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## PROPERTY OF THE ESTATE AFTER CONFIRMATION OF A CHAPTER 13 REPAYMENT PLAN: BALANCING COMPETING INTERESTS

*Abstract:* Under Chapter 13 of the Bankruptcy Code, it is unclear whether property of the estate and protection of the automatic stay continue after confirmation of debtor's repayment plan. Courts use diverse approaches to determine whether property of the estate exists after confirmation, resulting in confusion for trustees, debtors, and creditors. This Comment proposes that bankruptcy courts use their equitable powers and adopt a test that balances the competing interests of debtor and creditor.

Under bankruptcy law, an automatic stay protects debtor's property of the estate from creditors. In Chapter 13<sup>1</sup> proceedings, property of the estate includes property debtor owns at the time of filing the bankruptcy petition, as well as property debtor acquires after filing. The stay remains in effect during the period from filing the bankruptcy petition until confirmation of the repayment plan, but courts disagree whether the stay continues after confirmation.

To answer this question, courts must decide whether property of the estate exists after confirmation. The relevant provisions of the Bankruptcy Code (the Code),<sup>2</sup> however, create an ambiguity as to when property of the estate ceases to exist—at confirmation, or when the case is closed, dismissed, or converted. Thus, courts, as well as trustees, debtors, and creditors, cannot agree whether the automatic stay continues after confirmation. If the stay continues after confirmation, post-confirmation creditors must first seek relief from stay before proceeding against debtor's property of the estate.

Courts should use a balancing test to decide whether property of the estate exists after confirmation and therefore receives protection from the automatic stay. Courts should evaluate whether allowing the post-confirmation creditor's action adversely affects debtor's ability to complete plan payments, whether performing the plan requires the property at issue, whether continuing the stay irreparably harms the post-confirmation creditor, and whether debtor carries his weight in the rehabilitation process by not abusing the stay's protection. To resolve the issue and further the goals of bankruptcy law, bankruptcy courts should consider the foregoing factors while weighing the rights of the individual debtor and creditor.

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1. 11 U.S.C.A. §§ 1301-1330 (West 1979 & Supp. 1989).

2. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C.A. §§ 101-1330 (West 1979 & Supp. 1989)).

## I. PROPERTY OF THE ESTATE IN CHAPTER 13 BANKRUPTCY PROCEEDINGS

Chapter 13's dual goals are to rehabilitate debtor and to equitably distribute debtor's assets to creditors.<sup>3</sup> An automatic stay, imposed when debtor files the bankruptcy petition, facilitates these goals. The stay protects debtor's property owned at the time the bankruptcy petition is filed from all pre-petition and some post-petition creditors' actions. However, the stay protects property acquired after filing only if it qualifies as property of the estate. Although Chapter 13 property of the estate includes property debtor acquires after filing the bankruptcy petition, courts disagree whether property of the estate exists after confirmation. To determine whether the stay remains in effect after confirmation, courts must decide whether property of the estate exists after confirmation.

### A. *Chapter 13 Bankruptcy: Purpose and Scope*

Bankruptcy proceedings under Chapter 13 are voluntary and generally available to individuals earning regular incomes.<sup>4</sup> Congress intended Chapter 13 as the preferred method of bankruptcy for consumer debtors.<sup>5</sup> Chapter 13 generally allows debtors to retain their property while repaying creditors.<sup>6</sup>

In 1978, Congress revised the Bankruptcy Act of 1938 to reflect the increase in consumer bankruptcies since the end of World War II.<sup>7</sup>

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3. See Kennedy, *Automatic Stays Under the New Bankruptcy Law*, 12 U. MICH. J.L. REF. 1, 61 (1978).

4. Only individuals owing, on the date the petition is filed, less than \$100,000 of noncontingent, liquidated, unsecured debts, and less than \$350,000 of noncontingent, liquidated, secured debts may file under Chapter 13. 11 U.S.C.A. § 109(e) (West 1979). A claim is contingent if debtor's legal duty to pay does not come into existence until triggered by a future event. NORTON BANKRUPTCY LAW AND PRACTICE § 68.05, at 13 (1987). Regular income is income sufficiently regular and stable to enable debtor to make plan payments. 11 U.S.C.A. § 101(29) (West Supp. 1989).

5. H.R. REP. NO. 595, 95th Cong., 2d Sess. 118, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6078 [hereinafter 1978 HOUSE REPORT].

