine***, 532 U.S. 742,750-51 (2001)).

Importantly here, ***Johnson*** then notes that judicial estoppel may be appropriate in a Chapter 13 case where, unlike here, a debtor fails to disclose an asset *during the confirmation process*:

> Under the right circumstances, Chapter 13 of the bankruptcy code may present a strong case for the application of judicial estoppel. As part of the Chapter 13 plan confirmation process, the debtor may be required to represent to the court what unsecured creditors theoretically would have received under a Chapter 7 liquidation. The purpose of this evidence is to convince the court that these creditors are doing at least as well under the Chapter 13 plan as they would have done if the case were converted for liquidation under Chapter 7. 5. William Miller Collier, *COLLIER ON BANKRUPTCY* (Lawrence P. King ed., 15th ed. 1991). By confirming the debtor's Chapter 13 plan, the court implicitly accepts the debtor's Chapter 7 liquidation analysis. In such a case, if the debtor wrongfully failed to disclose a personal injury asset that would have affected the liquidation analysis, judicial estoppel should preclude the debtor from subsequently litigating the personal injury claim.

107 Wn. App. at 909-10. This analysis is consistent with the plain language of the Code discussed *supra*: if the debtor withholds a potential claim during the confirmation process – *i.e., before the plan is confirmed* – then judicial estoppel may apply.

But the court went on to note (also consistent with the plain-language argument set forth *supra*) that under 11 U.S.C. Rule 1007(*h*), the duty to amend schedules is limited to § 541(a)(5) assets, which do "not include other interests acquired by the debtor after the commencement of the case, such as Mr. Johnson's claims against

McDonalds." 107 Wn. App. at 911. As explained *supra*, the same is true here: Arp had no duty to disclose his after-acquired claim.

The ***Johnson*** court goes on to explain the "crucial difference between the after-acquired property specified in 11 U.S.C. § 541(a)(5) and other after-acquired property." *Id.* The trustee may liquidate non-exempt § 541(a)(5) property for the benefit of unsecured creditors (*id.*), but not-so for after-acquired claims:

> By contrast, other property acquired by the debtor after the commencement of a Chapter 13 case may be retained by the debtor and would not be available for distribution to unsecured creditors in the event of Chapter 7 liquidation. ***In re Stamm***, 222 F.3d 216, 218 (5th Cir. 2000). This means that after Mr. Johnson's Chapter 13 was converted to a Chapter 7, he was entitled to retain the proceeds of his lawsuit against McDonalds, free from any claim of the bankruptcy trustee or creditors of his bankruptcy. *See* ***Farmer v. Taco Bell Corp.***, 242 B.R. 435 (W.D. Tenn. 1999).

107 Wn. App. at 911. While Arp did not convert his Chapter 13 into a Chapter 7, that simply makes it all the more true that Arp had no duty to disclose, where Chapter 7 debtors do not have a vested right to the assets under 11 U.S.C. § 1327, but Arp did.

Indeed, McDonalds argued in ***Johnson*** that the conversion to a Chapter 7 required disclosure of the claim. *Id.* at 911. Rejecting even this argument, the court held (again consistent with the plain-

language analysis set forth *supra*) that due to the confirmation of the Chapter 13, no such duty could arise:

> If the conversion occurs after the confirmation of the debtor's Chapter 13 plan, the rule requires the debtor to file other schedules containing additional information, but it does not require the debtor to disclose after-acquired property, unless the debtor's case was converted in bad faith from Chapter 13 to Chapter 7. Fed. R. Bank. P. 1019(5)(C)(i); 11 U.S.C. § 348(f)(2).

107 Wn. App. at 911-12.

In sum, ***Johnson*** is on-point and should control the outcome here. Arp had no duty to disclose his after-acquired claim under the Bankruptcy Code and under the confirmation order. This Court should reverse and remand for trial.

D. The trial court erred because Arp was not required to disclose his potential claim under the most recent and apposite Washington precedent.

Judge Bryan recently issued a decision in another quite similar case, ***Castellano v. Charter Communications, LLC***, 2013 U.S. Dist. LEXIS 164636 (W.D. Wa. 2013).[8] Relying on ***Johnson***, *supra*, Judge Bryan rejected very similar arguments to those brought by Riley and Sierra. He correctly rejected judicial estoppel.

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[8] Arp first cited this case on reconsideration. CP 384-86. To the extent that the trial court failed to consider this relevant authority in denying reconsideration, it abused its discretion.

In ***Castellano***, Angela Castellano (while employed by Charter) filed for Chapter 13 bankruptcy on December 29, 2009, and her plan was confirmed on April 6, 2010. *Id.* She did not disclose any potential law suits. *Id.* She was diagnosed with MS in May 2010. *Id.* She then suffered what she believed to be discriminatory adverse employment actions and failures to accommodate her disability, culminating in her filing suit against Charter in September 2012. *Id.* at *3-*12. Charter asserted judicial estoppel. *Id.* at *16.

Judge Bryant noted that "Castellano's bankruptcy plan was confirmed on April 6, 2010, and her claims did not arise until after she was diagnosed with MS in May of 2010." *Id.* at *17. Therefore, like Arp, "Castellano did not have a duty to disclose her discrimination claims in her initial reorganization plan or debtor's schedules because she was, at that time, unaware of her potential discrimination claims." And crucially here, for "the same reason, Castellano[, like Arp,] did not have a duty to amend her plan after confirmation to include her claims against Charter." *Id.* at *17 (citing ***Johnson***, 107 Wn. App. at 910-11). Ultimately, these "facts prevent the doctrine of judicial estoppel from barring Castellano's [and Arp's] claims." *Id.*

Like Riley and Sierra, Charter cited ***Hamilton*** and ***Coastal***, *supra*. *Id.* at *17-*18. "However, *Hamilton* posits that judicial estoppel is only proper when the plaintiff had knowledge of claims prior to the bankruptcy plan's confirmation." *Id.* "The plaintiff in *Hamilton* actually threatened litigation before filing for bankruptcy." *Id.* at *18 (citing ***Hamilton***, 270 F.3d at 781). Indeed, "[n]ot one of the cases cited by Charter involved claims that arose after the bankruptcy plan's confirmation, as they did at the case at hand." *Id.* (citing ***Hamilton*** and ***Coastal***, *supra*, and several other cases). "Accordingly, the doctrine of judicial estoppel should not bar Castellano's claims against Charter." *Id.* at *19.

The same is true here. Arp did not know of his claims until long after his plan was confirmed. He had no duty to disclose an unknown claim at the outset, and no duty to amend his schedules after the fact. The Court should reverse and remand for trial.

