

POSTPETITION ASSETS --- DUTY TO DISCLOSE

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- I. Disclose Postpetition Assets Upon Notice - Statute requires disclosure
 - a. 11 U.S.C. § 541 “creates an estate” which is “comprised of all the following property, wherever located and by whomever held ... all legal or equitable interests of the debtor in property as of the commencement of the case ...”
 - b. 11 U.S.C. § 1306 expands Section 541 in Chapter 13 cases by including all property listed in Section 541 “that the debtor acquires *after the commencement of the case* but before the case is closed, dismissed, or converted ... whichever occurs first”
 - c. 11 U.S.C. § 521(a)(1)(B)(i) requires the Debtor to file schedules listing all of the Debtor's assets and all of the Debtor's liabilities.
 - d. Rule 1007 mandates that the Debtor must use the official forms to comply with Section 521. Official form 6B (Schedule B) is to be used for reporting all of the Debtor's interests in personal property.
 - e. Rule 1007(h) imposes a duty upon the Debtor to disclose property acquired by inheritance, property settlement agreement, or life insurance: “If, as provided by Section 541(a)(5) of the Code, the debtor acquires or becomes entitled to acquire any interest in property, the debtor shall within 14 days after the information comes to the debtor’s knowledge ... file a supplemental schedule ...”
 - i. Query if § 1306 expands this duty to all property of the estate in a chapter 13
 - f. Rule 1009(a) – schedules “may be amended by the debtor as a matter of course at any time before the case is closed” - with notice to the Trustee and any affected entity

- II. Failure to disclose may be a federal crime.
 - a. 18 U.S.C. § 152 provides that: “A person who [does the following] shall be fined under this title, imprisoned not more than 5 years, or both.”
 - (1) knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;
 - (2) knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11 ...
 - b. US v. Butler, 704 F. Supp 1338, 1345 (E.D. Va 1989)(upholding conviction for 9 counts of bankruptcy fraud for failing to disclose and transferring assets and finding that “each separate act of transfer or concealment is a separate violation of the statute”)

III. Fourth Circuit - Postpetition assets are property of the estate and must be disclosed

- a. Pliler v. Stearns, 747 F.3d 260, 264-66 (4th Cir. 2014)(holding that above-median debtors with negative disposable income on B22 must remain in Chapter 13 for the full 60 months if their unsecured creditors have not been paid in full because “an ‘applicable commitment period’ is a temporal requirement.” The court observed that “the lack of projected disposable income at the time a plan is confirmed does not necessarily mean that additional funds with which to satisfy claims will not later surface. Indeed, as we recently saw in *Carroll v. Logan*, Chapter 13 debtors can and do benefit from windfalls such as inheritances or other unforeseeable income after plan confirmation but before their Chapter 13 proceedings are closed).¹
- b. Carroll v. Logan, 735 F.3d 147, 151-152 (4th Cir. 2013)(citations omitted)(finding that an inheritance received more than 180 days postpetition is property of the chapter 13 estate and must be paid over to creditors upon the Trustee’s motion to modify. “The repayment plan remains subject to modification for reasons including a debtor's decreased ability to pay according to plan, as well as the debtor's increased ability to pay. *See* 11 U.S.C. § 1329. As we have stated before, “[w]hen a [Chapter 13] debtor's financial fortunes improve, the creditors should share some of the wealth” ... The Supreme Court has eschewed interpreting the Bankruptcy Code such that it “would deny creditors payments that the debtor could easily make ... The plain language of Section 1306(a) blocks the Carrolls from depriving their creditors a part of their windfall acquired before their Chapter 13 case was closed, dismissed, or converted.”)²
- c. Murphy v. O’Donnell (In re Murphy) and O’Donnell v. Goralski (In re Goralski), 474 F3d 143 (4th Cir. 2007)(Upon determining that a debtor experienced a change in his post-confirmation financial condition that is both substantial and unanticipated, it can inquire whether the proposed modification is limited to the circumstances provided in §1329(a). If it meets one of those circumstances, Court can turn to whether the modification complies with §1329(b)(1). In *Goralski*, a cash-out refinancing is not a substantial change in their financial condition. In *Murphy*, the debtors had a 51.6% increase in 11 months in the value of their home, which they sold. The money received by him represented a “substantial improvement in ... his financial condition” upon receipt of this income. Trustee sought to modify the plan from 37% to 100%. Court rejected the debtor’s argument that the fact that his property had vested in him upon confirmation prevented the Trustee from seeking to modify his plan.

