

CONVERSION . . . OR CONVOLUTION:

THE EFFECT OF CONVERSIONS BETWEEN CHAPTER 7 AND CHAPTER 13

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#### I. Introduction

The conversion of a bankruptcy case between Chapter 7 and 13 can be perilous for both debtors and creditors. From a debtor's perspective, there are a multitude of reasons to move from one Chapter to another. For example, Chapter 13 debtors that have confirmed a plan that commits future income in excess of the liquidation value of their assets, may prefer the Chapter 7 process. Also, a Chapter 7 debtor that has been unable to negotiate the reinstatement of a home mortgage loan or a repayment plan for nondischargeable taxes, may need to convert to Chapter 13 to preserve their home or to avoid post petition tax levies. It is the author's experience, however, that most conversions are not motivated by such considerations. Rather, the motions to convert that appear most frequently in the Bankruptcy Court seem to be motivated by a debtor's desire to escape the pursuit of an aggressive Chapter 7 or Chapter 13 Trustee. These materials will explore some of the cases that have dealt with the issue of a debtor's "right" to convert a case, and will also consider the effect of conversion on objections to exemptions, time limitations for certain avoidance actions and the determination of property of the estate.

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II. Does §706(a) Afford Debtors an Absolute Right to Convert a Case?

A. Many Courts have determined that there is no absolute right to convert.

1. In re Marrama, 430 F.3d 474 (1st Cir. 2005)

Procedural History: Seven months before filing for bankruptcy under Chapter 7, the debtor transferred residential real estate, having an unencumbered value of \$85,000.00, to a revocable spendthrift trust. Upon filing a voluntary Chapter 7 petition, the Debtor stated that the trust's res had a value of zero, that he had made no property transfers within one year preceding the filing of his petition, and that he was owed no tax refunds. In reality he was due over \$11,000.00 in tax refunds. When the trustee questioned the Debtor regarding these inconsistencies, he responded by filing a motion to convert the Chapter 7 to a Chapter 13 case.

Holding: The First Circuit refused to permit the conversion. It concluded that §706(a) permitted the Bankruptcy Court to deny a §706(a) motion to convert where the Court determines that the debtor was engaged in bad faith conduct. The Court discussed the plain meaning of §706(a) and noted that as a subsection, it must be read in light of a fundamental canon of the Code: "a Bankruptcy Court sitting in equity is duty bound to take all reasonable steps to prevent a debtor from abusing or manipulating the bankruptcy process of the Bankruptcy Code, including the principle that all

the debtor's assets are to be gathered and deployed in a bona fide effort to satisfy valid claims." The Court concluded that there was no evidence that Congress intended to override the presumptive power and responsibility of the Bankruptcy Court to weed out abuses of the bankruptcy process at any stage in bankruptcy proceedings. The Court also addressed the debtor's position, that permitting conversion is consistent with the policy behind the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 to encourage more debtors to seek relief under Chapter 13. The Court noted that the language of §706(a) remained unchanged under 2005 Act and that the reform was "aimed at encouraging able debtors to undertake the voluntary repayment of their lawful credit obligations", not "to advance an ongoing scheme to retain non-exempt assets from bona fide creditors."

**2. In re Neely, 334 B.R. 863 (S.D. Tex. 2005)**

Procedural History: Debtor was an attorney that had filed bankruptcy three times before commencing a fourth petition for relief under Chapter 7. Seven months after the filing of his latest Chapter 7, he filed a motion to convert his case to one under Chapter 13. The Chapter 7 Trustee filed a motion objecting to the motion to convert. The Court converted the case to a Chapter 13 and considered the Trustee's objection as a motion to reconvert to a Chapter 7. During the hearing on the motions, the Bankruptcy Court recounted several instances of questionable conduct by Debtor in his current

bankruptcy, including: non-disclosure of a trust that Debtor was the Trustee for, selling Trust property to another attorney, failure to disclose records of property owned by Debtor but which he had characterized as his wife's separate property, and refusal to provide Trustee with records pertaining to monies used. The Court held that the findings were sufficient to constitute extreme circumstances and justified a re-conversion of the case back to a Chapter 7. Debtor appealed.