E. Riley & Sierra's argument regarding the "modified estate preservation approach" is unavailing because the unequivocal confirmation order vests all § 1306(a) property in Arp.

Riley and Sierra also raised the "modified estate preservation approach" under ***California Franchise Tax Board v. Kendall (In re Jones)***, 657 F.3d 921 (9th Cir. 2011). CP 135-37. They apparently

suggested that this approach somehow overcomes the plain language of the Bankruptcy Code and the confirmation order. *Id.* The trial court erroneously accepted their argument. CP 375.

In re Jones concerns not an asset, but a debt, and whether the automatic stay provisions in the Code operated to prevent a Chapter 7 discharge from discharging a tax debt, thereby permitting the California Franchise Tax Board (FTB) to pursue the debt as a creditor of the estate. 657 F.3d at 923-24. Consistent with all of the analysis above, the Ninth Circuit Bankruptcy Appellate Panel (BAP) concluded that the confirmation vested the assets in the debtor:

> When the bankruptcy court confirmed the Joneses' Chapter 13 plan, the estate property revested in Jones and became Jones's property, thus lifting the applicable stay provisions. *Id.* §§ 362(a)(3), 362(a)(4)). Since this revesting occurred before the tax debt came due, no stay precluded the FTB from collecting on the debt under § 362. Consequently, the tax debt was not excepted from the Chapter 7 discharge, and the principles of equitable tolling do not apply to extend the lookback period as the FTB was neither precluded from collecting on the tax debt nor did it actively try to protect its claim. We hold the debt was discharged and affirm the BAP.

657 F.3d 921. As even this brief holding shows, ***Jones*** has little relevance here beyond affirming the above analyses.

The key issue on which Riley and Sierra's analysis of ***Jones*** turned is an apparent "conflict" between § 1306 and § 1327. ***Jones*** notes that § 1306(a), in conjunction with § 541, captures "all property

acquired between the Chapter 13 petition filing date and the date the case is closed, dismissed or converted." 657 F.3d at 927. Yet (as explained above) § 1327 says that "[e]xcept as otherwise provided in the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." *Id.* at 927.

The ***Jones*** court goes on to identify four possible resolutions to this "conflict," rejects one,[9] but refuses to resolve which other interpretation applies. 657 F.3d at 927-28. Under all three remaining theories, at least some assets vest in the debtor after confirmation. *Id.* at 928. This resolved ***Jones*** because it meant that the debtor had assets not subject to the bankruptcy stay from which FTB could have collected the taxes within the three-year "lookback" period under the Code. *Id.* at 929. ***Jones*** plainly does not apply here.

Jones notes that under the "modified estate preservation approach," "property vests in the debtor upon plan confirmation, but property acquired after confirmation becomes property of the estate pursuant to § 1306(a)." *Id.* at 927-28. But the 9th Circuit refused to adopt this approach.

---

[9] The 9th Circuit rejects the estate preservation approach, which no court has adopted and which would prevent any assets from vesting in the debtor. 657 F.3d at 928. This rejection is consistent with Arp's arguments.

And this approach is irrelevant here because ¶ 6 of the confirmation order says all § 1306(a) property remains vested in Arp:

> 6. That during the pendency of the plan hereby confirmed, all property of the estate, as defined by 11 U.S.C. 1306(a), shall remain vested in the debtor.

App. A (emphasis added). Simply put, to the extent that § 1306(a) might capture Arp's post-confirmation lawsuit as property of the estate, the confirmation order instead left that property vested in Arp. He thus had no duty to disclose it on his schedules or otherwise report it to the Trustee because it was not property of the estate.

The trial court erred in ruling to the contrary. This Court should reverse and remand for trial.

F. The order confirming Arp's plan did not require disclosure of his claim against Riley and Sierra, but rather provides precisely the contrary.

Riley and Sierra nonetheless argued (at CP 132) – without any citation to authority – that *paragraph 4* of the order confirming the plan required Arp to disclose his potential claim against them:

> 4. That the debtor shall inform the Trustee of any change in circumstances, or receipt of additional income, and shall further comply with any requests of the Trustee with respect to additional financial information the Trustee may require;

App. A, CP 114. In light of ¶ 6, this claim lacks any merit.

Complying with ¶ 4, Arp fully informed the Trustee of his "change in circumstances" when he told the Trustee that he had

suffered a horrible accident for which he was not at fault and due to which he had suffered short-term memory loss that caused him to forget to make his payments. App. B, CP 116-18. Arp plainly had no "additional income" to report, and Arp had paid over $154,336.42 to his creditors, forgetting payments worth only $2,875. *Id.* The Trustee never requested further information. Arp fully complied with the plain language of ¶ 4.

Nonetheless, it appears that the trial court may have granted summary judgment on this basis. That court was apparently confused about § 1306(a) post-confirmation assets, missing the fact that ¶ 6 of the confirmation order vested *precisely those assets* in Arp. On this faulty foundation, Riley and Sierra were apparently able to build an argument about ¶ 4 – which does not require disclosure of non-income assets vested in Arp – that the trial court accepted. Absent any authority – and in light of Arp's full compliance with ¶ 4 – the trial court lacked any tenable basis to grant summary judgment. This Court should reverse and remand for trial.

G. Arp was not judicially estopped to assert his claim.

The following core factors guide the judicial estoppel analysis:

(1) whether a party's later position is clearly inconsistent with its earlier position;

(2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that one court was misled; and

(3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Arkison, 160 Wn.2d at 538-39 (citing, *inter alia*, ***New Hampshire v. Maine***, 532 U.S. at 750-51).

Here, Arp's lawsuit against Riley and Sierra is in no way inconsistent with his earlier assertion that he had suffered a horrible accident, for which he was not at fault, and due to which he had suffered short-term memory loss that caused him to forget to make his payments. App. B (CP 116-18). Thus, no court was misled. Nor would Arp derive an "unfair advantage or impose an unfair detriment" simply by pursuing his fully justified lawsuit against Riley and Sierra for rear-ending him at about 60 m.p.h. or more – while apparently talking on a cellphone – when Arp was at a full stop in traffic on the highway. Under the plain language of the Code and the confirmation order, Arp had no further duty to disclose the potential lawsuit.

This Court should reverse and remand for trial.

H. Arp had standing to sue Riley and Sierra.

Finally, Riley and Sierra argued that due to his "failure" to "properly disclose" his claim against them, Arp lacked standing to

sue them. CP 141-42. Since he had no duty to disclose, he did not fail to properly disclose his claim. Arp is the *only* person or entity with standing to sue Riley and Sierra for their gross and destructive negligence in colliding with Arp at 60 m.p.h. because the confirmation order left that asset vested in Arp (*e.g.*, the Trustee has no standing to sue regarding a non-estate asset). Justice and equity require that this Court reinstate Arp's wholly justified claim.