¹ In re Richard and Shirley Niday, 11-72491, (Bankr. W.D. Va. 8/27/13)(Judge Stone held that to pay off a confirmed 36 month case early, a below median debtor must modify his plan under 1329 and prove good faith. The debtors may seek modification of the confirmed plan for that purpose under 1329. The ACP is “a material element of the confirmation bargain not subject to reduction absent a modification” under 1329. To obtain an early discharge, the debtors need to obtain modification of their plan to do so.)

² In re Solomon, 67 F3d. 1128 (4th Cir. 1995)(Refusing to require a debtor to pay over exempt IRA funds to fund a chapter 13 plan because they were exempt, saying, “a debtor's choice to proceed under Chapter 13 [should not] entitle creditors to more than they would receive in Chapter 7...”, and remanding to the bankruptcy court to review the plan in light of the Code’s “good faith” requirement – there is a strong dissent)

- d. In re Arnold, 869 F.2d 240, 243 (4th Cir. 1989) (finding that the Bankruptcy Court did not abuse its discretion by increasing a debtor's monthly payment from \$800 to \$1,500 because the Debtor's salary went from \$80K/yr to \$200K/yr. Res judicata prevents modification of a confirmed plan via §1329(a)(1) or (2) unless the party seeking modification demonstrates "that the debtor has experienced a 'substantial' and "unanticipated' ["could not have been reasonably anticipated at the time the plan was confirmed"] post-confirmation change in his financial condition.")

IV. Virginia Courts Agree - Debtors Must Disclose Postpetition Assets for Benefit of Creditors

- a. Goodman v. Gorman, 1:15-cv-00219 (E.D. Va. July 21, 2015)(District court affirmed the bankruptcy court on three issues. First, property of the estate did not vest in debtor upon confirmation "because under *Carroll* ... an inheritance received before the Chapter 13 case is closed, dismissed, or converted ... is property of the bankruptcy estate pursuant to 11 U.S.C. § 1306(b) and should thus be used to repay Debtor's compromised creditors." Second, the District Court found that the "inheritance 'substantially' changed her financial circumstances under 11 U.S.C. § 1329 ... such that a modification of her Chapter 13 Plan was warranted." Third, no "change to the Debtors' financial condition ... would make any portion of the \$36,000 inheritance necessary to support Debtor's [lower] Modified Plan" and so the Court required that "the entirety of the Debtor's ... inheritance" be paid into the plan for the benefit of creditors "because Debtor failed to present evidence of any necessity for retaining any portion of the inheritance."
- b. In re Walley, 525 B.R. 320 (Bankr. E.D. Va. 2015)(overruling the Trustee's objection to exemption of the personal injury settlement, and agreeing such proceeds are property of the estate; however, in footnote 11 the Court pointed out that the issue of plan modification was not before it and therefore it would not reach the issue)
- c. In re Padula, 11-12985 (Bankr. E.D. Va. 2015)(Court allowed the Debtor to amend two years later to disclose and exempt a postpetition personal injury claim arising from an auto accident, when she had previously been advised not to disclose by prior legal counsel, and which she agreed to pay over for the benefit of her creditors. The court observed that debtor's failure to disclose may result in dismissal in other circumstances.)
- d. In re Swain, 509 B.R. 22, 27 (Bankr. E.D. Va. 2014) (Judge Phillips agreed that plan modification was appropriate where the Debtors income increased from \$6,712/month to \$9,938/month).
- e. In re Criscuolo, 09-14063 (Bankr. E.D. Va. 2014)(Judge Kenney dismissed a case with prejudice with a one year bar on refiling for bad faith conduct by debtor who concealed the fact that he had earned over \$1 million in 2012, and instead claimed gross income of \$150K.)
- f. Rivera v. JP Morgan Chase Bank (In re Rivera), 13-14351, adv no. 13-01280 (Bankr. E.D. Va., 2014)(observing that "Debtor has the affirmative duty to disclose all causes of action in her Schedules.")

