No. 23-2491

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

In re: Machele L. Goetz

Debtor

Machele L. Goetz

Appellant

v.

Victor Felix Weber, Chapter 7 Trustee

Appellee

ON APPEAL FROM THE BANKRUPTCY APPELLATE PANEL FOR THE EIGHTH CIRCUIT

OPENING BRIEF FOR THE APPELLANT

Respectfully submitted,
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SUMMARY OF THE CASE

The Appellant (Ms. Machele Goetz) filed for Chapter 13 relief in August 2020. At that time, her homestead would have yielded no net proceeds to the bankruptcy estate in a hypothetical Chapter 7 liquidation.

Ms. Goetz converted her case to Chapter 7 in April 2022, and the Chapter 7 Trustee (Appellee) indicated he was going to list the property for sale given that the value of the house had appreciated significantly and that the Chapter 7 estate was entitled to the new equity in the property. Ms. Goetz filed a Motion to Compel Abandonment soon thereafter which was denied by the Bankruptcy Court of the Western District of Missouri on the grounds that the post-petition equity in the homestead was property of the bankruptcy estate. Ms. Goetz appealed to the Bankruptcy Appellate Panel which affirmed the Bankruptcy Court's order.

Oral argument of 20 minutes per side should be granted because this case involves issues which affect many, if not all, cases converting from Chapter 13 to Chapter 7 within the Eighth Circuit.

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I. STATEMENT OF JURISDICTION

Machele L. Goetz ("the debtor") filed a Chapter 13 bankruptcy case in the United States Bankruptcy Court for the Western District of Missouri (App. 2, R. Doc. 1) on August 19, 2020. The Bankruptcy Court had jurisdiction of the case under 28 U.S.C. § 1334(b) and 28 U.S.C. § 157(a) and (b).

After conversion of the case to Chapter 7 (App. 9, R. Doc. 62), Debtor filed a Motion to Compel Abandonment of Real Property (App. 15 and 37, R. Doc. 98), which the Bankruptcy Court denied (Addendum 5, App. 21, R. Doc. 128) and then the debtor timely appealed that final Order (App 22, R. Doc. 129). The Bankruptcy Appellate Panel for the Eighth Circuit ("BAP") had jurisdiction over this matter under 28 U.S.C. § 158(b) and (c). The BAP affirmed the Bankruptcy Court's judgment by filing its final Order on June 1, 2023. (Addendum 17, App. 81).

This Court has jurisdiction of the case under 28 U.S.C. § 1291.

II. STATEMENT OF ISSUES

A. Did the Bankruptcy Appellate Panel for the Eighth Circuit err when it found debtor's homestead, and the post-petition appreciation in the equity thereof, were property of the bankruptcy estate upon conversion to Chapter 7, creating more than "inconsequential value and benefit to the estate" under 11 U.S.C. § 554?

   a. The most apposite cases are:

      i. *Owen v. Owen*, 500 U.S. 305 (1991).

      ii. *Abramowitz v. Palmer*, 999 F.2d 1274 (8th Cir. 1993).

      iii. *Bell v. Bell (In re Bell)*, 225 F.3d 203 (2nd Cir. 2000).

      iv. *In re Gamble,* 168 F.3d 442 (11th Cir. 1999).

B. Did the Bankruptcy Appellate Panel for the Eighth Circuit err when it determined that 11 U.S.C. § 348(f)(1) was without ambiguity and thus failed to consider the legislative history, Congressional intent, and policy objectives?

   a. The most apposite cases are:

      i. *Harris v. Viegelahn*, 575 U.S. 510 (215).

      ii. *In re Fobber*, 256 B.R. 268 (Bankr. E.D. Tenn. 2000)

iii. *In re Pearson*, 214 B.R. 156 (Bankr. N.D. Ohio 1997).

iv. *Warren v. Peterson*, 298 B.R. 322 (N.D. Ill. 2003).

C. Did the Bankruptcy Appellate Panel for the Eighth Circuit err when it failed to find post-petition appreciation of property to be a separate interest in the property from the pre-petition interest in the property?

a. The most apposite cases are:

i. *In re Lynch*, 363 B.R. 101 (9th Cir. BAP 2007).

ii. *In re Nichols*, 319 B.R. 854 (Bankr. S.D. Ohio 2004).

iii. *In re Niles*, 342 B.R. 72 (Bankr. D. Ariz. 2006).

iv. *In re Page*, 250 B.R. 465 (Bankr. D. N.H. 2000).

D. Did the Bankruptcy Appellate Panel for the Eighth Circuit err when it failed to find that property is vested in the debtor upon confirmation of her Chapter 13 plan?

a. The most apposite case is: *In re Black*, 609 B.R. 519 (BAP 9th Cir. 2019).

b. The most apposite statutory provisions are: 11 U.S.C. § 1327(b) and (c).

E. Did the Bankruptcy Appellate Panel for the Eighth Circuit err when it failed to find that there is a difference between "value" and "valuation" within 11 U.S.C. § 348(f)(1)(B) and that 11 U.S.C. § 348(f)(1)(B) is not relevant when interpreting 11 U.S.C. § 348(f)(1)(A)?

a. The most apposite cases on this issue are:

i. *In re Castleman*, 631 B.R. 914 (Bankr. W.D. Wash. 2021).

ii. *In re Goins*, 539 B.R. 510 (Bankr. E.D. Virginia 2015).

iii. *In re Hodges*, 518 B.R. 445 (Bankr. E.D. Tenn. 2014).

F. Did the Bankruptcy Appellate Panel for the Eighth Circuit err when it failed to find that the trustee's interpretation of 11 U.S.C. § 348(f)(1) would treat the debtor's property the same way such property would be treated if the debtor were found to have filed in bad faith, rendering 11 U.S.C. § 348(f)(2) superfluous?

a. The most apposite case is:

i. *Harris v. Viegelahn*, 575 U.S. 510 (2015).