6. *Id.* at 6079. In contrast, in Chapter 7 proceedings, debtor must surrender to the trustee all non-exempt assets for liquidation and sale. *Id.*

Additional reasons why Congress prefers Chapter 13 to straight bankruptcy (Chapter 7 liquidation proceedings) include protecting debtor's credit standing, avoiding stigma attached to straight bankruptcy, and retaining pride by meeting one's obligations. Creditors also benefit because the losses are significantly less than if debtor files for straight bankruptcy. *Id.*

7. In 1970, Congress appointed The Commission on Bankruptcy Laws of the United States to evaluate changes in social and economic conditions occurring since the last major revisions of the Bankruptcy Act in 1938. H.R. REP. NO. 927, 91st Cong., 2d Sess. 2, reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 3559, 3560 [hereinafter 1970 HOUSE REPORT]. For the complete text of the Bankruptcy Commission's findings, see REPORT OF THE COMMISSION ON THE

## Chapter 13 Property of the Estate

The revisions simplified bankruptcy laws and accommodated the increase in consumer bankruptcies by simplifying, expanding, and making more flexible Chapter 13 wage earner plans.<sup>8</sup> Under the new Code, individuals earning regular incomes may propose and carry out reasonable plans for debt repayment under Chapter 13.<sup>9</sup> After filing the petition for relief, debtor proposes and files with the bankruptcy court a plan for repaying creditors.<sup>10</sup>

The court confirms debtor's plan if the plan complies with Chapter 13 requirements.<sup>11</sup> The court will not confirm the plan if either the trustee or holders of allowed unsecured claims object.<sup>12</sup> Confirmation binds debtor and all creditors to the confirmed plan's provisions, whether or not the plan provides for particular creditors.<sup>13</sup> In addition, except as otherwise provided in the plan, all property of the estate vests in debtor free of the claims or interests of creditors designated in the plan.<sup>14</sup>

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BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, 93d Cong., 1st Sess., pts. I-III (1973) [hereinafter COMMISSION REPORTS I, II, AND III]. The Commission reported a tremendous increase in consumer credit after the end of World War II resulting in a conflict between the interests of debtors and creditors. To ease the conflict, the Commission sought to increase the cooperation between the two parties to achieve debtor rehabilitation. In response to the Commission's report, Congress acknowledged the hardship on consumers overburdened with debt and criticized the credit industry's abusive extension of credit. Consumers and creditors should both bear the responsibility for debtor's predicament. See 1978 HOUSE REPORT, *supra* note 5, at 6076-77; COMMISSION REPORT III, *supra*, at 49, 51, 59, 86.

8. See 1978 HOUSE REPORT, *supra* note 5, at 6078.

9. S. REP. NO. 989, 95th Cong., 2d Sess. 13, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS, 5787, 5799 [hereinafter 1978 SENATE REPORT]. Eligible individuals include traditional wage earners, self-employed persons with regular incomes, and individuals living on welfare, social security, fixed pension incomes or investment incomes. *Id.* at 5810.

10. 11 U.S.C.A. §§ 1321, 1322 (West 1979 & Supp. 1989). The bankruptcy case commences upon filing the petition for relief with the court. *Id.* § 301 (West 1979). Chapter 13 debtors file repayment plans with the court listing creditors and the amount each creditor receives in deferred cash payments. *Id.* §§ 1321, 1322(a) (West 1979 & Supp. 1989). The term "wage earner plans" developed because Chapter XIII under the 1938 Act was designed for individuals earning regular wages. See *supra* note 9 and accompanying text. The repayment plan requires submission of all or part of debtor's future earnings and income to the supervision and control of the trustee. 11 U.S.C.A. § 1322(a)(1) (West 1979).

11. See *id.* § 1325(a) (setting forth the requirements for confirmation).

12. *Id.* § 1325(b) (West Supp. 1989). See *id.* § 506 (West 1979 & Supp. 1989) (regarding determination of secured status of creditors' claims).

13. *Id.* § 1327(a) (West 1979).

14. *Id.* § 1327(b)-(c).