- g. Vanderheyden v. Peninsula Airport Comm'n, 4:12-cv-46 (E.D. Va., 2013)(citations omitted) (dismissing debtor's Title VII claims because she lacked standing to bring the claim which still belonged to her bankruptcy estate and because the claim is barred by judicial estoppel, "Because all of a debtor's assets and liabilities, including any actual or potential legal claims, are property of the bankruptcy estate, the debtor has an affirmative duty to disclose such assets and liabilities to the bankruptcy court ... This duty does not end when the debtor files her bankruptcy petition; it continues through the pendency of the debtor's bankruptcy proceedings, requiring the debtor to update the bankruptcy court as her financial situation changes.")
- h. Robertson v. Flowers Baking Co. of Lynchburg, 6:11-cv-13 (W.D. Va., 2012), *affd.* 12-1520 (4th Cir. 2012)(dismissing the Debtor's ADA claims for lack of standing because while a chapter 13 the debtor failed to amend his schedules to disclose the postpetition cause of action and after conversion to chapter 7 also failed to disclose the asset, upon bad advice of counsel, and so the Debtor lost standing to pursue the claim. The court also found that judicial estoppel applied because of the Debtor's failure to disclose the property of the estate noting that the duty to disclose "continues through the pendency of the bankruptcy proceeding and requires the Plaintiff to amend his financial statements if his situation changes.")
- i. In re DelConte, 2012 WL 1739788 (Bankr. E.D. Va. 2012) (finding that the debtor's failure to disclose the postpetition inheritance and the transfer of such property "violate the court's order of confirmation" and debtor must amend to pay 100%, or convert, or the case will be dismissed)
- j. Beskin v. Knupp (In re Knupp), 461 B.R. 351 (Bankr. W.D. Va. 2011)(failure to disclose postpetition inheritance resulted in revocation of discharge)
- k. In re Grover and Cynthia Clark, #5-00-00696 (Bankr. W.D. Va. 4/1/04) (Debtors may not modify the plan to reduce the number of months when the IRS claim came in much less than anticipated even though the percentage to unsecured creditors was much greater than noticed because the failure of creditors to file in expected amounts is not "unanticipated" and there is no "substantial change" in the debtor's financial circumstances)
- l. Circuit Cases on Duty to Disclose and Payment of Postpetition Assets:
 - i. In re Waldron, 536 F.3d 1239, 1242, 244 (11th Cir. 2008)(Affirming the bankruptcy court's ruling that the Debtor must amend the schedules to disclose underinsured motorist benefits paid as a result of a postpetition automobile accident which are property of the estate. "A debtor seeking shelter under the bankruptcy laws must disclose all assets, or potential assets, to the bankruptcy court. The duty to disclose is a continuing one that does not end once the forms are submitted to the bankruptcy court; rather, a debtor must amend his financial statements if circumstances change."). See also, Robinson v. Tyson Foods, Inc., 595 F.3d 1269, 1274 (11th Cir 2010); Burnes v. Pemso Aeroplex, Inc., 291 F3d 1282, 1288 (11th Cir. 2002). However, the Court qualified

its holding: “We do not hold that a debtor has a free-standing duty to disclose the acquisition of any property interest after the confirmation of his plan under Chapter 13. Neither the Bankruptcy Code nor the Bankruptcy Rules mention such a duty, *cf.* Fed. R. Bankr.P. 1007(h) (requiring a debtor to supplement his schedule regarding interests acquired after petition under section 541(a)(5) of the Code) But the bankruptcy court has the discretion, under Rule 1009, to require a debtor to amend his schedule of assets to disclose a new property interest acquired after the confirmation of the debtor’s plan.”

- ii. In Re Koch, 109 F.3d 1285, 1289-1290 (8th Cir. 1997)(holding that “Chapter 13 contains no language suggesting that exempt post-petition revenues are not Chapter 13 “income,” and § 1325(b)(2) expressly defines “disposable income” to mean income not needed for debtor's support ... the ability to claim an exemption is an independent issue from whether debtors have the ability to repay their debts” and so requiring payment of exempt worker’s compensation benefits to fund a plan)
- iii. Kimberlin v. Dollar General Corp., 12-3584, 2013 WL 1136563 (6th Cir. 2013) (page 6) (debtor has an “affirmative and ongoing duty to disclose assets, including unliquidated litigation interests” and her failure to amend schedules to disclose a postpetition cause of action for wrongful termination resulted in application of judicial estoppel to bar her recovery)
- iv. Baud v. Carroll, 634 F.3d 327, 330, 338, 356 (6th Cir. 2011)(finding that “there is no exception to the temporal requirement set forth in 1325(b) for debtors with zero or negative projected disposable income ... the Supreme Court recognized in both *Ransom* and *Lanning*, the legislative history makes clear that the focus of Congress in enacting BAPCPA was on maximizing the amount of disposable income that debtors would pay to creditors. And there are numerous circumstances in which disposable income might become available to the Appellees and to other debtors after confirmation, even those who have zero or negative projected disposable income as of confirmation.”)
- v. Fulgence v. Axis Surplus Ins. Co. (In re Fulgence), 738 F.3d 126, 128 (5th Cir. 2013)(finding there is a “continuing duty to disclose in a Chapter 13 proceeding” the personal injury action in a chapter 13 case and the failure to disclose resulted in application of estoppel and Debtor could not recover, but the Chapter 13 Trustee could pursue the claim)