CONCLUSION

Equity cannot tolerate the result in this case. Ben Arp was stopped on the highway when Riley -- apparently talking on his cellphone and undisputedly in the course and scope of his employment – plowed into Ben's car at 60 m.p.h. The damages Ben suffered are severe and permanent. Among them was a loss of memory that caused him to forget to make the last couple-of-thousand-dollars in payments on his $150,000+ wage-earner payoff plan in bankruptcy. He nonetheless made those payments and his bankruptcy was appropriately discharged. Ben had no duty to disclose his post-confirmation claim under the Code and the confirmation order.

The trial court plainly erred in granting summary judgment to Riley and Sierra, and in denying Arp's motion for summary judgment on their judicial estoppel and standing defenses. This Court should ensure that this equitable doctrine is sparingly used to achieve only equity. It should reverse and remand for trial.

RESPECTFULLY SUBMITTED this 12th day of March, 2015.

MASTERS LAW GROUP, P.L.L.C.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed and/or emailed, a copy of the foregoing **BRIEF OF APPELLANT** postage prepaid, via U.S. mail on the 12th day of March 2015, to the following counsel of record at the following addresses:

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APPENDICES

Appendix A	Order Confirming Chapter 13 Plan
Appendix B	Response to Motion to Dismiss & Declaration of Benjamin Arp in Response to Motion to Dismiss

ATTACHMENTS

Title 11, Bankruptcy Rule 1007	Lists, Schedules, and Statements; Time Limits
Title 11, Bankruptcy Rule 1019	Conversion of Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to Chapter 7 Liquidation Case
Title 11 Bankruptcy § 348	Effect of Conversion
Title 11 Bankruptcy § 521	Debtor's Duties
Title 11 Bankruptcy § 541	Property of the Estate
Title 11 Bankruptcy § 1306	Property of the Estate
Title 11 Bankruptcy § 1327	Effect of Confirmation

Entered on Docket Dec. 17, 2009

Judge: Philip H. Brandt
Chapter: 13

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In Re: BENJAMIN CLARENCE ARP Debtor.	IN CHAPTER 13 PROCEEDING NO. 08-14588 ORDER CONFIRMING CHAPTER 13 PLAN

This Matter having come on for hearing this date before the undersigned bankruptcy Judge, and the Court having heard the arguments, if any, for and against confirmation of the plan proposed herein, and having heard the Trustee's recommendations concerning the plan, the Court does therefore hereby ORDER:

1. That subject to the terms of this order, the plan proposed by the debtor dated 12-09-09 is hereby confirmed;

2. That original attorney fees are set in the amount of $10,915.83;

3. That the debtor shall incur no additional debt except after obtaining prior Court permission;

4. That the debtor shall inform the Trustee of any change in circumstances, or receipt of additional income, and shall further comply with any requests of the Trustee with respect to additional financial information the Trustee may require;

5. That the Trustee shall charge such percentage fee as may periodically be fixed by the Attorney General pursuant to 28 U.S.C. section 586(e);

6. That during the pendency of the plan hereby confirmed, all property of the estate, as defined by 11 U.S.C. section 1306(a), shall remain vested in the debtor, under the exclusive jurisdiction of the Court, and further, that the debtor shall not, without specific approval of the Court, lease, sell, transfer, encumber or otherwise dispose of such property;

7. That all disposable income received by the debtor beginning on the date the first payment is due under the plan shall be applied as payments under the plan pursuant to 11 U.S.C. section 1325(b)(1)(B), unless the Court orders otherwise.

Dated: December 17, 2009

Philip H. Brandt, Judge

Presented by:

APPENDIX A

THE HONORABLE TIMOTHY W. DORE
Hearing Date: January 18, 2011
Hearing Time: 9:30 a.m.
Response Date: January 11, 2011
Hearing Location: Seattle
Chapter 7

THE UNITED STATES BANKRUPTCY COURT FOR THE
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In re BENJAMIN ARP, Debtor.	Case No. 08-14588 DECLARATION OF BENJAMIN ARP IN RESPONSE TO MOTION TO DISMISS

I am the debtor herein.

On October 5, 2010 I was in an auto accident, not of my fault, which resulted in significant brain injury to myself. Since that time I have experienced short-term memory loss and have quite frankly forgotten to make my plan payments. I have made arrangements to obtain a gift from my sister and pay off the balance remaining on my plan. I therefore request that my plan not be dismissed, but that I be allowed to make a one-time payment on the remaining balance to complete my Chapter 13.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing statements are true and correct to the best of my information and knowledge.

Dated this 10th day of January, 2012.

/s/ Benjamin Arp
Benjamin Arp

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will be able to complete his Chapter 13 plan with one payment.

The Debtor has paid over $154,336.42 into the plan and while regrettable, the recent lack of payments given Mr. Arp's injury is understandable. Therefore, Debtor respectfully requests that the court not dismiss Debtor's plan but allow the Debtor to pay off the balance due and owing on his plan.

Dated this 6th day of January, 2012.

/s/ Jeffrey B. Wells, WSBA #6317
Jeffrey B. Wells, WSBA #6317
Attorney for Debtor

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Exhibit C

THE HONORABLE TIMOTHY W. DORE
Hearing Date: January 18, 2011
Hearing Time: 9:30 a.m.
Response Date: January 11, 2011
Hearing Location: Seattle
Chapter 7

THE UNITED STATES BANKRUPTCY COURT FOR THE
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In re BENJAMIN ARP, Debtor.	Case No. 08-14588 RESPONSE TO MOTION TO DISMISS

COMES NOW the Debtor, Benjamin Arp, by and through his attorney of record Jeffrey B. Wells, and in response to the Trustee's motion to dismiss for lack of payment, states as follows. As set forth in the declaration of Benjamin Arp which accompanies this response, the Debtor was involved in an automobile accident on October 5, 2010. The accident was serious enough that Ben Arp received significant brain injuries which has resulted in significant short-term memory loss. No doubt as a result of this accident, the Debtor has "forgotten" to make his Chapter 13 plan payments.

Because there appears to be only a relatively small amount of $2,875 due and owing to complete his Chapter 13 case, and because the requisite three years has now passed, the Debtor has asked his sister whether she could gift him the remaining balance, so that his Chapter 13 plan can be completed. His sister has indicated she is willing to be of assistance so the Debtor

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Rule 1007. Lists, Schedules, and Statements; Time Limits

(a) List of Creditors and Equity Security Holders

(1) *Voluntary Case.* In a voluntary case, the debtor shall file with the petition a list containing the name and address of each creditor unless the petition is accompanied by a schedule of liabilities.