III. STATEMENT OF THE CASE

As stipulated by the parties, when the debtor filed her Chapter 13, she listed in her schedules her homestead, valued at $130,000 with a mortgage against the property in the amount of $107,460.54 held by Freedom Mortgage, and claimed her full $15,000 homestead exemption under RSMO § 513.475 (the Missouri homestead exemption), leaving no net proceeds available to a Chapter 7 trustee in a hypothetical liquidation. (Addendum 1, App. 18, R. Doc. 115, at ¶¶3-4). No objections to the exemption of debtor's homestead were filed during the Chapter 13.

The debtor filed a Motion to Convert (App. 9, R. Doc. 62) on April 3, 2022, and the Motion was granted (App. 9, R. Doc. 65) on April 5, 2022. No objections to the exemption of debtor's homestead were filed after the conversion to Chapter 7.

Soon after conversion, the Chapter 7 Trustee, Victor F. Weber ("the trustee"), indicated that he was going to list debtor's home for sale. Debtor filed a Motion to Compel Abandonment of Real Property (App.

37, R. Doc. 98) on May 5, 2022, a hearing on the Motion to Compel was held on June 21, 2022, and briefs were submitted by the trustee (App. 19 and 39, R. Doc. 118) and the debtor (App. 19 and 53, R. Doc. 119) on June 28, 2022, with response briefs submitted by the trustee on (App. 19, R. Doc. 120) and the debtor (App. 19 and 68, R. Doc. No. 121) on July 5, 2022.

The Bankruptcy Court took the matter under advisement, ultimately issuing a final Order (Addendum 5, App. 21, R. Doc. 128) denying debtor's Motion to Compel Abandonment on November 10, 2022, on the basis that debtor's homestead was part of the bankruptcy estate and thus the appreciated value in the homestead had created non-exempt equity which was not of "inconsequential value and benefit to the estate" under 11 U.S.C. § 554. The debtor filed a timely Notice of Appeal on November 17, 2022 (App. 22, R. Doc. 129).

The Debtor-Appellant submitted her brief (App. 83) for the Bankruptcy Appellate Panel for the Eighth Circuit on January 18, 2023 and the Appellee submitted his response brief on February 22, 2023 with Debtor-Appellant filing a reply brief (App. 134) on March 14, 2023. The BAP heard oral arguments on April 18, 2023 and issued its final

Order (Addendum 17, App. 81) on June 1, 2023, affirming the Bankruptcy Court's denial of the Debtor's Motion to Compel Abandonment. The Debtor-Appellant filed a timely notice of appeal (App. 81) to the United States Court of Appeals for the Eighth Circuit on June 20, 2023.

IV. SUMMARY OF THE ARGUMENT

One major question before the Court is whether the post-petition, pre-conversion appreciation in the value of debtor's home is the property of the debtor or property of the Chapter 7 bankruptcy estate after conversion from Chapter 13.

Another major question before the Court is whether the debtor's homestead was exempted out of the bankruptcy estate and thus was of "inconsequential value and benefit to the estate" under 11 U.S.C. § 554.

A majority of courts have found, after analyzing the legislative history of 11 U.S.C. § 348(f)(1) and policy goals of Congress, that post-petition pre-conversion appreciation of an asset is not part of the bankruptcy estate.

The debtor's interests in property can include pre-petition interests and post-petition interests, pre-confirmation and post-confirmation interests, and pre-conversion and post-conversion interests.

Distinctions exist between the property interests within the debtor's estate versus property interests within the bankruptcy estate, and especially upon confirmation of the Chapter 13 plan.

There is a difference between "value" and "valuation" under 11 U.S.C. § 348(f)(1)(B) and that section is irrelevant when interpreting 11 U.S.C. § 348(f)(1)(A).

If the Chapter 7 trustee's argument is allowed to stand, the debtor's property will be treated the same as if the debtor had converted her case in bad faith under 11 U.S.C. § 348(f)(2).

V. ARGUMENT

A. Standard of Review

1. On appeal, this Court reviews the BAP's findings of fact for clear error and its conclusions of law de novo. *In re Usery*,

123 F.3d 1089, 1093 (8th Cir. 1997). These standards of review apply to each of the issues in this case.

B. <u>The Bankruptcy Appellate Panel for the Eighth Circuit erred when it found the debtor's homestead held equity which was not of "inconsequential value and benefit to the estate."</u>

1. <u>The debtor's homestead was exempted out of the bankruptcy estate.</u>

   a. It is undisputed, and the parties stipulated (Addendum 1, App. 18, R. Doc. 115), that there was no liquidation value for the bankruptcy in the debtor's homestead as of the date of the filing of the Chapter 13.

   b. The debtor properly listed and exempted her homestead in her schedules (App. 26, R. Doc. 1, Schedules A/B and C) and there were no objections by any parties, including the trustee, to the homestead exemption during the Chapter 13 nor upon conversion to Chapter 7.

   c. In *Owen v Owen*, the United States Supreme Court defined an exemption as "an interest *withdrawn from the estate* (and hence from the creditors) for the benefit of the debtor" and "[p]roperty that is properly exempted under §

522(b) is (with some exceptions) immunized against liability for prebankruptcy debts." *Owen v. Owen,* 500 U.S. 305, 308 (1991) (emphasis added). See also *Abramowitz v. Palmer,* 999 F.2d 1274, 1276 (8th Cir.1993) (holding that where [the] trustee failed to object to [an] exemption, the trustee was "precluded from including" the property in the debtor's bankruptcy estate).