### B. *Property of the Estate in Chapter 13*

When debtor files the bankruptcy petition, a bankruptcy case commences, creating an estate comprising debtor's property.<sup>15</sup> The estate includes, with certain exceptions, all debtor's legal or equitable interests in property at the time the case is commenced.<sup>16</sup> The existing interests and proceeds from such property represent the entire property of the estate for purposes of Chapter 7 liquidation proceedings.<sup>17</sup> The provision defining Chapter 13 property of the estate, however, expands the estate to include property debtor acquires after commencement of the case, including earnings from services performed.<sup>18</sup>

Characterization of property as property of the estate is important in Chapter 13 proceedings for two reasons. First, debtor's future earnings or income constitute property of the estate and primarily fund the repayment plan.<sup>19</sup> Second, an automatic stay protects property of the estate from actions brought by all pre-petition and some post-petition creditors.<sup>20</sup>

### C. *The Automatic Stay*

The automatic stay facilitates debtor rehabilitation and equitable distribution of debtor's estate to creditors.<sup>21</sup> Filing of the bankruptcy petition operates as an automatic stay prohibiting actions against both

15. *Id.* § 541(a) (West 1979 & Supp. 1989) (setting forth what is property of the estate in bankruptcy proceedings).

16. *Id.* For a discussion regarding commencement of the bankruptcy case, see *supra* note 10.

17. See 11 U.S.C.A. §§ 704(1), 726 (West 1979 & Supp. 1989); see also *id.* § 541(a)(5) (property of the estate also includes property debtor acquires within 180 days after filing the petition if acquired (1) by inheritance or gift, (2) as part of a property settlement, or (3) as a beneficiary of life insurance).

18. The Code defines Chapter 13 property of the estate as follows:

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

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

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

11 U.S.C.A. § 1306(a)(1)–(2) (West Supp. 1989).

19. *Id.* § 1322(a)(1) (West 1979). The sale of property of the estate may also fund the plan. *Id.* § 1322(b)(8) (West Supp. 1989).

20. The stay of proceedings against property of the estate continues until such property no longer is property of the estate. *Id.* § 362(c)(1) (West 1979).

21. The stay protects creditors by providing an orderly distribution of debtor's assets. 1978 SENATE REPORT, *supra* note 9, at 5835. The stay also gives debtor a breathing spell from creditors permitting him to complete the repayment plan, and relieving him of the financial pressures that led to bankruptcy. *Id.* at 5840–41; see also Kennedy, *supra* note 3, at 3.

debtor and property of the estate.<sup>22</sup> First, the stay prohibits judicial, administrative, or other proceedings against debtor or property of the estate to satisfy claims arising before filing the petition.<sup>23</sup> Second, the stay prohibits actions to obtain or create liens against property of the estate to satisfy claims arising both before and after filing the petition.<sup>24</sup> Therefore, pre-petition and post-petition creditors must obtain court approval before proceeding against property of the estate.<sup>25</sup>

The duration of the stay in Chapter 13 cases is unclear. To determine whether the stay continues after confirmation, courts must decide if property of the estate exists after confirmation. The stay initially protects property debtor owns at the time of filing the bankruptcy petition.<sup>26</sup> In addition, courts unanimously agree that property debtor acquires after commencement and before confirmation is property of the estate and protected by the stay.<sup>27</sup> The Code is unclear,

22. 11 U.S.C.A. § 362(a) (West 1979 & Supp. 1989). *But see id.* § 362(b)(2) (West 1979) (collection of alimony and child support may still proceed against property that is not property of the estate).

23. *See id.* § 362(a)(1), (2), (5), (6) and (7) (West 1979 & Supp. 1989).

24. In Chapter 13, property of the estate includes property debtor acquires before and after commencement of the case. *Id.* § 1306 (West Supp. 1989). Therefore, the stay protects against post-petition claims to obtain property of the estate:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of—

...  
(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate . . .

*Id.* § 362(a)(3)–(4) (West 1979 & Supp. 1989).

25. *Id.* § 362 (West 1979 & Supp. 1989). After notice and hearing, the court may grant relief from the stay. *Id.* § 362(d) (West Supp. 1989).

Actions taken in violation of the stay are at the very least void. *See Johnson & O'Leary, Automatic Stay Provisions of the Bankruptcy Act of 1978*, 13 N.M.L. REV. 599, 618 (1983). Debtors injured by creditors willfully violating the stay can recover their actual damages, including costs and attorneys' fees. 11 U.S.C.A. § 362(h) (West Supp. 1989); *see, e.g., In re Batla*, 12 Bankr. 397, 401 (Bankr. N.D. Ga. 1981) (debtor awarded damages, plus attorneys' fees and costs, for loss of employment caused by creditor's garnishment proceedings). If appropriate, punitive damages may be awarded. 11 U.S.C.A. § 362(h) (West Supp. 1989). Creditors violating the stay can be held in contempt by the bankruptcy court. *E.g., In re Littke*, 105 Bankr. 905, 908 (Bankr. N.D. Ind. 1989). However, courts do not hold creditors in contempt who unknowingly violate the stay. *See Johnson & O'Leary, supra*, at 618.