(2) *Involuntary Case.* In an involuntary case, the debtor shall file within 15 days after entry of the order for relief, a list containing the name and address of each creditor unless a schedule of liabilities has been filed.

(3) *Equity Security Holders.* In a chapter 11 reorganization case, unless the court orders otherwise, the debtor shall file within 15 days after entry of the order for relief a list of the debtor's equity security holders of each class showing the number and kind of interests registered in the name of each holder, and the last known address or place of business of each holder.

(4) *Extension of Time.* Any extension of time for the filing of the lists required by this subdivision may be granted only on motion for cause shown and on notice to the United States trustee and to any trustee, committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code, or other party as the court may direct.

(b) Schedules and Statements Required

(1) Except in a chapter 9 municipality case, the debtor, unless the court orders otherwise, shall file schedules of assets and liabilities, a schedule of current income and expenditures, a schedule of executory contracts and unexpired leases, and a statement of financial affairs, prepared as prescribed by the appropriate Official Forms.

(2) An individual debtor in a chapter 7 case shall file a statement of intention as required by § 521(2) of the Code, prepared as prescribed by the appropriate Official Form. A copy of the statement of intention shall be served on the trustee and the creditors named in the statement on or before the filing of the statement.

(c) Time Limits

The schedules and statements, other than the statement of intention, shall be filed with the

petition in a voluntary case, or if the petition is accompanied by a list of all the debtor's creditors and their addresses, within 15 days thereafter, except as otherwise provided in subdivisions (d), (e), and (h) of this rule. In an involuntary case the schedules and statements, other than the statement of intention, shall be filed by the debtor within 15 days after entry of the order for relief. Schedules and statements previously filed in a pending chapter 7 case shall be deemed filed in a superseding case unless the court directs otherwise. Any extension of time for the filing of the schedules and statements may be granted only on motion for cause shown and on notice to the United States trustee and to any committee elected pursuant to §705 or appointed pursuant to §1102 of the Code, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

(d) List of 20 Largest Creditors in Chapter 9 Municipality Case or Chapter 11 Reorganization Case

In addition to the list required by subdivision (a) of this rule, a debtor in a chapter 9 municipality case or a debtor in a voluntary chapter 11 reorganization case shall file with the petition a list containing the name, address and claim of the creditors that hold the 20 largest unsecured claims, excluding insiders, as prescribed by the appropriate Official Form. In an involuntary chapter 11 reorganization case, such list shall be filed by the debtor within 2 days after entry of the order for relief under §303(h) of the Code.

(e) List in Chapter 9 Municipality Cases

The list required by subdivision (a) of this rule shall be filed by the debtor in a chapter 9 municipality case within such time as the court shall fix. If a proposed plan requires a revision of assessments so that the proportion of special assessments or special taxes to be assessed against some real property will be different from the proportion in effect at the date the petition is filed, the debtor shall also file a list showing the name and address of each known holder of title, legal or equitable, to real property adversely affected. On motion for cause shown, the court may modify the requirements of this subdivision and subdivision (a) of this rule.

(f) [Abrogated]

(g) Partnership and Partners

The general partners of a debtor partnership shall prepare and file the schedules of the assets and liabilities, schedule of current income and expenditures, schedule of executory contracts and unexpired leases, and statement of financial affairs of the partnership. The court may order any general partner to file a statement of personal assets and liabilities within such time as the court may fix.

(h) Interests Acquired or Arising After Petition

If, as provided by §541(a)(5) of the Code, the debtor acquires or becomes entitled to acquire any interest in property, the debtor shall within 10 days after the information comes to the debtor's knowledge or within such further time the court may allow, file a supplemental schedule in the chapter 7 liquidation case, chapter 11 reorganization case, chapter 12 family farmer's debt adjustment case, or chapter 13 individual debt adjustment case. If any of the property required to be reported under this subdivision is claimed by the debtor as exempt, the debtor shall claim the exemptions in the supplemental schedule. The duty to file a supplemental schedule in accordance with this subdivision continues notwithstanding the closing of the case, except that the schedule need not be filed in a chapter 11, chapter 12, or chapter 13 case with respect to property acquired after entry of the order confirming a chapter 11 plan or discharging the debtor in a chapter 12 or chapter 13 case.

(i) Disclosure of List of Security Holders

After notice and hearing and for cause shown, the court may direct an entity other than the debtor or trustee to disclose any list of security holders of the debtor in its possession or under its control, indicating the name, address and security held by any of them. The entity possessing this list may be required either to produce the list or a true copy thereof, or permit inspection or copying, or otherwise disclose the information contained on the list.

(j) Impounding of Lists

On motion of a party in interest and for cause shown the court may direct the impounding of the lists filed under this rule, and may refuse to permit inspection by any entity. The court may permit inspection or use of the lists, however, by any party in interest on terms prescribed by the court.

(k) Preparation of List, Schedules, or Statements on Default of Debtor

If a list, schedule, or statement, other than a statement of intention, is not prepared and filed as required by this rule, the court may order the trustee, a petitioning creditor, committee, or other party to prepare and file any of these papers within a time fixed by the court. The court may approve reimbursement of the cost incurred in complying with such an order as an administrative expense.

(*l*) Transmission to United States Trustee

The clerk shall forthwith transmit to the United States trustee a copy of every list, schedule, and statement filed pursuant to subdivision (a)(1), (a)(2), (b), (d), or (h) of this rule.

(As amended Mar. 30, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Aug. 1, 1991.)

NOTES OF ADVISORY COMMITTEE ON RULES—1983

This rule is an adaptation of former Rules 108, 8-106, 10-108 and 11-11. As specified in the rule, it is applicable in all types of cases filed under the Code.

Subdivision (a) requires at least a list of creditors with their names and addresses to be filed with the petition. This list is needed for notice of the meeting of creditors (Rule 2002) and notice of the order for relief (§342 of the Code). The list will also serve to meet the requirements of §521(1) of the Code. Subdivision (a) recognizes that it may be impossible to file the schedules required by §521(1) and subdivision (b) of the rule at the time the petition is filed but in order for the case to proceed expeditiously and efficiently it is necessary that the clerk have the names and addresses of creditors. It should be noted that subdivision (d) of the rule requires a special list of the 20 largest unsecured credi-

Rule 1019. Conversion of Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to Chapter 7 Liquidation Case

When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case:

(1) *Filing of Lists, Inventories, Schedules, Statements.*

(A) Lists, inventories, schedules, and statements of financial affairs theretofore filed shall be deemed to be filed in the chapter 7 case, unless the court directs otherwise. If they have not been previously filed, the debtor shall comply with Rule 1007 as if an order for relief had been entered on an involuntary petition on the date of the entry of the order directing that the case continue under chapter 7.