Holding: The Neely Court concluded that the right to convert was not absolute. In doing so, the Court noted that while bound by the Fifth Circuit precedent of In re Martin, 880 F.2d 857 (5th Cir. 1989), which held that the Bankruptcy Court's denial of conversion was improper, the Martin dicta recognized that a Debtor's right to convert was not completely unfettered and there could be "extreme circumstances." The Neely Court stated that the Martin opinion could be read harmoniously saying that the Court's language leaves open the possibility that sufficient facts could exist to justify denying the conversion, in an "extreme circumstance." The Neely Court then remanded the case to the Bankruptcy Court for further findings on whether Debtor's actions constituted bad faith, because the record contained no such findings.

**3. In re Cooper, 426 F.3d 810 (6th Cir. 2005)**

Procedural History: Over a 9-year period, before filing for Chapter 7 relief, the Debtor had taken evasive action to avoid paying his ex-wife thousands

of dollars of which she was awarded under the couple's divorce decree. The Bankruptcy Court discovered a number of false statements in the Debtor's Schedules and Statement of Financial Affairs. Seventeen months after filing for Chapter 7, the Debtor filed a Motion to Convert to Chapter 13; the Bankruptcy Court denied the Motion. The Debtor appealed, and the BAP affirmed the Bankruptcy Court's holding.

Holding: After quoting from both the BAP and Divorce Court opinions noting the Debtor's difficulty as a witness, cavalier attitude, lack of credibility, and vexatious litigation the Circuit Court addressed the split of authority regarding §706(a) and the absolute right to convert. The Court held that a debtor's right to convert from Chapter 7 to 13 was subject to a bad faith exception. The Court reasoned that the phrase providing that a Debtor may convert "at any time" referred to time frame and not "regardless of circumstances." The Court concluded that the Debtor was attempting to convert his case to Chapter 13 not by a desire to repay his creditors, but to avoid a his obligations to his ex-wife, which were not dischargeable, and thus it represented an improper attempt to manipulate the Bankruptcy Code.

**4. In re Epley, 2005 Bankr. LEXIS 2817 (E.D. Va. 2005)**

Procedural History: Debtor filed for relief under Chapter 7. The Chapter 7 Trustee later determined that there would be assets available for distribution of unsecured creditors and requested an

"Asset Notice" advising creditors to file Proof of Claim forms. The Trustee obtained a contract for sale of the property for \$285,000.00. This sale would pay unsecured creditors approximately 50% of their claims. The Debtor filed a Motion to Convert to Chapter 13, and the Trustee objected. The Debtor's proposed plan was to sell the residence herself and pay all the creditors in full from the proceeds, essentially the same as the Chapter 7 Trustee's plan.

Holding: The Bankruptcy Court denied the Motion to Convert, concluding that it was filed in bad faith because the Debtor had no ability to propose a confirmable plan. The Court noted that there would be no guarantee that the Debtor would be able to pay all her unsecured claims in full under her Chapter 13 plan and that denial of the Motion would not harm the Debtor since a sale of the property would take place in either event. The Court stated that conversion would only delay the sale of the property and risk a decline in value or loss of the Trustee's contract of sale.

**B. Other Courts have recognized a "right" to convert.**

**1. In re Croston, 313 B.R. 447 (B.A.P. 9th Cir. 2004)**

Procedural History: The Debtors filed for Chapter 7 relief. They later filed a Motion to Dismiss their Chapter 7 case. The Trustee opposed the dismissal and sued the Debtors to recover an alleged intentionally fraudulent transfer. During the case, the Debtors also filed and then dismissed a separate

Chapter 13 case. The Bankruptcy Court ruled that the Motion to Dismiss had been filed in bad faith and declined to dismiss. Subsequently, the Debtors filed a §706(a) Motion to Convert to Chapter 13. The Trustee filed a complaint denying Debtors' discharge under §727. The Bankruptcy Court made findings inferring bad faith by the Debtors for numerous reasons and held that the Debtors' right to convert was not absolute, but in the Court's discretion. The Debtors appealed.