26. *See* 11 U.S.C.A. § 541(a)(1) (West 1979 & Supp. 1989); *see also id.* § 362(a)(3)–(4) (West 1979 & Supp. 1989). While sections 362(a)(1), (2), (5), (6), and (7) protect property of the estate from various types of actions arising before filing the bankruptcy petition, sections 362(a)(3) and (4) protect property of the estate from actions arising after filing, including actions against property of the estate after confirmation of debtor's repayment plan. *Id.* § 362(a)(1)–(7).

27. *E.g., In re Mack*, 46 Bankr. 652, 655 (Bankr. E.D. Pa. 1985) (wages earned prior to filing Chapter 13 petition and during pendency of case are property of the estate).

however, whether property of the estate exists after confirmation. As a result, courts disagree whether the stay's protection continues after confirmation.

## II. JUDICIAL APPROACHES TO POST-CONFIRMATION PROPERTY OF THE ESTATE

Determining what constitutes property of the estate after confirmation has not been an easy task for bankruptcy courts. Courts must consider one of two questions when deciding what constitutes property of the estate after confirmation: (1) whether debtor's property interests at commencement of the case remain property of the estate after confirmation, and (2) whether debtor's property acquired after confirmation ever qualifies as property of the estate.<sup>28</sup> The stay continues until property is no longer property of the estate.<sup>29</sup> Resolving the status of property after confirmation is critical, therefore, because the automatic stay protects only post-confirmation property qualifying as property of the estate.<sup>30</sup>

Bankruptcy courts disagree whether post-confirmation property constitutes property of the estate.<sup>31</sup> Courts focus on an apparent ambiguity between sections 1306 and 1327(b) of the Code.<sup>32</sup> Section 1306 provides that, in addition to property owned at commencement of the case, property of the estate includes property acquired after commencement until the case is closed, dismissed, or converted.<sup>33</sup> Section 1327(b) states that upon confirmation of debtor's plan, property of the estate vests in debtor.<sup>34</sup> Section 1327(b), however, does not indicate whether vesting in debtor means that property of the estate ceases to exist.<sup>35</sup> Adding to the confusion, Code sections defining

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28. For purposes of this Comment, the term "post-confirmation property" refers to property acquired both before and after confirmation.

29. 11 U.S.C.A. § 362(c)(1) (West 1979).

30. *See id.* § 362(a)(3)-(4) (West 1979 & Supp. 1989).

31. *Compare In re Rutt*, 98 Bankr. 490, 492 (Bankr. D. Neb. 1988) (after confirmation, funds trustee received for payment to creditors under terms of confirmed plan are not property of the estate), *aff'd sub nom. Laughlin v. Commissioner*, 98 Bankr. 494 (D. Neb. 1989), *with In re Littke*, 105 Bankr. 905, 909 (Bankr. N.D. Ind. 1989) (dictum) (property of the estate exists after confirmation).

32. *E.g., Littke*, 105 Bankr. at 908-09 (the split in authority arises out of the different emphasis courts place upon Code sections 1306 and 1327); *In re Osci*, 90 Bankr. 910, 911 (Bankr. N.D. Ill. 1988) (two conflicting Code sections come into play when determining what constitutes property of the estate after confirmation).

33. *See supra* note 18 for text of section 1306(a)(1)-(2).

34. Section 1327(b) states: "[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." 11 U.S.C.A. § 1327(b) (West 1979).

35. *Id.*

property of the estate fail to state when property of the estate ceases to exist.<sup>36</sup> Courts therefore argue whether property of the estate terminates at confirmation when it vests in debtor, or whether property of the estate exists after confirmation until the case is closed, dismissed, or converted.<sup>37</sup> Furthermore, courts disagree whether property debtor acquires after confirmation ever qualifies as property of the estate.

Courts must analyze two kinds of property when deciding what constitutes property of the estate after confirmation. The first form includes property debtor owns when the bankruptcy case is commenced and property debtor acquires after the case is commenced, but before confirmation.<sup>38</sup> The second form includes property acquired by debtor after confirmation, most often debtor's post-confirmation wages.<sup>39</sup>

Courts reach conflicting conclusions regarding the nature of property of the estate after confirmation. Some courts hold that vesting property of the estate in debtor at confirmation terminates both the estate and the automatic stay.<sup>40</sup> Other courts conclude that vesting property of the estate in debtor removes from the estate any property not designated in the plan.<sup>41</sup> Property designated in the repayment plan, however, qualifies as property of the estate.<sup>42</sup> Still other courts state that property of the estate exists after confirmation with title merely vesting in debtor.<sup>43</sup> Under this third view, debtor retains full use of the property, limited only by the terms of the repayment plan, and the stay protects all property.<sup>44</sup> Finally, some courts turn to equi-

36. *Id.* §§ 541, 1306 (West 1979 & Supp. 1989).