(B) The statement of intention, if required, shall be filed within 30 days following entry of the order of conversion or before the first date set for the meeting of creditors, whichever is earlier. An extension of time may be granted for cause only on motion made before the time has expired. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

(2) *New Filing Periods.* A new time period for filing claims, a complaint objecting to dis-

charge, or a complaint to obtain a determination of dischargeability of any debt shall commence pursuant to Rules 3002, 4004, or 4007, provided that a new time period shall not commence if a chapter 7 case had been converted to a chapter 11, 12, or 13 case and thereafter reconverted to a chapter 7 case and the time for filing claims, a complaint objecting to discharge, or a complaint to obtain a determination of the dischargeability of any debt, or any extension thereof, expired in the original chapter 7 case.

(3) *Claims Filed Before Conversion.* All claims actually filed by a creditor before conversion of the case are deemed filed in the chapter 7 case.

(4) *Turnover of Records and Property.* After qualification of, or assumption of duties by the chapter 7 trustee, any debtor in possession or trustee previously acting in the chapter 11, 12, or 13 case shall, forthwith, unless otherwise ordered, turn over to the chapter 7 trustee all records and property of the estate in the possession or control of the debtor in possession or trustee.

(5) *Filing Final Report and Schedule of Postpetition Debts.*

(A) *Conversion of Chapter 11 or Chapter 12 Case.* Unless the court directs otherwise, if a chapter 11 or chapter 12 case is converted to chapter 7, the debtor in possession or, if the debtor is not a debtor in possession, the trustee serving at the time of conversion, shall:

(i) not later than 15 days after conversion of the case, file a schedule of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each holder of a claim; and

(ii) not later than 30 days after conversion of the case, file and transmit to the United States trustee a final report and account;

(B) *Conversion of Chapter 13 Case.* Unless the court directs otherwise, if a chapter 13 case is converted to chapter 7,

(i) the debtor, not later than 15 days after conversion of the case, shall file a schedule of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each holder of a claim; and

(ii) the trustee, not later than 30 days after conversion of the case, shall file and transmit to the United States trustee a final report and account;

(C) *Conversion After Confirmation of a Plan.* Unless the court orders otherwise, if a chapter 11, chapter 12, or chapter 13 case is converted to chapter 7 after confirmation of a plan, the debtor shall file:

(i) a schedule of property not listed in the final report and account acquired after the filing of the petition but before conversion, except if the case is converted from chapter 13 to chapter 7 and §348(f)(2) does not apply;

(ii) a schedule of unpaid debts not listed in the final report and account incurred after confirmation but before the conversion; and

(iii) a schedule of executory contracts and unexpired leases entered into or assumed after the filing of the petition but before conversion.

(D) *Transmission to United States Trustee.* The clerk shall forthwith transmit to the United States trustee a copy of every schedule filed pursuant to Rule 1019(5).

(6) *Filing of Postpetition Claims; Notice.* On the filing of the schedule of unpaid debts, the clerk, or some other person as the court may direct, shall give notice to those entities, including the United States, any state, or any subdivision thereof, that their claims may be filed pursuant to Rules 3001(a)–(d) and 3002. Unless a notice of insufficient assets to pay a dividend is mailed pursuant to Rule 2002(e), the court shall fix the time for filing claims arising from the rejection of executory contracts or unexpired leases under §§348(c) and 365(d) of the Code.

(As amended Mar. 30, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Aug. 1, 1991; Apr. 23, 1996, eff. Dec. 1, 1996; Apr. 11, 1997, eff. Dec. 1, 1997.)

NOTES OF ADVISORY COMMITTEE ON RULES—1983

This rule is derived from former Bankruptcy Rule 122 and implements §348 of the Code. The rule applies to proceedings in a chapter 7 case following supersession of a case commenced under chapter 11 or 13, whether the latter was initiated by an original petition or was converted from a pending chapter 7 or another chapter case. The rule is not intended to invalidate any action taken in the superseded case before its conversion to chapter 7.

Paragraph (1): If requirements applicable in the superseded case respecting the filing of schedules of debts and property, or lists of creditors and inventory, and of statements of financial affairs have been complied with before the order directing conversion to liquidation, these documents will ordinarily provide all the information about the debts, property, financial affairs, and contracts of the debtor needed for the administration of the estate. If the information submitted in the superseded case is inadequate for the purposes of administration, however, the court may direct the preparation of further informational material and the manner and time of its submission pursuant to paragraph (1). If no schedules, lists, inventories, or statements were filed in the superseded case, this paragraph imposes the duty on the debtor to file schedules and a statement of affairs pursuant to Rule 1007 as if an involuntary petition had been filed on the date when the court directed the conversion of the case to a liquidation case.

Paragraphs (2) and (3). Paragraph (2) requires notice to be given to all creditors of the order of conversion. The notice is to be included in the notice of the meeting of creditors and Official Form No. 16 may be adapted for use. A meeting of creditors may have been held in the superseded case as required by §341(a) of the Code but that would not dispense with the need to hold one in the ensuing liquidation case. Section 701(a) of the Code permits the court to appoint the trustee acting in the chapter 11 or 13 case as interim trustee in the chapter 7 case. Section 702(a) of the Code allows creditors to elect a trustee but only at the meeting of creditors held under §341. The right to elect a trustee is not lost because the chapter 7 case follows a chapter 11 or 13 case. Thus a meeting of creditors is necessary. The date fixed for the meeting of creditors will control at least the time for filing claims pursuant to Rule 3002(c). That time will remain applicable in the ensuing chapter 7 case except as paragraph (3) provides, if that time had expired in an earlier chapter 7 case which was converted to the chapter 11 or 13 case, it is not revived in the subsequent chapter 7 case. The same is true if the time for filing a complaint objecting to discharge or to determine nondischargeability of a debt had expired. Paragraph (3), however, recognizes that such time may be extended by the court under Rule 4004 or 4007 on motion made within the original prescribed time.

§ 348. Effect of conversion

(a) Conversion of a case from a case under one chapter of this title to a case under another chapter of this title constitutes an order for relief under the chapter to which the case is converted, but, except as provided in subsections (b) and (c) of this section, does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief.