Holding: The Bankruptcy Appellate Panel (BAP) reversed saying that §706(a)'s anti-waiver language precluded barring Debtors from exercising their one-time right to convert for reasons other than the ones stated in the statute. The BAP went on to say that courts could redress dishonest exploitation of the right to re-convert through its statutory powers to convert the case back to Chapter 7 for "cause". The Court addressed the added work of converting and then reconverting by saying that "[w]hile it may seem unnecessarily formalistic to require that one go through the drill of conversion and re-conversion where re-conversion appears to be a foregone conclusion, we think that is the balance struck by Congress."

**2. Miller v. U.S. Trustee, 303 B.R. 471 (B.A.P. 10th Cir. 2003)**

Procedural History: An Involuntary Chapter 7 Petition was filed against Debtor. Debtor later filed a Motion to Convert to a Chapter 13. The Bankruptcy Court denied the Motion on the grounds



that there were circumstances indicating an abuse of process. The Debtor appealed to the BAP. The Debtor argued that §706 grants all debtors a one-time absolute right to convert that is restricted only by the requirements specifically delineated in that statute.

Holding: The BAP agreed with the Debtor relying on the plain meaning of §706 and 109(e) (an individual may be a Chapter 13 debtor if he has a regular income, unsecured debts of less than \$290,525.00 and secured debts of less than \$871,550.00) and saying, "[t]here is nothing in §706 or anywhere else in the Code that demands more than the 109(e) requirements of a converting Chapter 7 debtor." The Court concluded that the Bankruptcy Court may not exercise its discretion and impose requirements on the conversion process other than those delineated in the plain language of §706.

**3. In re Carrow, 315 B.R. 8 (Bankr. N.D.N.Y. 2004)**

Procedural History: The Debtor filed a Chapter 7 Petition in which, in addition to 3 parcels of real estate, she omitted \$1,000.00 worth of income per month (Debtor stated that the error was an 'oversight'). Nevertheless, the Debtor received a discharge. The Trustee continued to administer the Estate and filed a Motion to Sell the Real Estate. The Debtor filed an Objection and a Motion to Convert her case to a Chapter 13.

Holding: The Court, while "troubled" by the Debtor's apparent \$1,000.00 oversight in income, stated that it agreed with the strict, literal

interpretation of §706, granting the Debtor an absolute right of conversion. This Court addressed the question of bad faith by saying that "while bad faith cannot prevent the debtor from converting from Chapter 7 to Chapter 13, once conversion is done, bad faith would constitute grounds for an objection to confirmation pursuant to §1325(a)(3) or cause for re-conversion under 1307(c)."

**4. In re Finney, 992 F.2d 43 (4th Cir. 1993)**

Procedural History: Debtor filed Chapter 7 petition and was generally uncooperative during the proceedings. The Debtor also made undisclosed post-petition transfers of real estate. Debtor then moved to have his case dismissed. The Bankruptcy Court denied the Motion because of the Debtor's "recalcitrant" and fraudulent conduct. The Debtor then sought to have his case converted to Chapter 11 under §706(a); the Bankruptcy Court also denied this Motion stating that as a matter of law a Bankruptcy Court may, in its discretion, deny a §706(a) motion upon finding that immediate re-conversion from Chapter 11 to Chapter 7 is appropriate under §1112(b). The Debtor appealed.

Holding: The Fourth Circuit stated that the Debtor's actions did not justify overriding his "one-time absolute right" to convert, but it also found that the facts justified the Bankruptcy Court's sua sponte consideration of whether an immediate re-conversion under § 1112(b) was warranted. The Court remanded for a hearing on whether the Debtor's Chapter 11 reorganization would

be objectively futile. Further, the Court recognized some circumstances might warrant invocation of Code section 105(a) to deny a Section 706(a) motion, but declined to comment about what type of conduct would be sufficiently egregious to deny debtor his statutory right of conversion.