d. Several jurisdictions have held similarly regarding exemption of assets out of the bankruptcy estate. *See Bell v. Bell (In re Bell),* 225 F.3d 203, 216 (2nd Cir. 2000) ("It is well-settled law that the effect of ... exemption is to remove property from the estate and vest it in the debtor."); *Mayer v. Nguyen (In re Nguyen),* 211 F.3d 105, 107 & 109 (4th Cir.2000) (the operation of the exemption is to "exclude" the exempt property from the estate); *In re Gamble,* 168 F.3d 442, 443 (11th Cir.1999) ("exempt property is not part of the bankruptcy estate"); *Seror v. Kahan (In re Kahan),* 28 F.3d 79, 81 (9th Cir. 1994) ("The bankruptcy estate includes all of the

debtor's interests in property at the commencement of the case, except property that the debtor elects to exempt."); *In re Yonikus,* 996 F.2d 866, 870 (7th Cir.1993) ("[a]fter an asset is property of the estate ..., it can still pass out of the estate (thus out of the reach of creditors) as a" § 522 exemption); *Taylor v. Freeland & Kronz,* 938 F.2d 420, 422 (3d Cir.1991) ("[T]he property so exempted is no longer considered property of the bankruptcy estate."); *Sherk v. Tex. Bankers Life & Loan Ins. Co. (In re Sherk)*, 918 F.2d 1170, 1174 (5th Cir. 1990) *abrograted on other grounds by Taylor v. Freeland & Kronz,* 503 U.S. 638, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992) (exempt property "is no longer property of the estate"); Norton Bankruptcy Law and Practice 2d § 51:2 (2000) ("The debtor by acting affirmatively, may take the required action to set aside his or her exemptions. The court may determine *what is appropriately exempted and what property remains in the estate.*") (emphasis added); *see also Graziadei v. Graziadei (In re*

Graziadei), 32 F.3d 1408, 1410 n. 2 (9th Cir.1994) (bankruptcy court lacked jurisdiction over homestead property because it was exempt and therefore had no conceivable effect on the estate). But see *Traina v. Sewell (In re Sewell),* 180 F.3d 707, 710 (5th Cir. 1999) (contrasting excluded property with exempt property and noting that exempt property is "included in the bankruptcy estate but `exempted from use in satisfying claims of creditors and other authorized charges'.").

e. Further, 11 U.S.C. § 522(b)(1) states, "Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph 2 or, in the alternative, paragraph 3 of this subsection." Moreover, 11 U.S.C. § 522(c) instructs that, "[u]nless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose … before the commencement of the case …".

f. Debtor's homestead was exempted out of the bankruptcy estate and thus was of "inconsequential value and benefit to the estate."

g. The debtor argued in her Brief in Support of Debtor's Motion to Compel Trustee to Abandon Real Property of Debtor (App. 53, R. Doc. 119, at page 7, ¶¶ 32-39) that the bankruptcy estate that existed at the time of the filing of the case consisted of no equity to liquidate for the benefit of unsecured creditors, based on the stipulation with the trustee that no liquidation value would have been available for the bankruptcy estate as of the commencement of the case.

h. The trustee has now sought to disregard the stipulation by arguing that the homestead was not 100% exempted out of the bankruptcy estate pursuant to the holding in *Schwab v. Reilly*, 130 S.Ct. 2652 (2010).

i. In *Schwab*, the Court held that what was relevant for exemption purposes was to recognize the *interests* that

were being exempted and not just the asset itself. *Schwab v. Reilly*, 130 S.Ct. 2652, 2655 (2010) (emphasis added).

j. It is inconsistent to state, pursuant to the stipulation agreement, that there would be no liquidation value for the bankruptcy estate, but then argue that there was non-exempt equity in the homestead for *Schwab* purposes.

k. The Debtor's argument that the homestead was exempted out of the bankruptcy estate is consistent with the holding in *Schwab* because the trustee admitted, through the stipulation, that there was no liquidation value in the homestead for the bankruptcy estate and that meant that the value of the homestead as listed in Schedule B was indeed the full fair market value and the Debtor's interests were fully exempted without objection, because otherwise there would have been a liquidation value for the bankruptcy estate and the trustee would not have thus stipulated.

l. The trustee should be estopped from using *Schwab* to now claim that there was non-exempt equity in the homestead as of the commencement of the case.

2. *Potter v. Drewes* does not address the issues in this case.

a. The Bankruptcy Court's Order (Addendum 5, App. 21, R. Doc. 128, at page 6, line 22) cited *Potter v. Drewes (In re Potter)*, 228 B.R. 422, 424 (8th Cir. BAP 1999) for the premise that 11 U.S.C. § 541 captures "the entire asset, including any changes in its value which might occur after the date of filing." The debtor in *Potter* held a contingent interest in the corpus of a trust with $150,000 in it, which was not able to be fully exempted. But in this case, the debtor already had the homestead (which was not a contingent interest) which was properly exempted resulting in no liquidation value for the trustee, and thus was exempted out of the bankruptcy estate without objection.

3. *Crane's* definition of property does not address the issues raised in this case.

a. The Bankruptcy Court's Order (Addendum 5, R. Doc. 128, at page 8, line 9) cited *Crane v Commissioner of Internal Rev.*, 331 U.S. 1, 6 (1947) for the premise that equity is not a separate interest of property. But the *Crane* case was a tax case, not a bankruptcy case, did not involve a conversion from Chapter 13 to Chapter 7, and was decided in 1947, long before Congress passed the legislation regarding 348(f)(1)(A) in the Bankruptcy Reform Act of 1994, Pub.L. 103-394, enacted on October 22, 1994. *Crane* does not address the estates (bankruptcy estate vs. debtor's estate) that are created when a bankruptcy is filed, nor the estates that are affected when a Chapter 13 plan is confirmed, nor which interests in property exist within the estates upon conversion from Chapter 13 to Chapter 7.