(b) Unless the court for cause orders otherwise, in sections 701(a), 727(a)(10), 727(b), 1102(a), 1110(a)(1), 1121(b), 1121(c), 1141(d)(4), 1201(a), 1221, 1228(a), 1301(a), and 1305(a) of this title, "the order for relief under this chapter" in a chapter to which a case has been converted under section 706, 1112, 1208, or 1307 of this title means the conversion of such case to such chapter.

(c) Sections 342 and 365(d) of this title apply in a case that has been converted under section 706, 1112, 1208, or 1307 of this title, as if the conversion order were the order for relief.

(d) A claim against the estate or the debtor that arises after the order for relief but before conversion in a case that is converted under section 1112, 1208, or 1307 of this title, other than a claim specified in section 503(b) of this title, shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition.

(e) Conversion of a case under section 706, 1112, 1208, or 1307 of this title terminates the service of any trustee or examiner that is serving in the case before such conversion.

(f)(1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title—

(A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion;

(B) valuations of property and of allowed secured claims in the chapter 13 case shall apply only in a case converted to a case under chapter 11 or 12, but not in a case converted to a case under chapter 7, with allowed secured claims in cases under chapters 11 and 12 reduced to the extent that they have been paid in accordance with the chapter 13 plan; and

(C) with respect to cases converted from chapter 13—

(i) the claim of any creditor holding security as of the date of the filing of the petition shall continue to be secured by that security unless the full amount of such claim determined under applicable nonbankruptcy law has been paid in full as of the date of conversion, notwithstanding any valuation or determination of the amount of an allowed secured claim made for the purposes of the case under chapter 13; and

(ii) unless a prebankruptcy default has been fully cured under the plan at the time of conversion, in any proceeding under this title or otherwise, the default shall have the effect given under applicable nonbankruptcy law.

(2) If the debtor converts a case under chapter 13 of this title to a case under another chapter under this title in bad faith, the property of the estate in the converted case shall consist of the property of the estate as of the date of conversion.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2568; Pub. L. 99–554, title II, § 257(i), Oct. 27, 1986, 100 Stat. 3115; Pub. L. 103–394, title III, § 311, title V, § 501(d)(5), Oct. 22, 1994, 108 Stat. 4138, 4144; Pub. L. 109–8, title III, § 309(a), title XII, § 1207, Apr. 20, 2005, 119 Stat. 82, 194; Pub. L. 111–327, § 2(a)(11), Dec. 22, 2010, 124 Stat. 3558.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

The House amendment adopts section 348(b) of the Senate amendment with slight modifications, as more accurately reflecting sections to which this particular effect of conversion should apply.

Section 348(e) of the House amendment is a stylistic revision of similar provisions contained in H.R. 8200 as passed by the House and in the Senate amendment. Termination of services is expanded to cover any examiner serving in the case before conversion, as done in H.R. 8200 as passed by the House.

SENATE REPORT NO. 95-989

This section governs the effect of the conversion of a case from one chapter of the bankruptcy code to another chapter. Subsection (a) specifies that the date of the filing of the petition, the commencement of the case, or the order for relief are unaffected by conversion, with some exceptions specified in subsections (b) and (c).

Subsection (b) lists certain sections in the operative chapters of the bankruptcy code in which there is a reference to "the order for relief under this chapter." In those sections, the reference is to be read as a reference to the conversion order if the case has been converted into the particular chapter. Subsection (c) specifies that notice is to be given of the conversion order the same as notice was given of the order for relief, and that the time the trustee (or debtor in possession) has for assuming or rejecting executory contracts recommences, thus giving an opportunity for a newly appointed trustee to familiarize himself with the case.

Subsection (d) provides for special treatment of claims that arise during chapter 11 or 13 cases before the case is converted to a liquidation case. With the ex-

§ 521. Debtor's duties

(a) The debtor shall—

(1) file—

(A) a list of creditors; and

(B) unless the court orders otherwise—

(i) a schedule of assets and liabilities;

(ii) a schedule of current income and current expenditures;

(iii) a statement of the debtor's financial affairs and, if section 342(b) applies, a certificate—

(I) of an attorney whose name is indicated on the petition as the attorney for the debtor, or a bankruptcy petition preparer signing the petition under section 110(b)(1), indicating that such attorney or the bankruptcy petition preparer delivered to the debtor the notice required by section 342(b); or

(II) if no attorney is so indicated, and no bankruptcy petition preparer signed the petition, of the debtor that such notice was received and read by the debtor;

(iv) copies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition, by the debtor from any employer of the debtor;

(v) a statement of the amount of monthly net income, itemized to show how the amount is calculated; and

(vi) a statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the filing of the petition;

(2) if an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate—

(A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, file with the clerk a statement of his intention with respect to the retention or surrender of such property

and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property; and

(B) within 30 days after the first date set for the meeting of creditors under section 341(a), or within such additional time as the court, for cause, within such 30-day period fixes, perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph;

except that nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title, except as provided in section 362(h);

(3) if a trustee is serving in the case or an auditor is serving under section 586(f) of title 28, cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title;

(4) if a trustee is serving in the case or an auditor is serving under section 586(f) of title 28, surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate, whether or not immunity is granted under section 344 of this title;

(5) appear at the hearing required under section 524(d) of this title;

(6) in a case under chapter 7 of this title in which the debtor is an individual, not retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property unless the debtor, not later than 45 days after the first meeting of creditors under section 341(a), either—

(A) enters into an agreement with the creditor pursuant to section 524(c) with respect to the claim secured by such property; or

(B) redeems such property from the security interest pursuant to section 722; and

(7) unless a trustee is serving in the case, continue to perform the obligations required of the administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974) of an employee benefit plan if at the time of the commencement of the case the debtor (or any entity designated by the debtor) served as such administrator.

If the debtor fails to so act within the 45-day period referred to in paragraph (6), the stay under section 362(a) is terminated with respect to the personal property of the estate or of the debtor which is affected, such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable nonbankruptcy law, unless the court determines on the motion of the trustee filed before the expiration of such 45-day period, and after notice and a hearing, that such property is of consequential value or benefit to the estate, orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee.

(b) In addition to the requirements under subsection (a), a debtor who is an individual shall file with the court—

(1) a certificate from the approved nonprofit budget and credit counseling agency that provided the debtor services under section 109(h) describing the services provided to the debtor; and

(2) a copy of the debt repayment plan, if any, developed under section 109(h) through the approved nonprofit budget and credit counseling agency referred to in paragraph (1).

(c) In addition to meeting the requirements under subsection (a), a debtor shall file with the court a record of any interest that a debtor has in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986) or under a qualified State tuition program (as defined in section 529(b)(1) of such Code).