**C. What Constitutes Bad Faith?**

The Marrama Court used the totality of the circumstances test to determine whether a Chapter 13 petition had been filed in good faith. The Marrama Court cited In re Sullivan, 326 B.R. 204, 211 (B.A.P. 1st Cir. 2005), which found that "bankruptcy courts generally consider the following factors: (1) debtor's accuracy in stating her debts and expenses, (2) debtor's honesty in the bankruptcy process, including whether she has attempted to mislead the court and whether she has made any misrepresentations, (3) whether the Bankruptcy Code is being unfairly manipulated, (4) the type of debt sought to be discharged, (5) whether the debt would be dischargeable in a Chapter 7, and (6) debtor's motivation and sincerity in seeking Chapter 13 relief. The totality of circumstances test to determine good faith is a fact intensive determination based upon a multi-faceted analysis applied on a case-by-case basis."

**III. Upon Conversion Does the Time Within Which Exemptions May Be Objected To Re-Start?**

**A.** Rule 4003(b), which is set forth in its entirety below, generally provides that objections to exemptions must be filed within 30 days following a §341 meeting. Upon

conversion, a question arises as to whether that time limitation will restart. A minority of Courts hold that the time limitation for objecting to exemptions does restart upon conversion. Massachusetts Courts seem to have adopted this position.

**1. In re Koss, 319 B.R. 317 (Bankr. D. Mass 2005)**

Procedural History: Debtor filed a Chapter 11 petition and during the pendency of the case, and while the Debtor was a debtor in possession (DIP), a fire substantially destroyed the residence owned by Debtor. The Debtor filed an insurance claim without advising the Court. The insurer remitted a check to the Debtor in the amount of \$1,300,000.00. Debtor did not deposit the proceeds into the DIP bank account, report the proceeds or include the proceeds in his reports to the U.S. Trustee. Seventeen months into the case, the Debtor moved for, and was granted, a conversion under Chapter 7. A Chapter 7 Trustee was appointed, convened a §341 meeting and held it open for 7 months. During which time, the Trustee learned of the insurance disbursement and filed adversary proceedings against the Debtor. The Trustee then filed a Motion Objecting to the Debtor's Exemptions. The Debtor argued that the Objection to Exemptions was untimely because the period does not recommence and the time within which the Trustee could have objected expired because of the length that the Trustee kept the §341 meeting open.

Holding: The issue was a case of first impression in the First Circuit. The Court ruled that the

Chapter 7 Trustee's Objection to Exemptions was timely. The Court ruled that the time does re-start upon conversion saying that if the 30-day period to file objections did not recommence when a reorganization case converted to a liquidation case under Chapter 7, a newly appointed Trustee would rarely, if ever, have an opportunity to object to exemptions. The Court discussed the difference between convening and concluding a §341 meeting. The Court stated that the Trustee had convened the meeting within a reasonable time, but acknowledged that the meeting was not concluded for an unusually long time. However, the Court adopted the view that a §341 meeting is not concluded until "the Trustee so declares or the court so orders," saying that continuation of §341 meeting is entirely appropriate and if the Debtor felt that the continuation unnecessary he could have filed a motion to compel the Trustee to conclude the meeting.

**2. In re Alexander, 236 F.3d 431 (8th Cir. 2001)**

Procedural History: The Debtor filed a Chapter 13 Bankruptcy Petition and stated one address as his residence. However, the Debtor claimed a homestead exemption on another address. The Chapter 13 Trustee objected to the exemption arguing that the Debtor did not live at the property he had declared a homestead exemption on. The Debtor later admitted that he had declared a homestead exemption on his business address. The Court sustained the Trustee's objection, denied Debtor his exemption, and converted his case to one under Chapter 7. The

Debtor then filed amended Schedules and again claimed an exemption on his business address. The Chapter 7 Trustee objected to the exemption.