37. *Id.* § 1307 (regarding conversion or dismissal of a Chapter 13 case). The Chapter 13 case is closed and debtor discharged upon completion of all payments under the plan. *Id.* § 1328.

38. Problems involving property of the estate owned by debtor before confirmation can arise where debtor's residence becomes property of the estate at commencement of the case. After confirmation, creditors might proceed against debtor's residence to satisfy debt. Whether the residence remains property of the estate after confirmation is unclear. Compare *In re Walker*, 84 Bankr. 888, 888 (Bankr. D.C. 1988) (post-petition creditor not required to seek relief from stay to proceed against debtor's condominium unit) with *In re Schewe*, 94 Bankr. 938, 945 (Bankr. W.D. Mich. 1989) (debtors' possessory interest in residential real property remains property of the estate after confirmation).

39. Post-confirmation creditors may commence garnishment proceedings against debtor's post-confirmation wages. Courts must determine whether property acquired after confirmation ever becomes property of the estate. See, e.g., *In re Mason*, 45 Bankr. 498 (Bankr. D. Or. 1984), *aff'd*, 51 Bankr. 548 (D. Or. 1985).

40. E.g., *In re Dickey*, 64 Bankr. 3, 4 (Bankr. E.D. Va. 1985); *Mason*, 45 Bankr. at 498.

41. E.g., *In re Root*, 61 Bankr. 984, 985 (Bankr. D. Colo. 1986); *In re Johnson*, 36 Bankr. 958, 959 (Bankr. D. Utah 1983).

42. See *Root*, 61 Bankr. at 985.

43. E.g., *In re Aneiro*, 72 Bankr. 424 (Bankr. S.D. Cal. 1987).

44. *Id.* at 429.



table considerations.<sup>45</sup> Most recently, one court balanced the competing interests of debtor and creditor to conclude that property of the estate exists after confirmation.<sup>46</sup>

A. *Mason: Confirmation Terminates Property of the Estate*

An early line of authority holds that property of the estate ceases to exist upon confirmation. In *In re Mason*, the court held that when property of the estate vests in debtor at confirmation, the estate ceases to exist unless debtor specifically states otherwise in the plan.<sup>47</sup> In *Mason*, debtor's Chapter 13 plan specifically stated that all property vested in debtor at confirmation.<sup>48</sup> Therefore, property of the estate did not exist after confirmation and the stay did not protect debtor's post-confirmation wages from garnishment by a post-confirmation creditor.<sup>49</sup>

To justify its decision, the court weighed the rights of debtors and creditors generally after confirmation. Before confirmation, the bankruptcy court has title to and control over property of the estate.<sup>50</sup> After confirmation, debtor obtains title to property of the estate and may use, sell, or lease it without court approval. Post-confirmation creditors, therefore, may deal with debtor as if no bankruptcy case existed.<sup>51</sup> Otherwise, post-confirmation creditors might be reluctant to extend credit, thus frustrating Chapter 13 debtors' rehabilitation efforts.<sup>52</sup> In addition, the court reasoned that it should not delay post-confirmation creditors, who have no opportunity to object to debtor's plan, from collecting their damages.<sup>53</sup> Debtor, on the other hand, may protect himself from unexpected expenses by insurance, if necessary, and modify the plan to permit payment of post-confirmation debt.<sup>54</sup>

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45. See *infra* notes 71-79 and accompanying text.

46. *In re Schewe*, 94 Bankr. 938, 945 (Bankr. W.D. Mich. 1989).

47. *In re Mason*, 45 Bankr. 498 (Bankr. D. Or. 1984), *aff'd*, 51 Bankr. 548 (D. Or. 1985). The court specifically addressed whether the stay prohibits garnishment proceedings after confirmation. The court held that wages earned by debtors after confirmation of the Chapter 13 plan do not constitute property of the estate because no estate exists after confirmation. *Id.* at 501.

48. *Id.*

49. *Id.*

50. *Id.* at 500.

51. *Id.*

52. *Id.*

53. *Id.* at 501.