C. The Bankruptcy Court erred when it found no ambiguity in 11 U.S.C. § 348(f)(1) and thus failed to analyze the legislative history, Congressional intent, and public policy considerations.

1. Consulting the legislative history is never improper.

a. Courts can resort to legislative history, even where the plain language of a statute appears unambiguous, "where the legislative history clearly indicates that Congress meant something other than what it said." See *Perlman v. Catapult Ent., Inc.*, 165 F.3d 747, 753 (9th Cir. 1999); see also *United States v. Am. Trucking Ass'ns, Inc.*, 310 U.S. 534, 542-43 (1940)(commenting that if the interpretations of a statute would produce an absurd result, it might be rejected in favor of an alternative interpretation consistent with the legislative purpose).

b. The United States Supreme Court has stated that all courts must "look to the provisions of the whole law, and to its object and policy." *Kelly v Robinson*, 479 U.S. 36, 43 (1986) and that "[w]hen aid to construction of the meaning of words, as used in the state, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" 2A Norman Singer & Shambie Singer, *Sutherland Statutory Construction* § 48:1 (7th ed.

2014)(quoting *Train v Colo. Public Interest Research Group, Inc.,* 95 S.Ct. 1938, 1942 (1976)).

c. "A statute is ambiguous if it is reasonably susceptible to more than one interpretation … or capable of being understood in two or more possible senses or ways." *Nat'l Credit Union Administration Board v. Nomura Home Equity Loan, Inc.*, 764, F.3d 1199,1226 (10th Cir. 2014)(internal citations omitted).

d. When there are several courts around the country that have interpreted 11 U.S.C. § 348(f)(1) in favor of debtors while several other courts have interpreted 11 U.S.C. § 348(f)(1) in favor of trustees, that indicates an inherent ambiguity within the statute, requiring further analysis of the legislative history to determine the intent and policies considered by Congress for that statute.

2. <u>The legislative history of 11 U.S.C. § 348(f) shows that Congress intended to protect debtors upon conversion to Chapter 7.</u>

a. Congress amended 11 U.S.C. § 348(f) by adding subsection 348(f)(1) as part of the Bankruptcy Reform Act of 1994, enacted on October 22, 1994. Congress stated:

> This amendment would clarify the Code to resolve a split in the case law about what property is in the bankruptcy estate when a debtor converts from chapter 13 to chapter 7. The problem arises because in chapter 13, any property acquired after the petition becomes property of the estate, at least until confirmation of the plan. Some courts have held that if the case is converted, all of this after-acquired property becomes part of the estate in the converted chapter 7 case, even though the statutory provisions making it property of the estate do not apply in chapter 7. Other courts have held that the property of the estate in a converted case is the property the debtor had when the original chapter 13 petition was filed.
>
> These latter courts have noted that to hold otherwise would create a serious disincentive to chapter 13 filings. For example, a debtor who had $10,000 equity

in a home at the beginning of the case, in a State with a $10,000 homestead exemption, would have to be counseled concerning the risk that after he or she paid off a $10,000 second mortgage in the chapter 13 case, creating $10,000 in equity, there would be a risk that the home could be lost if the case were converted to chapter 7 (which can occur involuntarily). If all of the debtor's property at the time of conversion is property of the chapter 7 estate, the trustee would sell the home, to realize the $10,000 in equity for the unsecured creditors and the debtor would lose the home.

This amendment overrules the holding in cases such as *Matter of Lybrook*, 951 F.2d 136 (7th Cir. 1991) and adopts the reasoning of *In re Bobroff*, 766 F.2d 797 (3rd Cir. 1985). However, it also gives the court discretion, in a case in which the debtor has abused the right to convert and converted in bad faith, to order that all property held at the time of conversion shall constitute property of the estate in the converted case.

H.R.Rep. No. 103-835 at 57 (1994), as reprinted in 1994 U.S.C.C.A.N. 3340, 3366.

3. The reasoning of *In re Bobroff.*

a. In *Bobroff*, the court stated: This result is consonant with the Bankruptcy Code's goal of encouraging the use of debt repayment plans rather than liquidation. See H.R.Rep. No. 595, 95th Cong., 1st Sess. 118 (1977), U.S. Code Cong. & Admin. News p. 5904. *If debtors must take the risk that property acquired during the course of an attempt at repayment will have to be liquidated for the benefit of creditors if chapter 13 proves unavailing*, *the incentive to give chapter 13 – which must be voluntary – a try will be greatly diminished.* Conversely, when chapter 13 does prove unavailing "no reason of policy suggests itself why creditors should not be put back in precisely the same position as they would have been had the debtor never sought to repay his debts…" *In re Bobroff*, 766 F.2d 797, 803-804 (3rd Cir. 1985)(emphasis added) citing *In re Hannan*, 24 B.R. 691, 692 (Bankr.E.D.N.Y. 1982).

b. A leading commentator has stated that: It seems to have been congressional intent to take a snapshot of the estate at the filing of the original Chapter 13 petition and, based on that inventory, include in the Chapter 7 estate upon conversion only the portion that remains in the possession or control of the debtor. The spirit of § 348(f)(1)(A) is best captured by a rule that property acquired by the Chapter 13 estate or by the debtor after the Chapter 13 petition does not become property of the Chapter 7 estate at a good-faith conversion. The method of acquisition after the Chapter 13 petition should not matter: post-petition property does not become property of the Chapter 7 estate at conversion, whether acquired with earnings by the debtor, by transfer to the debtor – for example, an inheritance after 180 days after the petition – *or by appreciation* in the value of a pre-petition asset. Keith M. Lundin & William H. Brown, Chapter 13 Bankruptcy, §316.1, at ¶ 26 (4th ed. 2004)(emphasis added).