Holding: The Eighth Circuit concluded that a Chapter 7 Trustee in a converted case is allowed 30 days after the conclusion of the §341 meeting *in the converted case* in which to file an objection to the debtor's exemptions.

**3. In re Campbell, 313 B.R. 313 (B.A.P. 10th Cir. 2004)**

Procedural History: The Debtor filed a Chapter 13 Petition and listed the home she lived in as exempted. The Debtor contributed funds for the down payment of the house, but the Debtor's ex-husband financed the rest of the purchase price and then leased it to the Debtor, who paid him rent. The Chapter 13 Trustee objected to the claimed exemption because Debtor did not own the house. In the meantime, the Bankruptcy Court entered an Order confirming the Debtor's Chapter 13 plan. Subsequently, the Bankruptcy Court held a hearing on the Trustee's Objection to Debtor's Exemption. The Court sustained the Trustee's Objection and the Debtor appealed.

Holding: The Tenth Circuit vacated the Exemption Order entered by the Bankruptcy Court stating that the Bankruptcy Court did not have jurisdiction because it was unnecessary for the Court to resolve the Exemption Objection given that, but for the potential conversion of the case to a Chapter 7, its resolution would have no effect in the Chapter 13 case; no live controversy existed in the Chapter 13

case and therefore the Court lacked jurisdiction. The Court went on to discuss the split of authority regarding Rule 4003(b) and how the 30-day deadline operates when a Chapter 13 case is converted to Chapter 7. There was no binding case law in the 10th Circuit, so the Court adopted the minority view, holding that the 30-day period to object to a Debtor's claimed exemption in Bankruptcy Rule 4003(b) recommences upon the conversion of a Chapter 13 to a Chapter 7 case.

**B.** A substantial number of Courts have followed the majority position and rule that the Rule 4003(b) deadline does not restart upon the conversion of a Chapter 13 case to Chapter 7.

**1. In re Smith, 235 F.3d 472 (9th Cir. 2000)**

Procedural History: Debtor filed a Petition under Chapter 11 and exempted property that he characterized as a "private retirement plan" (his interest in the real estate properties of a Limited Partnership). The Trustee called a §341 meeting of the creditors and continued the meeting twice thereafter. Eight months later, creditors objected to Debtor's exemptions. Debtor filed a Motion to Dismiss on the grounds that the Objections were not timely. The Bankruptcy Court denied the Debtor's Motion, and Debtor appealed to the District Court. The District Court denied the Debtor's appeal. Subsequently, the case was converted to a Chapter 7 proceeding. The Chapter 7 Trustee objected to the Debtor's exemptions 8 days after continuing the §341

meeting. The Bankruptcy Court sustained the Chapter 7 Trustee's Objections and again the Debtor appealed to the District Court. The District Court held that the conversion started a new period for filing Objections and that Creditors may object to any exemptions claimed pre- and post- conversion. Debtor appealed.

Holding: The Ninth Circuit reversed the District Court on the pre-conversion ruling and remanded on the post-conversion. The Court stated that §341 requires a Trustee to convene a meeting within a reasonable time after the Order for relief and that the conversion of a case initially brought under Chapter 11 to a case under Chapter 7 constitutes an Order for relief under the chapter to which the case is converted. Further, the Court stated that the conversion does not reset the date because §348 preserves actions already taken in the case before conversion. The Court concluded that the "retirement plan" vested in the Debtor and was no longer subject to the Creditors' right to object.