54. *Id.*

More recent decisions criticize *Mason* for misinterpreting the effect of confirmation,<sup>55</sup> for not acknowledging the ambiguity between sections 1306 and 1327(b),<sup>56</sup> and for giving insufficient weight to the policy of debtor rehabilitation underlying Chapter 13 proceedings.<sup>57</sup> Most courts addressing whether property of the estate exists after confirmation do not consider *Mason* persuasive.<sup>58</sup> Using diverse rationales, courts recognize that at least a portion of debtor's post-confirmation property qualifies as property of the estate.

### B. *Root: Limited Existence of Property of the Estate*

Refusing to follow *Mason*, a second line of authority holds that debtor's property qualifies as property of the estate after confirmation, but only to the extent provided in the confirmed plan. In the leading case, *In re Root*, the court stated that property of the estate exists after confirmation, consisting of debtor's property and future earnings designated in the plan.<sup>59</sup> Under the *Root* analysis, debtor's wages up to the amount of plan payments constitute property of the estate and receive protection from creditors by the automatic stay.<sup>60</sup>

The *Root* court rejected the *Mason* analysis, reasoning that an estate must continue to exist after confirmation, or else Chapter 13 trustees have nothing to administer.<sup>61</sup> Chapter 13 trustees must file final reports and accounts detailing the estate's administration.<sup>62</sup> Trustees could not carry out their responsibilities if the entire estate ceased to exist at confirmation. Therefore, property of the estate exists after confirmation, although limited to the property mentioned in the repayment plan.<sup>63</sup>

55. See *In re Aneiro*, 72 Bankr. 424, 428–29 (Bankr. S.D. Cal. 1987) (*Mason* line of authority based upon the mistaken belief that vesting at confirmation transforms property of the estate into property of the debtor).

56. See *In re Clarke*, 71 Bankr. 747, 750 (Bankr. E.D. Pa. 1987) (courts following *Mason* do not acknowledge the conflict between sections 1306 and 1327(b)).

57. See *In re Schewe*, 94 Bankr. 938, 942–45 (Bankr. W.D. Mich. 1989).

58. E.g., *In re Root*, 61 Bankr. 984, 985 (Bankr. D. Colo. 1986) (strongly disagrees with *Mason*). But see *In re Osei*, 90 Bankr. 910, 912 (Bankr. N.D. Ill. 1988) (court inclined to agree with *Mason's* reasoning).

59. *Root*, 61 Bankr. at 985. The Internal Revenue Service sought a levy against debtor, demanding payment of fees debtor owed his attorney for income tax purposes. Debtor paid his attorney prior to the demand, however, pursuant to a confirmed Chapter 13 plan. The court determined that the IRS did not attempt to obtain property of the estate, yet proceeded to decide whether property of the estate exists after confirmation. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*; see also 11 U.S.C.A. § 704(9) (West Supp. 1989) (made applicable to Chapter 13 trustees by 11 U.S.C.A. § 1302(b)(1) (West Supp. 1989)).

63. *Root*, 61 Bankr. at 985.

### C. *Two Approaches to Post-Confirmation Property of the Estate*

#### 1. *Aneiro: Vesting Does Not Terminate*

In a more generous approach than either *Mason* or *Root*, some courts state that property of the estate exists after confirmation with the stay's full protection from creditors.<sup>64</sup> In *In re Aneiro*, for example, the court stated that property vesting in debtor at confirmation remains property of the estate after confirmation.<sup>65</sup> The court reasoned that under section 1306, property of the estate continues to exist until the case is closed, dismissed, or converted to a case under another chapter.<sup>66</sup> Vesting does not convert property of the estate into property of debtor because debtor may not use the property as he pleases.<sup>67</sup>

The *Aneiro* court attempted to reconcile sections 1306 and 1327(b). Confirmation does not dictate when property of the estate terminates.<sup>68</sup> Instead, the relevant events are dismissal, closing, or conversion.<sup>69</sup> When property vests in debtor at confirmation, it remains property of the estate subject to the confirmation order's terms and the stay's protection.<sup>70</sup>

#### 2. *Schewe: Balancing Competing Interests*

One court recently used a balancing test to determine whether post-confirmation property qualifies as property of the estate. Although earlier decisions discussed the policies underlying Chapter 13, the court in *In re Schewe* focused solely on these policies to balance the competing interests of debtor and creditor, holding that property of

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64. See, e.g., *In re Nash*, 765 F.2d 1410, 1414 (9th Cir. 1985) (property of the estate continues to exist following confirmation although ownership vests in debtor).