c. The reasoning from *Bobroff* has two parts: (1) that debtors should not be made worse off for having tried a Chapter 13 and failed than they would have been if they had simply filed a Chapter 7 in the first place, and (2) creditors should not be made better off upon a debtor converting from Chapter 13 to Chapter than if the debtor had simply filed Chapter 7 in the first place.

d. The courts that have ruled in favor of trustees have simply disregarded the legislative history which clearly shows Congress' stated purpose to resolve the split in the case law surrounding 11 U.S.C. § 348(f)(1)(A). By choosing the reasoning of the *Bobroff* case, Congress stated that it's intent in amending 348(f)(1)(A) was to make debtors no worse off for having tried a Chapter 13 and failed and then converted to Chapter 7 than if debtors had simply filed for Chapter in the first place. If a debtor is going to be made worse off for having tried a Chapter 13 and then converted to Chapter 7 then the debtor would have more incentive to simply file Chapter 7 in the first place, which

is against Congress' goal of encouraging more debtors try Chapter 13.

e. Imagine a scenario where a debtor had no equity in his vehicle upon the filing of a Chapter 13 and pays off a significant portion, or perhaps even all, of his vehicle loan through the Chapter 13, but as he nears the end of his Chapter 13 he loses his job and converts his case to Chapter 7, leaving the Chapter 7 trustee with ample non-exempt equity in the vehicle. The debtor loses his vehicle under these circumstances if the trustee's position is allowed to stand.

f. Perhaps a court would consider it unjust to allow creditors to reap the rewards of the debtor's diligent efforts during the Chapter 13, but if a court were to allow the debtor to keep that interest in equity which he created that would be an acknowledgement that such an interest was not in existence as of the commencement of the case.

g. Now consider that if that same vehicle somehow increased in value during the Chapter 13, like we've seen in recent

years due to parts shortages and supply chain issues. There would now be two interests in equity that did not exist as of the commencement of the case, one interest in equity from the payoff of the loan and another interest in equity from the appreciation of the value. It would be inconsistent to recognize one such interest but not the other.

h. Clearly under this hypothetical, which is not far-fetched in today's world, the debtor would be made worse off for having converted from Chapter 13 to Chapter 7 than if he had simply filed Chapter 7 to begin with.

4. A majority of courts have ruled in favor of debtors with similar facts patterns as in this case.

a. Several courts have held that Congress enacted § 348(f) as a means of reducing disincentives for debtors to first try Chapter 13 by equalizing the treatment a debtor would receive under a conversion to Chapter 7 with the treatment the debtor would receive if the debtor had filed Chapter 7 initially. Below are a few samples.

i. See *In re Barrera*, 620 B.R. 644, 648 (Bankr. D. Colorado 2020)("Congress has given the debtor who attempts to repay his debts in chapter 13, albeit unsuccessfully, a sort of guarantee that he will be no worse off for having tried a repayment plan, as long as he converts in good faith. This guarantee comes in the form of allowing the debtor to retain his postpetition assets, which of course he would never have had to contribute if he had originally filed a chapter 7 case.").

ii. See *In re Pearson*, 214 B.R. 156, 164 (Bankr.N.D.Ohio 1997) ("The general purpose of [Section] 348(f) was to equalize the treatment a debtor would receive under a Chapter 13 case that converted to a Chapter 7 case with the treatment the debtor would receive if ... [the debtor] filed a Chapter 7 originally.").

iii. See *In re Fobber*, 256 B.R. 268, 277-78 (Bankr. E.D. Tenn. 2000)("Congress intended to ... plac[e debtors in a case converted from chapter 13 to chapter 7] in the

same economic position they would have occupied if they had filed chapter 7 originally.").

b. Several courts have held that the post-petition pre-conversion appreciation insures to the debtor. Below are a few samples.

i. See footnote 1 in *Warren v. Peterson*, 298 B.R. 322 (N.D. Ill. 2003)("The earlier-quoted example in the legislative history is highly instructive in this case. See H.R.Rep. No. 103-835 at 57 (1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3366. Warren, like the debtor in the example, had no equity in her residence when her bankruptcy plan was confirmed (at least according to her scheduled values). Warren's case, like the debtor's, was subsequently converted to chapter7. And finally, at the time of conversion, Warren, like the debtor, probably had equity in her residence (because of appreciation and payments made against the secured claims) that would permit the trustee to sell her residence to capture the equity. Section 348(f) was

adopted to ensure that property, such as Warren's residence, would not be liquidated as a result of converting to chapter 7."

ii. See *In re Page*, 250 B.R. 465 (Bankr. D. N.H. 2000)("Subsection (f) of section 348 was added to the Bankruptcy Code in October 1994 in an effort to induce individuals to file under Chapter 13. Under this section, absent a showing of bad faith, property of the estate of a converted case consists of the property at the date of the filing, and valuations of property and allowed secured claims are binding in the converted case. In the instant case, there is no allegation of bad faith, and the Court sees no reason to distinguish between property acquired after the original petition date which is clearly not part of the Chapter 7 estate from appreciation of property during a Chapter 13 proceeding.").

iii. See *In re Burt*, 2009 WL 2386102, at *3, 2009 Bankr. LEXIS 2384, at *16-17 (Bankr. N.D. Ala. July 31,

2009)(“There is a consensus among courts that equity attributed to appreciation in a property's value may not be claimed by the trustee in a converted case. Such appreciation may come from an overall increase in market values — inflation — and from increased value caused by renovations to the property paid for by a debtor.”).