**2. In re Ferretii, 230 B.R. 883 (Bankr. S.D. Fl. 1999), *aff'd*, 268 F.3d 1065 (11th Cir. 2001)**

Procedural History: Debtor filed a Chapter 13 Petition. In Schedule B, the Debtor listed an automobile accident claim as having a value of \$1.00. On Schedule C, Debtor exempted that \$1.00 claim. There was no objection from the Chapter 13 Trustee or any other party. Debtor's Chapter 13 plan was later confirmed and Debtor subsequently settled the automobile accident claim for



\$70,000.00. The Chapter 13 Trustee objected to the exemption and the Court held that in the absence of a timely objection, the entire amount of the insurance claim was exempted. Two years after the original Petition, Debtor filed a Notice for Conversion to Chapter 7, which the Court converted. The Chapter 7 Trustee filed Objections to the Debtor's exemptions within 10 days of the §341 meeting.

Holding: The Eleventh Circuit ruled that without objection to the Chapter 13 Trustee, the property vested in the Debtor and was not property of the Estate subject to exemption or objection. The Court held that because there were no allegation of the Debtor converting in bad faith nor any request that the Debtor amend his Schedules, and relying on Rules 4003(b), 2003(a), 1009(a), 1007(c) and 1019, there was no time period for the Trustee to assert objections to exemptions.

**C.** Rule 4003(b) reads as follows:

A party in interest may file an objection to the list of property claimed as exempt within 30 days after the meeting of creditors held under §341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later. The court may, for cause, extend the time for filing objections if, before the time to object expires, a party in interest files a request for an extension. Copies of the objections shall be delivered or mailed to the trustee, the

person filing the list, and the attorney for that person.

**IV. Upon Conversion, Does The Time Within Which Avoidance Actions Must Be Commenced Re-Start?**

**A.** Bankruptcy Code Section 546(a) generally provides that an avoidance action may not be commenced after the later of two years after an order for relief, or one year after the appointment of the first trustee. Three Circuit Courts of Appeals have held that the language of Section 546(a) unambiguously provides for a *single* 2-year time-frame. McCucky v. Central Trailer, Ltd., 37 F.3d 1329 (8th Cir. 1994); In re San Joaquin Roast Beef, 7 F.3d 1413 (9th Cir. 1993); In re M&L Business Machine Company, Inc., 75 F.3d 586 (10th Cir. 1996). The period commences to run on appointment of the *first* trustee (as well as a Chapter 11's DIP) during which that Trustee, or any subsequently appointed Trustee, can pursue avoidance actions. Once *any* Trustee is appointed, the limitations period is set in motion.

**B.** Some courts have found that while no new 2-year period will begin, the limitation periods in Section 546(a) may be equitably tolled when a Trustee, exercising due diligence, has been prevented from, due to fraud or misrepresentation, asserting a cause of action because he or she remains unaware of the action or if "extraordinary circumstances" beyond the Trustee's control prevented him/her from bring action sooner.

**1. In re Peebles, 224 B.R. 519 (Bankr. D. Mass 1998)**

Procedural History: The Debtor received a discharge in his Chapter 7 case and an Order closing his case was entered 4 days later. Nearly three years later, the Chapter 7 Trustee filed a Complaint asking that the Debtor's discharge be revoked under 727(e)(2)(B) because he failed to disclose and turnover several assets of the Estate. The Debtor defended the action by asserting that the Trustee's Complaint was untimely.

Holding: The Bankruptcy Court denied the Debtor's Motion to Dismiss. The Court held that for purposes §727(e)(2)(B), the case had not been validly closed, and therefore the Trustee's Complaint was timely. The Court noted that, in any event, the doctrine of equitable tolling should be read into §727(e)(2), and that the parties were to present evidence as to this issue at trial to determine whether the statute had in fact been tolled. In concluding that equitable tolling applied to §727(e)(2), the Court referred to In re Johnson, 187 B.R. 984, 986 (Bankr. S.D. Cal. 1995), where it recognized that equitable tolling may apply to a Trustee's avoiding cause of action under §§ 544-549. The Peebles Court saw no valid basis for distinguishing between §546(a) and §727(e)(2).