65. *In re Aneiro*, 72 Bankr. 424, 429 (Bankr. S.D. Cal. 1987). The *Aneiro* court considered whether a nonresidential lease validly assumed by debtors after confirmation constituted property of the estate. If so, debtors must receive court approval before modifying the lease. The court decided the lease was property of the estate. *Id.* at 428-29.

66. *Id.* at 429.

67. *Id.* The *Aneiro* court reasoned that monies and property committed to the plan are still subject to the trustee's supervision and control as necessary to execute the plan. *Id.*; see also 11 U.S.C.A. § 1322(a)(1) (West 1979). If debtor fails to make payments to the confirmed plan, the trustee may seek dismissal for cause. 11 U.S.C.A. § 1307(c) (West Supp. 1989).

68. *Aneiro*, 72 Bankr. at 429. The court reasoned that if Congress intended confirmation to affect Chapter 13's expansive definition of property of the estate, it would have drafted such a provision. *Id.*

69. *Id.*; see also 11 U.S.C.A. § 1306(a) (West 1979 & Supp. 1989).

70. *Aneiro*, 72 Bankr. at 429.

the estate exists after confirmation.<sup>71</sup> Debtors in *Schewe* commenced adversary proceedings to prevent their eviction from a leased mobile home lot. Debtors' leasehold interest in the lot converted to property of the estate when the case commenced. The court decided whether it maintained that status after confirmation.<sup>72</sup> The *Schewe* court held that debtors' possessory interest in residential real property remained property of the estate.<sup>73</sup>

The *Schewe* court considered the competing policies of protecting debtor and preserving creditors' property rights in relation to the facts of the case before it. Chapter 13 bankruptcy's primary goal is debtor rehabilitation. The stay facilitates debtor rehabilitation by protecting debtor's property and thus giving debtor time to consummate a confirmed repayment plan.<sup>74</sup> Therefore, the stay should continue to protect debtor's property. Creditors not included in the confirmed plan are protected because they may move for relief from the stay.<sup>75</sup> Creditors seeking relief from stay are not substantially harmed during the short period before the bankruptcy court hears their motion.<sup>76</sup>

The equities in *Schewe* favored debtors.<sup>77</sup> Debtors' ability to earn income and carry out the repayment plan required continued occupancy of the family residence.<sup>78</sup> Without protection of the stay, creditors could evict debtors without prior court approval. The threat of losing the family home jeopardized debtors' rehabilitation efforts.<sup>79</sup>

Under the *Schewe* analysis, the court balances the competing interests of debtor and post-confirmation creditor. The court considers whether lifting the stay impairs debtor's ability to repay creditors

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71. *In re Schewe*, 94 Bankr. 938, 945 (Bankr. W.D. Mich. 1989).

At least two other courts recognize the necessity of balancing equities. *In re Osei*, 90 Bankr. 910, 912 (Bankr. N.D. Ill. 1988) (agrees with *Mason*, but balances equities to determine whether the stay applies); *In re Clarke*, 71 Bankr. 747, 750 (Bankr. E.D. Pa. 1987) (agrees with *Root's* reasoning, but balances equities, holding in favor of debtor).

72. *Schewe*, 94 Bankr. at 942.

73. *Id.* at 946.

74. *Id.* at 945.

75. *Id.* Bankruptcy courts can terminate, annul, modify, or condition the stay. 11 U.S.C.A. § 362(d) (West Supp. 1989); see also Johnson & O'Leary, *supra* note 25, at 614–17 (discussing elements to be proved at hearing for relief from stay). Bankruptcy courts also can, with or without hearing, grant relief from stay to prevent irreparable damage to creditor. 11 U.S.C.A. § 362(f) (West Supp. 1989).

76. *Schewe*, 94 Bankr. at 945.

77. See *id.* The *Schewe* court distinguished the facts of its case from cases regarding nondischargeable support obligations and recognized that the equities favor parties seeking to recover debtor's property in those cases because ex-spouses and minor children are entitled to support for daily needs. *Id.*

78. *Id.* at 945.

79. See *id.*

according to the repayment plan, thus frustrating debtor's rehabilitation efforts. Furthermore, under the balancing test, the court considers the possible harm to post-confirmation creditors should the stay continue.

### III. BANKRUPTCY COURTS SHOULD EMPLOY A BALANCING TEST

Bankruptcy courts, as courts of equity, adjudicate disputes by balancing debtor and creditor's competing interests.<sup>80</sup> Bankruptcy courts may use their broad equitable powers to issue any order necessary to carry out the Code's purposes.<sup>81</sup> Bankruptcy courts, therefore, should employ a balancing test when determining whether the automatic stay protects post-confirmation property. A balancing test allows courts to consider the competing factors in particular cases rather than apply rigid rules. This leads to decisions equitably balancing debtor and creditor's interests.