(d) If the debtor fails timely to take the action specified in subsection (a)(6) of this section, or in paragraphs (1) and (2) of section 362(h), with respect to property which a lessor or bailor owns and has leased, rented, or bailed to the debtor or as to which a creditor holds a security interest not otherwise voidable under section 522(f), 544, 545, 547, 548, or 549, nothing in this title shall prevent or limit the operation of a provision in the underlying lease or agreement that has the effect of placing the debtor in default under such lease or agreement by reason of the occurrence, pendency, or existence of a proceeding under this title or the insolvency of the debtor. Nothing in this subsection shall be deemed to justify limiting such a provision in any other circumstance.

(e)(1) If the debtor in a case under chapter 7 or 13 is an individual and if a creditor files with the court at any time a request to receive a copy of the petition, schedules, and statement of financial affairs filed by the debtor, then the court shall make such petition, such schedules, and such statement available to such creditor.

(2)(A) The debtor shall provide—

(i) not later than 7 days before the date first set for the first meeting of creditors, to the trustee a copy of the Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such return) for the most recent tax year ending immediately before the commencement of the case and for which a Federal income tax return was filed; and

(ii) at the same time the debtor complies with clause (i), a copy of such return (or if elected under clause (i), such transcript) to any creditor that timely requests such copy.

(B) If the debtor fails to comply with clause (i) or (ii) of subparagraph (A), the court shall dismiss the case unless the debtor demonstrates that the failure to so comply is due to circumstances beyond the control of the debtor.

(C) If a creditor requests a copy of such tax return or such transcript and if the debtor fails to provide a copy of such tax return or such transcript to such creditor at the time the debtor provides such tax return or such transcript to the trustee, then the court shall dismiss the case unless the debtor demonstrates that the

failure to provide a copy of such tax return or such transcript is due to circumstances beyond the control of the debtor.

(3) If a creditor in a case under chapter 13 files with the court at any time a request to receive a copy of the plan filed by the debtor, then the court shall make available to such creditor a copy of the plan—

(A) at a reasonable cost; and

(B) not later than 7 days after such request is filed.

(f) At the request of the court, the United States trustee, or any party in interest in a case under chapter 7, 11, or 13, a debtor who is an individual shall file with the court—

(1) at the same time filed with the taxing authority, a copy of each Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such tax return) with respect to each tax year of the debtor ending while the case is pending under such chapter;

(2) at the same time filed with the taxing authority, each Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such tax return) that had not been filed with such authority as of the date of the commencement of the case and that was subsequently filed for any tax year of the debtor ending in the 3-year period ending on the date of the commencement of the case;

(3) a copy of each amendment to any Federal income tax return or transcript filed with the court under paragraph (1) or (2); and

(4) in a case under chapter 13—

(A) on the date that is either 90 days after the end of such tax year or 1 year after the date of the commencement of the case, whichever is later, if a plan is not confirmed before such later date; and

(B) annually after the plan is confirmed and until the case is closed, not later than the date that is 45 days before the anniversary of the confirmation of the plan;

a statement, under penalty of perjury, of the income and expenditures of the debtor during the tax year of the debtor most recently concluded before such statement is filed under this paragraph, and of the monthly income of the debtor, that shows how income, expenditures, and monthly income are calculated.

(g)(1) A statement referred to in subsection (f)(4) shall disclose—

(A) the amount and sources of the income of the debtor;

(B) the identity of any person responsible with the debtor for the support of any dependent of the debtor; and

(C) the identity of any person who contributed, and the amount contributed, to the household in which the debtor resides.

(2) The tax returns, amendments, and statement of income and expenditures described in subsections (e)(2)(A) and (f) shall be available to the United States trustee (or the bankruptcy administrator, if any), the trustee, and any party in interest for inspection and copying, subject to the requirements of section 315(c) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

(h) If requested by the United States trustee or by the trustee, the debtor shall provide—

(1) a document that establishes the identity of the debtor, including a driver's license, passport, or other document that contains a photograph of the debtor; or

(2) such other personal identifying information relating to the debtor that establishes the identity of the debtor.

(i)(1) Subject to paragraphs (2) and (4) and notwithstanding section 707(a), if an individual debtor in a voluntary case under chapter 7 or 13 fails to file all of the information required under subsection (a)(1) within 45 days after the date of the filing of the petition, the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition.

(2) Subject to paragraph (4) and with respect to a case described in paragraph (1), any party in interest may request the court to enter an order dismissing the case. If requested, the court shall enter an order of dismissal not later than 7 days after such request.

(3) Subject to paragraph (4) and upon request of the debtor made within 45 days after the date of the filing of the petition described in paragraph (1), the court may allow the debtor an additional period of not to exceed 45 days to file the information required under subsection (a)(1) if the court finds justification for extending the period for the filing.

(4) Notwithstanding any other provision of this subsection, on the motion of the trustee filed before the expiration of the applicable period of time specified in paragraph (1), (2), or (3), and after notice and a hearing, the court may decline to dismiss the case if the court finds that the debtor attempted in good faith to file all the information required by subsection (a)(1)(B)(iv) and that the best interests of creditors would be served by administration of the case.

(j)(1) Notwithstanding any other provision of this title, if the debtor fails to file a tax return that becomes due after the commencement of the case or to properly obtain an extension of the due date for filing such return, the taxing authority may request that the court enter an order converting or dismissing the case.

(2) If the debtor does not file the required return or obtain the extension referred to in paragraph (1) within 90 days after a request is filed by the taxing authority under that paragraph, the court shall convert or dismiss the case, whichever is in the best interests of creditors and the estate.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2586; Pub. L. 98–353, title III, §§ 305, 452, July 10, 1984, 98 Stat. 352, 375; Pub. L. 99–554, title II, § 283(h), Oct. 27, 1986, 100 Stat. 3117; Pub. L. 109–8, title I, § 106(d), title II, § 225(b), title III, §§ 304(1), 305(2), 315(b), 316, title IV, § 446(a), title VI, § 603(c), title VII, § 720, Apr. 20, 2005, 119 Stat. 38, 66, 78, 80, 89, 92, 118, 123, 133; Pub. L. 111–16, § 2(5), (6), May 7, 2009, 123 Stat. 1607; Pub. L. 111–327, § 2(a)(16), Dec. 22, 2010, 124 Stat. 3559.)