iv. See *In re Nichols*, 319 B.R. 854, 857 (Bankr. S.D. Ohio 2004)("Congress did not intend that a chapter 13 debtor should lose the benefit of any equity accrued in an asset because of said debtor's compliance with the chapter 13 plan payments.").

v. See *In re Niles*, 342 B.R. 72, 76 (Bankr. D. Ariz. 2006)(“While admittedly an increase in value to real property is not the same as after[-]acquired property as that term is traditionally defined under bankruptcy law, it is similar in nature and justifies the same result. Denying the debtor the increase in value upon

conversion would similarly act as a disincentive to filing chapter 13 in the first instance.").

vi. See *In re Lynch*, 363 B.R. 101, 107 (9th Cir. BAP 2007)("Excluding equity resulting from debtors' payments on loans secured by their residence and property appreciation subsequent to their chapter 13 filing in a case converted to chapter 7 serves the congressional purpose of encouraging chapter 13 reorganizations over chapter 7 liquidations, as reflected in the legislative history.").

5. A minority of courts have ruled in favor of the trustee in cases, some of which have similar fact patterns as in this case but some with not quite similar fact patterns.

a. Under similar circumstances to the current case, the court in *In re Goins*, 539 B.R. 510, 516 (Bankr. E.D. Virginia 2015) held for the trustee by reasoning that, "the cases under Section 541(a)(6) are applicable because the equity attributable to the post-petition appreciation of the property is not separate, after-acquired property, to which we might look to Section 348(f)(1)(A). The equity is

inseparable from the real estate, which was always property of the estate under Section 541(a)."

i. This argument is essentially the same argument as in the *Potter v Drewes* case. But just like in that case, the Goins court didn't make a distinction regarding whether the asset had been exempted out of the bankruptcy estate and didn't address the legislative history which clearly indicates that Congress did not want debtors to be made worse off for having tried Chapter 13 and failed than if they had simply filed Chapter 13 in the first place. There was also no analysis of what happens when the property became vested in the debtor upon confirmation of the Chapter 13 plan. Amazingly, the Goins court was okay with creating a separate interest for equity created by paydown of the mortgage but not for equity created by appreciation in market value, thus contradicting its own statement that "the equity is inseparable from the real estate."

ii. The *Goins* court also relied on the following cases that had different fact patterns than the case in *Goins*: *In re Hyman*, 967 F.2d 1316 (9th Cir. 1992), a chapter 7 case filed in 1998 with no conversions; *In re Reed*, 940 F.2d 1317, 1323 (9th Cir. 1991), a chapter 7 case filed in 1981 with no conversions; *In re Potter*, 228 B.R. 422, 424 (8th Cir. BAP 1999), chapter 13 filed in April 1994 and converted to Chapter 7 in August 1994, prior to the Bankruptcy Reform Act enactment; *In re Moyer*, 421 B.R. 587, 594 (Bankr. S.D. Ga. 2007), a chapter 7 case filed in 2004 with no conversions; *In re Shipman*, 344 B.R. 493, 495 (Bankr. N.D. W.Va. 2006), a chapter 7 case filed in 2000 with no conversions; *In re Bregni*, 215 B.R. 850, 854 (Bankr. E.D. Mich. 1997), a chapter 7 case filed in 1996 with no conversions; and *In re Paolella*, 85 B.R. 974, 977 (Bankr. E.D. Pa. 1988), a chapter 7 case filed in 1987 with no conversions.

b. *In re Bachman*, Case No. 14-22294-JGR (Bankr. D. Colorado, August 21, 2018). The court in this case

essentially just cited to the reasoning in *Goins* and didn't offer much else.

c. *In re Castleman*, 631 B.R. 914 (Bankr. W.D. Wash. 2021). The court in *Castleman* acknowledged the different approaches to interpreting § 348(f)(1) and ultimately went with the same general reasoning in the *Goins* case.

d. *In re Hayes*, Case No. 15-20727-MER (Bankr. D. Colo. March 28, 2019). The court in *Hayes* essentially held that appreciation in property is "proceeds" for purposes of § 541(a)(6) and then, inconsistently, held that the equity cannot be separated from the property itself for purposes of § 348(f)(1)(A). The *Hayes* court did not appear to take into consideration any of the relevant legislative history regarding § 348(f)(1).

D. The Bankruptcy Court erred when it failed to find post-petition pre-conversion appreciation of property to be a separate interest in the debtor's estate versus the pre-petition interest in the debtor's estate.

1. A bankruptcy estate and a debtor estate co-exist along the bankruptcy timeline.

a. Upon the filing of a bankruptcy petition, a bankruptcy estate is created pursuant to 11 U.S.C. § 541(a).

i. Section 541(a)(1) specifically states that the estate is comprised of all "legal or equitable **interests** of the debtor in property **as of the commencement of the case**." (Emphasis added).

ii. A plain reading of those words indicates that (1) a debtor can have more than one interest in the same property, and (2) the commencement of the case is the relevant date for determining what those interests are.

b. A bankruptcy estate "is a separate legal entity, created on (and by) the filing of a bankruptcy petition, and continuing until confirmation, conversion, or dismissal of the case." *Matter of Lopez*, 897 F.3d 663, 670 (5th Cir. 2018)(quoting *In re Herberman*, 122 B.R. 273, 278 (Bankr. W.D. Tex. 1990)).

c. A debtor's estate is also created upon the filing of the bankruptcy petition and consists of assets withdrawn from

the bankruptcy estate pursuant to exemption of those assets and no objections to those exemptions.

i. See *Abramowitz v. Palmer,* 999 F.2d 1274, 1276 (8th Cir.1993) (holding that where [the] trustee failed to object to [an] exemption, the trustee was "precluded from including" the property in the debtor's bankruptcy estate). If exempted property is precluded from being included in the bankruptcy estate, it follows that such property is in the debtor's estate.