**2. In re M&L Bus. Mach. Co., 75 F.3d 586 (10th Cir. 1996)**

Procedural History: A Chapter 7 Trustee brought an Adversary Proceeding against appellants within two years of her appointment as Trustee, but more than

two years after her initial appointment as Chapter 11 Trustee. Debtor filed motion to dismiss proceeding, stating the Trustee failed to file within two-year limitations period for avoidance actions as required by §546(a). The Bankruptcy Court denied Debtors' motion and District Court affirmed.

Holding: The Tenth Circuit Court reversed and holding that the language of statute was clear. It provided that two-year limitations period began to run once a Trustee was appointed. The Court noted that the plain reading of statute was that the two-year period began running from the date the first Trustee was appointed and that all subsequent Trustees were subject to the same two-year statute of limitations. However, the Court noted that §546(a) was subject to doctrine of equitable tolling. Equitable tolling would prevent §546(a) from running when "extraordinary circumstances" beyond the Trustee's control, would have made it impossible for the Trustee to file a claim on time. The Court then remanded with instructions to consider issue of equitable tolling of the limitations period.

**3. In re United Ins. Mgmt., Inc., 14 F.3d 1380, 30 C.B.C.2d 792 (9th Cir. 1994)**

Procedural History: Debtor filed for Chapter 7 relief and a Chapter 7 Trustee was appointed. The only thing that the Trustee did was assign Debtor's causes of action to assignee. Two years later, Debtor's assignee brought a lawsuit against Debtor's

accounting firm and raised the equitable tolling argument. The accounting firm commenced an Adversary Proceeding in Bankruptcy Court seeking a Declaratory Judgment that Federal statute of limitations barred any claims that Debtor's assignee might assert against it. The Chapter 7 Trustee and the Debtor's assignee argued that they were unaware of any cause of action that the Debtor had against the accounting firm and that equitable tolling should apply. The Bankruptcy Court granted partial summary judgment for the accounting firm, holding that the two-year statute of limitations in §546(a) barred any claims that Debtor or its assignee might have against the accounting firm; the Court never addressed the equitable tolling issue. The assignee appealed to the District Court, and the District Court remanded holding that the Bankruptcy Court erred by not considering the applicability of equitable tolling. The accounting firm then appealed.

Holding: The Ninth Circuit Court held that equitable tolling might, in proper cases, have been applied to §546(a)(1), but concluded that in this case, the Trustee's undisputed lack of diligence in pursuing claims against the appellant prevented him from now invoking the doctrine (the Court noted that the Trustee never took steps to obtain possession of the books nor requested any information from accounting firm, despite the fact that the accounting firm was listed on the Bankruptcy Petition as Debtor's auditor and as the possessor of Debtor's tax returns.)

4. In re The Mediators, Inc., 190 B.R. 515 (S.D.N.Y. 1995)

Procedural History: Plaintiffs, unsecured creditors, brought an action on behalf of a bankrupt corporation to recover monies, which allegedly were fraudulently taken from the corporation. Plaintiffs alleged fraudulent conveyance, breach of fiduciary duty, breach of contract, and numerous federal causes of action against defendants. The defendants filed motions to dismiss on the grounds that the claims were untimely under §546(a) 2-year statute of limitations.

Holding: The Court found equitable tolling inappropriate in this case citing the Plaintiff's lack of due diligence. However, the Court, citing the Supreme Court case Bailey v. Glover, 88 U.S. 342 (1874), noted that in order to use equitable tolling in cases of fraudulent concealment a plaintiff must prove that the alleged fraud was concealed by affirmative acts of the defendant, and that a suit was commenced within a reasonable time after plaintiff's discovery of the fraud. Further, in the absence of fraudulent concealment, if the party injured by fraud remains in ignorance of it without any fault or want of diligence or care on his part, then the period is tolled until the fraud is discovered.

C. Section 546(a) reads as follows:

D. An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of— (1) the later of— (A) 2 years after the entry of the Order for relief; or (B) 1 year after the appointment or election of the first trustee under Sections 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or (2) the time the case is closed or dismissed.