SUBCHAPTER III—THE ESTATE

§ 541. Property of the estate

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

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

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

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

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

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

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

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

(A) by bequest, 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—

(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;

(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;

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that—

(A)(i) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this title; or

(B)(i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 542 of this title;

(5) funds placed in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986) not later than 365 days before the date of the filing of the petition in a case under this title, but—

(A) only if the designated beneficiary of such account was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were placed in such account;

(B) only to the extent that such funds—

(i) are not pledged or promised to any entity in connection with any extension of credit; and

(ii) are not excess contributions (as described in section 4973(e) of the Internal Revenue Code of 1986); and

(C) in the case of funds placed in all such accounts having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $5,000;

(6) funds used to purchase a tuition credit or certificate or contributed to an account in accordance with section 529(b)(1)(A) of the Internal Revenue Code of 1986 under a qualified State tuition program (as defined in section 529(b)(1) of such Code) not later than 365 days before the date of the filing of the petition in a case under this title, but—

(A) only if the designated beneficiary of the amounts paid or contributed to such tuition program was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were paid or contributed;

(B) with respect to the aggregate amount paid or contributed to such program having the same designated beneficiary, only so much of such amount as does not exceed the total contributions permitted under section 529(b)(6) of such Code with respect to such beneficiary, as adjusted beginning on the date of the filing of the petition in a case under this title by the annual increase or decrease (rounded to the nearest tenth of 1 percent) in the education expenditure category of the Consumer Price Index prepared by the Department of Labor; and

(C) in the case of funds paid or contributed to such program having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $5,000;

(7) any amount—

(A) withheld by an employer from the wages of employees for payment as contributions—

(i) to—

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986;

except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title; or

(B) received by an employer from employees for payment as contributions—

(i) to—

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986;

except that such amount under this subparagraph shall not constitute disposable income, as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title;

(8) subject to subchapter III of chapter 5, any interest of the debtor in property where the debtor pledged or sold tangible personal property (other than securities or written or printed evidences of indebtedness or title) as collateral for a loan or advance of money given by a person licensed under law to make such loans or advances, where—

(A) the tangible personal property is in the possession of the pledgee or transferee;

(B) the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and

(C) neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law, in a timely manner as provided under State law and section 108(b); or

(9) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made—

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor),

unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition.

Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

(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.

(e) In determining whether any of the relationships specified in paragraph (5)(A) or (6)(A) of subsection (b) exists, a legally adopted child of an individual (and a child who is a member of an individual's household, if placed with such individual by an authorized placement agency for legal adoption by such individual), or a foster child of an individual (if such child has as the child's principal place of abode the home of the debtor and is a member of the debtor's household) shall be treated as a child of such individual by blood.

(f) Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2594; Pub. L. 98–353, title III, §§363(a), 456, July 10, 1984, 98 Stat. 363, 376; Pub. L. 101–508, title III, §3007(a)(2), Nov. 5, 1990, 104 Stat. 1388–28; Pub. L. 102–486, title XXX, §3017(b), Oct. 24, 1992, 106 Stat. 3130; Pub. L. 103–394, title II, §§208(b), 223, Oct. 22, 1994, 108 Stat. 4124, 4129; Pub. L. 109–8, title II, §225(a), title III, §323, title XII, §§1212, 1221(c), 1230, Apr. 20, 2005, 119 Stat. 65, 97, 194, 196, 201; Pub. L. 111–327, §2(a)(22), Dec. 22, 2010, 124 Stat. 3560.)

ADJUSTMENT OF DOLLAR AMOUNTS

For adjustment of certain dollar amounts specified in this section, that is not reflected in text, see Adjustment of Dollar Amounts note below.

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 541(a)(7) is new. The provision clarifies that any interest in property that the estate acquires after the commencement of the case is property of the estate; for example, if the estate enters into a contract, after the commencement of the case, such a contract would be property of the estate. The addition of this provision by the House amendment merely clarifies that section 541(a) is an all-embracing definition which includes charges on property, such as liens held by the debtor on property of a third party, or beneficial rights and interests that the debtor may have in property of another. However, only the debtor's interest in such property becomes property of the estate. If the debtor holds bare legal title or holds property in trust for another, only those rights which the debtor would have otherwise had emanating from such interest pass to the estate under section 541. Neither this section nor section 545 will affect various statutory provisions that give a creditor a lien that is valid both inside and outside bankruptcy against a bona fide purchaser of property from the debtor, or that creates a trust fund for the benefit of creditors meeting similar criteria. See Packers and Stockyards Act §206, 7 U.S.C. 196 (1976).

Section 541(c)(2) follows the position taken in the House bill and rejects the position taken in the Senate amendment with respect to income limitations on a spend-thrift trust.

Section 541(d) of the House amendment is derived from section 541(e) of the Senate amendment and reiterates the general principle that where the debtor holds bare legal title without any equitable interest, that the estate acquires bare legal title without any equitable interest in the property. The purpose of section 541(d) as applied to the secondary mortgage market is identical to the purpose of section 541(e) of the Senate amendment and section 541(d) will accomplish the same result as would have been accomplished by section 541(e). Even if a mortgage seller retains for purposes of servicing legal title to mortgages or interests in mortgages sold in the secondary mortgage market, the trustee would be required by section 541(d) to turn over the mortgages or interests in mortgages to the purchaser of those mortgages.

The seller of mortgages in the secondary mortgage market will often retain the original mortgage notes and related documents and the seller will not endorse the notes to reflect the sale to the purchaser. Similarly, the purchaser will often not record the purchaser's ownership of the mortgages or interests in mortgages under State recording statutes. These facts are irrelevant and the seller's retention of the mortgage documents and the purchaser's decision not to record do not change the trustee's obligation to turn

§ 1306. Property of the estate

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

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

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

(b) Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2647; Pub. L. 99–554, title II, § 257(u), Oct. 27, 1986, 100 Stat. 3116.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1306(a)(2) adopts a provision contained in the Senate amendment in preference to a similar provision contained in the House bill.

SENATE REPORT NO. 95–989

Section 541 is expressly made applicable to chapter 13 cases by section 103(a). Section 1306 broadens the definition of property of the estate for chapter 13 purposes to include all property acquired and all earnings from services performed by the debtor after the commencement of the case.

Subsection (b) nullifies the effect of section 521(3), otherwise applicable, by providing that a chapter 13 debtor need not surrender possession of property of the estate, unless required by the plan or order of confirmation.

AMENDMENTS

1986—Subsec. (a). Pub. L. 99–554 inserted reference to chapter 12 in pars. (1) and (2).

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

§ 1327. Effect of confirmation

(a) 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.

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

(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.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2650.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Subsection (a) binds the debtor and each creditor to the provisions of a confirmed plan, whether or not the claim of the creditor is provided for by the plan and whether or not the creditor has accepted, rejected, or objected to the plan. Unless the plan itself or the order confirming the plan otherwise provides, confirmation is deemed to vest all property of the estate in the debtor, free and clear of any claim or interest of any creditor provided for by the plan.