ii. See also *In re Brooks*, 227 B.R. 891, 894 (Bankr. W.D. Missouri 1998)("[U]ntil an asset of the bankruptcy estate is exempted out of the estate, the trustee, not the debtor, owns the entire asset."). This statement shows that (1) an asset can be exempted out of the bankruptcy estate, and (2) once an asset is exempted out of the estate then the debtor, not the trustee, owns it within the debtor's estate.

iii. See also 11 U.S.C. § 1327(b), "[e]xcept 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." This shows that a debtor's estate also exists upon confirmation of the plan.

d. In the current case, it is undisputed that the bankruptcy estate at the commencement of the case had no liquidation value for the trustee to capture. The debtor's estate consisted of the exempted assets after no objections were filed against those exemptions. If there had been non-exempt equity in this case the value of that equity would have been in the bankruptcy estate until the case was confirmed, at which point the non-exempt equity would have vested into the debtor's estate pursuant to 11 U.S.C. § 1327(b).

2. Any homestead appreciation in equity during the pendency of the Chapter 13 accrued within the debtor's estate.

a. The debtor's estate increased in value during the Chapter 13 due to the appreciation in value of the homestead to the tune of at least $62,000 in net equity.

3. Upon conversion, the focus should be more about what estate existed rather than what property existed.

a. Section 348(f)(1)(A) states that "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."

i. What bankruptcy estate existed at the filing of the petition? A bankruptcy estate that had no liquidation value for the trustee is what existed at that time. That is the bankruptcy estate that is resurrected upon conversion, otherwise 11 U.S.C. § 348(f)(2) would be rendered superfluous.

ii. What debtor's estate existed at the filing of the petition? A debtor's estate with the homestead exempted out of the bankruptcy estate.

iii. Section 348(f)(1)(A) must be read in conjunction with Section 541(a)(1) which indicates that the "interests" of the debtor in property as of the commence of the case are what constitutes the bankruptcy estate. If interests in equity due to appreciation arose after the

commencement of a Chapter 13 case, then those interests should not be part of the bankruptcy estate upon conversion to Chapter 7 because that would violate Congress' stated intent, through the reasoning in the *Bobroff* case, that debtors be made no worse off upon conversion from Chapter 13 to Chapter 7 than if those debtors had simply filed Chapter 7 in the first place.

iv. It is clear in the current case that the Debtor will be made worse off if the trustee's position is allowed to stand, contrary to Congress' stated intent pursuant to the reasoning of the *Bobroff* case.

E. The Bankruptcy Court erred when it failed to find that property is vested in the debtor upon confirmation of her Chapter 13 plan.

1. If the homestead had not already been exempted out of the bankruptcy estate, the debtor's homestead would have become vested in the debtor upon confirmation of the plan.

a. Under 11 U.S.C. § 1327(b), "[e]xcept 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."

b. Under 11 U.S.C. § 1327(c), "[e]xcept 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."

c. Thus, pursuant to 1327(b) and (c), "[t]he revesting provision of the confirmed plan means that the debtor owns the property outright and that the debtor is entitled to any postpetition appreciation …. As such, it is no longer property of the estate, so the appreciation did not accrue from estate property." *In re Black*, 609 B.R. 519, 529 (BAP 9th Cir. 2019).

2. Because there was no non-exempt homestead equity when the case was filed, any appreciation that occurred in the homestead did so when the homestead was vested in the debtor.

a. By taking a snapshot of the equity in the bankruptcy estate upon commencement of the case and vesting that

same equity upon conversion back to the bankruptcy estate, the provisions of 11 U.S.C. § 1306 and 11 U.S.C. § 1327(b) and (c) are given effect while at the same time being consistent with Congress' intent as stated in the legislative history, following Congress' policy of encouraging Chapter 13 over Chapter 7, and providing debtors an opportunity for a fresh start as recognized by the Supreme Court in *Harris v. Viegelahn*, 575 U.S. 510, 510 (2015).

F. The Bankruptcy Court erred when it failed to find that there is a difference between "value" and "valuation" within 11 U.S.C. § 348(f)(1)(B) and that 11 U.S.C. § 348(f)(1)(B) is not relevant when interpreting 11 U.S.C. § 348(f)(1)(A).

1. Value and valuation are not the same thing and 11 U.S.C. § 348(f)(1)(B) is not relevant when interpreting 11 U.S.C. § 348(f)(1)(A).

a. The relevant provisions of 11 U.S.C. § 348(f)(1) are:

> 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.

b. The trustee incorrectly urges the court to value the homestead, pursuant to 11 U.S.C. § 348(f)(1)(B), as of the date of conversion to Chapter 7.

   i. However, in *In re Hodges*, 518 B.R. 445, 450 (Bankr. E.D. Tenn. 2014), the court found that post-BAPCPA § 348(f)(1)(B) "addresses the rights of a secured credit in the context of valuation of specific property at the end of the Chapter 13 bankruptcy."

   ii. Further, in both *In re Castleman*, 631 B.R. 914, 920 n. 5 (Bankr. W.D. Wash. 2021) and *In re Goins*, 539 B.R. 510, 514 (Bankr. E.D. Virginia 2015), leading cases

holding against the debtor's post-petition pre-conversion appreciation arguments here, the courts acknowledged that "valuation does not mean value and the valuation provision in section 348(f)(1)(B) was irrelevant for interpretation of section 348(f)(1)(A) even prior to the 2005 [BAPCPA] amendment."

iii. Absent a bad faith conversion, the value of assets is determined at the commencement of the case and not upon conversion. It is undisputed that there was no equity in the debtor's homestead available for the trustee to liquidate at the commencement of the case.