V. Failure to disclose may result in judicial estoppel barring the claim

- a. Collucci v. Tyson Farms, 3:14-cv-397 (E.D. Va. 2014)(Debtor filed an employment discrimination complaint prior to filing Chapter 13, but he did not list his cause of action. After his Chapter 13 plan was confirmed, he amended his Schedules to include the cause of action among his listed assets with “unknown” value and without objection. About one year after filing bankruptcy, he filed suit for employment discrimination. The Court agreed that the first two prongs of the test were met by Collucci’s failure to list the cause of action initially. However, it cited Royal v. R & L

Carriers Shared Services, LLC, 2013 WL 1736658 (E.D.Va. Apr. 22, 2013), for the proposition that a bankruptcy court does not accept a party's inconsistent position until it enters a discharge of the debts.

- b. Kimberlin v. Dollar General Corp, 12-3584, 2013 WL 1136563 (6th Cir 2013)(Debtor's failure to amend her schedules to disclose a wrongful termination cause of action which occurred 41 days before completion of her chapter 13 plan resulted in judicial estoppel which barred the state court litigation she filed one year later. The court held judicial estoppel barred Kimberlin from pursuing the lawsuit because "the bankruptcy court still had options for protecting the estate's and creditors' potential interest in the retaliation claim" and "[h]ad Kimberlin notified the court of her potential claim within the 41-day period, it could have modified her Chapter 13 plan to grant creditors some percentage of any future recovery." Emphasizing that the court could have even converted the case to Chapter 7, the Court stated: "Because Kimberlin never amended her filings or otherwise disclosed the potential claim, she deprived the bankruptcy trustee, court, and creditors of any opportunity to consider possible options.")
- c. Flugence v. Axis Surplus Ins. Co., 738 F.3d 126 (5th Cir. 2013)(Debtor judicially estopped from pursuing her postpetition personal injury claim because she failed to disclose it in the bankruptcy case. The Chapter 13 trustee had the right to pursue Dunn's claim for the benefit of the creditors. Debtors argument that that she relied upon her legal counsel in failing to disclose her post-confirmation personal injury cause of action did not shield her. The Court held that: "[S]he must show not that she was unaware that she had a duty to disclose her claims but that . . . she was unaware of the facts giving rise to them. In other words, the controlling inquiry, with respect to inadvertence, is the knowing of facts giving rise to inconsistent positions [A] lack of awareness of a statutory disclosure duty for [] legal claims is not relevant."
- d. Royal v. R & L Carriers Shared Services, LLC, 3:12-cv-714 (E.D.Va. Apr. 22, 2013)(Debtor was terminated in 2008 and filed an EEOC complaint in 2009. He failed to disclose this cause of action when he filed a bankruptcy petition thereafter. Judicial estoppel did not apply because the third prong—acceptance by the court—was not met. "Courts have repeatedly emphasized that 'acceptance' in this context means that the bankruptcy court has not merely confirmed the debtor's bankruptcy plan but has also taken the ultimate step of granting the debtor relief (*i.e.*, discharge or repayment)."
- e. Robertson v. Flowers Baking Co. of Lynchburg, 6:11-cv-13 (W.D. Va., 2012), *affd.* 12-1520 (4th Cir. 2012)(Robertson was terminated by his employer one month before filing Chapter 13. Several months after the bankruptcy was filed, Robertson filed a complaint with the EEOC against his former employer. He did not amend his Schedules or Statements of Financial Affairs to disclose the cause of action for wrongful termination. About one month after filing the EEOC complaint, Robertson converted his case to Chapter 7, but he again failed to amend his Schedules or Statements of Financial Affairs. "Plaintiff's position that he had no contingent or unliquidated claims was accepted by the bankruptcy court when [after conversion to Chapter 7] it issued an order discharging Plaintiff's debts, discharging the trustee, and closing the case.")

- f. Robinson v. Tyson Foods, Inc., 595 F.3d 1269 (11th Cir. 2010)(Debtor was estopped from pursuing her racial discrimination claim because she failed to amend her bankruptcy schedules to disclose the cause of action which arose postpetition. The Court also rejected Robinson’s argument that her 100% Chapter 13 Plan removed any motive for her to fail to disclose, noting that she had voluntarily dismissed a previous Chapter 13 case. The Court suggested that, because she could have taken the proceeds of the cause of action and failed to complete her payments—and further, that she did not always maintain on-time payments to the trustee under her 100% plan—she had sufficient motive to withhold disclosure of her cause of action. These factors convinced the Court that Robinson’s failure to disclose was not a mistake.)