V. **The Effect of Conversion on Property of the Estate**

A. Section 348 governs the effect of the conversion of a case from one chapter of the Bankruptcy Code to another chapter. This section provides that a conversion of a case constitutes a new order for relief under the chapter to which the case is converted but, except as specifically provided in §348, a conversion does not change the date the Petition is considered to have been filed.

B. Congress attempted to resolve the issue of what constitutes property of a Chapter 7 estate when a case is converted from Chapter 13 to Chapter 7 by adding subsection (f) to §348 in the Bankruptcy Reform Act of 1994.

C. If a case is converted to Chapter 7 in good faith, property of the estate in the Chapter 7 consists of property of the estate in the Chapter 13 case to the extent that a debtor retains possession or control over

the property. However, this rule does not apply if the debtor converted from Chapter 13 in bad faith. In that event, the property of the Chapter 7 estate will consist of the property of the Chapter 13 estate as of the date of conversion.

D. Several Bankruptcy Courts have decided the issue and they have uniformly agreed that §348(f)(1)(A) established that property acquired after the Chapter 13 filing and before discharge under Chapter 7 is not part of the converted estate. Some of the decisions involving the effect of §348 follow.

**1. Barbosa v. Soloman, 235 F.3d 31 (1st Cir. 2000)**

Holding: The Court held that the appreciation in value after the sale of Debtors' property of almost 215%, which took place after confirmation of Chapter 13 plan but before the case closed or converted to Chapter 7, was property of the Chapter 7 Bankruptcy Estate.

**2. In re Young, 66 F.3d 376 (1st Cir. 1995)**

Holding: The Court held that \$24,498.00 in interim earnings acquired after the original filing of the Chapter 13 Petition and before conversion were *not* part of the converted Estate. However, the Court noted that in all future cases §348(f)(1)(A) would govern, the rule did not apply in this particular case because the Debtors had filed bankruptcy and the Chapter 13 had the disputed funds in hand well before the 1994 amendment's effective date.



**3. In re Boyum, 2005 U.S. Dist. LEXIS 20054 (Bankr. D. Or. 2005)**

Holding: Court held that the payments Debtor made on the a vehicle, under a confirmed Chapter 13 plan created equity in her vehicle and to the extent that the Debtor acquired equity in the vehicle after the filing of her Chapter 13 Petition, such equity was not property of the Estate upon conversion to Chapter 7. Denying the Debtor the benefit of equity created by her payment of the vehicle loan did not comport with the plain meaning of or policy underlying 11 U.S.C.S. § 348(f)(1)(A).

**4. In re Carter, 260 B.R. 130, (Bankr. W.D. Tenn. 2001)**

Holding: The Court held that post-petition life insurance proceeds did not constitute property of the Chapter 7 Estate. Debtor wife was the sole beneficiary of Debtor husband's \$50,000.00 life insurance policy. Debtor wife did not acquire an interest in the insurance proceeds until January 18, 2001, on the date of Debtor husband's death, almost 2 years after the Chapter 13 filing. The acquisition occurred outside the 180-day window as required in §541(a)(5)(C). Under §348(a), (f)(1)(A) and (f)(2), conversion did not effect a change in the date of the filing of the Petition, the commencement of the case, or the Order for relief. There was no bad faith that would have triggered §348(f)(2) and would have include all property of the Estate as of the date of conversion.

**5. In re Stamm, 222 F.3d 216 (5th Cir. Tex. 2000)**

Holding: The Fifth Circuit held that post-petition wages in the hands of the Chapter 13 Trustee, earned after their Chapter 13 filing and before discharge under Chapter 7, should be returned to the Debtors because they were not a part of the Chapter 7 Estate.

**6. Farmer v. Taco Bell Corp., 242 B.R. 435 (W.D. Tenn. 1999)**

Holding: The Court held that a Plaintiffs' personal injury tort claim, which arose after confirmation of their Chapter 13 bankruptcy plan but before they converted to Chapter 7 and which they failed to disclose on their Bankruptcy Schedules, did not become part of the Bankruptcy Estate, absent bad faith.