2. It is inconsistent to allow the trustee to obtain a "cram up" on value when a "cram down" on value is not allowed under 11 U.S.C. § 348(f)(1)(B).

G. The Bankruptcy Court erred when it failed to find that the trustee's interpretation of 11 U.S.C. § 348(f)(1) would treat the debtor's property the same way such property would be treated if the debtor were found to have filed in bad faith, rendering 11 U.S.C. § 348(f)(2) superfluous.

1. The trustee's interpretation of 11 U.S.C. § 348(f)(2) treats the debtor the same as if she'd converted in bad faith.

a. The provisions under 11 U.S.C. § 348(f)(2) are: 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.

b. The trustee wants the property valued as of the date of conversion, instead of the date of filing of the case, resulting in unexempt equity in the property of more than $62,000.

c. There have been no allegations of bad faith in this case, yet the debtor here would be punished through loss of her homestead the same way she would be punished if she had actually converted her case in bad faith.

d. During the argument before the BAP, it was stated that the proper time frame for valuing an asset for abandonment purposes was as of the date of the hearing for the motion to compel abandonment (Addendum 29). If the Debtor here had filed for Chapter 7 in the first place and if the trustee had not quickly abandoned the homestead, then the Debtor would have filed a Motion to Compel Abandonment right

away, leaving no opportunity for appreciation in the value of the house. But because this was a Chapter 13 originally, it would have been impossible to file such a motion to compel at the beginning of the case because the issue would not have been ripe for consideration. The issue only became ripe upon the conversion of the case to Chapter 7 and the Debtor filed the Motion to Compel Abandonment soon after conversion.

e. From the Debtor's perspective, the issue really isn't about whether the value as of the hearing date for the Motion to Compel is the relevant value for determining the equity in the homestead, but rather whether the equity created due to the appreciation in the house which occurred after the commencement of the case should be considered part of the bankruptcy estate. If that equity is not part of the bankruptcy estate, then it wouldn't matter when the Motion to Compel hearing was heard after the conversion to Chapter 7.

2. It is unjust to punish the debtor as though she had converted to Chapter 7 in bad faith.

   a. A simple mathematical analysis of the assets in the case show that there was zero liquidation value in debtor's homestead upon the filing of the case, but that at least $62,000 of liquidation value existed in the debtor's homestead at the date of conversion.

   b. If the Debtor had converted in bad faith, there would have been at least $62,000 of liquidation value in debtor's homestead based on the trustee's valuation of the homestead at that time. No assets other than the homestead have been claimed to have increased in value between the date of filing and the date of conversion. Also, there have been no allegations that new assets were brought into the estate during the pendency of the Chapter 13.

   c. It is clear the same results are obtained here whether bad faith is found or not in the conversion because there have been no allegations that any additional assets came into the estate upon conversion to Chapter 7.

d. As one commentator stated, "a logical inference that may be derived from [348(f)(2)] is that, in a good faith scenario, increases in value occurring after the Chapter 13 filing and prior to conversion should be excluded from the property of estate in the ensuing Chapter 7 case … [Further,] [u]nder the articulated legislative intent in enacting section 348(f)(1)(A), as well as the policy considerations articulated in *Harris v. Viegelahn*, 575 U.S. 510, 510 (2015), a strong case can be made that an increase in the debtor's equity, whether due to payments on the mortgage or market factors, should stay with the debtor." Lawrence Ponoroff, Allocation of Property Appreciation: A Statutory Approach to the Dialectic, 13 Wm. & Mary Bus. L. Rev. 721, 749 (2022), https://scholarship.law.wm.edu/wmblr/vol13/iss3/3.

VI. CONCLUSION

The debtor exempted her homestead without objection and thus it was withdrawn from the bankruptcy estate, leaving a zero-liquidation estate for the trustee, as stipulated by the parties. Because the

homestead was withdrawn from the estate all post-petition appreciation in the homestead vested in the debtor.

The legislative history of 11 U.S.C. § 348(f)(1) shows that Congress intended for debtors to not be made worse off for having tried a Chapter 13 and then converting to Chapter 7 than if they had simply filed for Chapter 7 from the beginning.

Allowing the trustee's interpretation of 11 U.S.C. § 348(f)(1) to stand will make the debtor worse off than if she had simply filed Chapter 7 in the first place (in direct conflict with Congress' intent), will disincentive debtors from filing Chapter 13 for fear their assets can be taken if the case is converted to Chapter 7 (which can occur involuntarily), will lead to fewer conversions amongst current Chapter 13 debtors, will reward the trustee and creditors when they would have had no expectation of such reward if the case were filed as a Chapter 7 initially, and leads to inconsistent results.

The debtor requests that the Court of Appeals hold that the Appellee's homestead was exempted out of the bankruptcy estate and that the post-petition pre-conversion equity created in the homestead through appreciation in value and through paydown of the mortgage

are interests that did not exist as of the commence of the case and thus are not part of the bankruptcy estate and thus that the homestead is of "inconsequential value and benefit to the estate" under 11 U.S.C. § 554. Debtor requests that the Court of Appeals grant debtor's Motion to Compel Abandonment of Real Property.

VII. CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of FRAP 32(a)(7) because it uses 14-point Century type and contains 9,764 words, excluding the sections exempted by FRAP 32(f).

Dated: August 8, 2023 */s/ Errin P. Stowell*

VIII. STATEMENT THAT BRIEF IS VIRUS FREE

The brief and addendum have been scanned for viruses and are virus-free.

/s/ Errin P. Stowell

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 8, 2023, a true and correct copy of Appellant's Brief was filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system and served via either CM/ECF or through United States postal service on the following parties:

Victor F. Weber, Chapter 7 Trustee (CM/ECF)

US Trustee (CM/ECF)

Dated: August 8, 2023 */s/ Errin P. Stowell*