#### A. *Rigid Rules Defeat Chapter 13's Goals*

The *Mason* court's rigid rule undermines Chapter 13 debtor's rehabilitation efforts by opening the door for any post-confirmation creditor to pursue actions against debtor's post-confirmation property.<sup>82</sup> The *Mason* court focused on section 1327(b) without considering section 1306. The court's failure to consider section 1327(b) and section 1306 together creates a rule giving insufficient weight to debtor rehabilitation, thus defeating the stay's purpose.

The *Mason* decision impairs debtor's ability to carry out the confirmed plan's terms. The stay facilitates debtor rehabilitation by giving debtor a "breathing spell" from creditors during which debtor can implement the repayment plan.<sup>83</sup> Debtor's post-confirmation wages fund the repayment plan.<sup>84</sup> If the stay terminates after confirmation, post-confirmation creditors may garnish debtor's post-confirmation wages without the bankruptcy court's intervention. Lifting the stay may impair debtor's capacity to pay the trustee pursuant to the terms of the confirmed plan.<sup>85</sup> If debtor does not pay, the trustee may move

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80. *Katchen v. Landy*, 382 U.S. 323, 327 (1966) (bankruptcy courts are courts of equity with summary jurisdiction to adjudicate questions between debtor and creditors arising during administration of debtor's estate).

81. 11 U.S.C.A. § 105(a) (West Supp. 1989).

82. For facts and discussion of *In re Mason*, see *supra* notes 47-54 and accompanying text.

83. 1978 HOUSE REPORT, *supra* note 5, at 6296-97.

84. See *supra* note 19 and accompanying text.

85. See *In re Root*, 61 Bankr. 984, 985 (Bankr. D. Colo. 1986).

to dismiss the case for failure to perform under the repayment plan.<sup>86</sup> Debtor making his best effort to repay creditors according to the plan “should not have his scarce resources and ‘property of the estate’ invaded and the Plan doomed to failure” by post-confirmation creditors’ actions.<sup>87</sup>

Similarly, the *Root* court’s rigid rule burdens debtor with the results of poorly drafted repayment plans.<sup>88</sup> In *Root*, the court held that only property designated in the plan remains property of the estate after confirmation.<sup>89</sup> The stay protects only post-confirmation property specified in the plan.

The *Root* decision wrongly places the burden of specifying what property the stay protects on debtor and debtor’s attorney. For example, the repayment plan must specify that debtor pay the trustee a fixed amount of future earnings.<sup>90</sup> Under the *Root* analysis, if a plan refers to no other property, property of the estate includes only post-confirmation wages used to fund the repayment plan. Therefore, the stay does not protect debtor’s post-confirmation wages beyond those required for plan payments. However, debtor might incur additional debt after confirmation. If post-confirmation creditors can automatically proceed to obtain post-confirmation wages not used to fund the plan, debtor’s wages needed for daily living expenses are diminished, thus frustrating rehabilitation efforts. Although one creditor might not upset payments to the plan, several creditors demanding equal access to debtor’s post-confirmation property without court intervention will upset payments, possibly forcing debtor into Chapter 7 liquidation.

Applying *Root* to debtor’s residential property further illustrates the decision’s destructive effect. If the residence does not remain property of the estate after confirmation, the automatic stay no longer applies and creditors may proceed to evict debtor without court intervention. Debtor’s performance under the repayment plan requires continued occupation of the family residence. Thus, post-confirmation creditors’ actions against debtor’s residence disrupt the plan’s performance. Rather than apply a rigid rule based solely on the wording of the plan, a court should consider whether allowing the post-confirmation creditor to proceed impairs debtor’s efforts to comply with the confirmed plan.

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86. *See id.*; 11 U.S.C.A. § 1307(c) (West 1979 & Supp. 1989).

87. *In re Clarke*, 71 Bankr. 747, 750 (Bankr. E.D. Pa. 1987).

88. For facts and discussion of *In re Root*, see *supra* notes 59–63 and accompanying text.

89. *Root*, 61 Bankr. at 985.

90. *See* 11 U.S.C.A. § 1322(a)(1) (West 1979).

Conversely, courts also should consider the impact on the post-confirmation creditor. Rather than holding that the stay bars enforcement of all post-confirmation creditors' actions against property of the estate, bankruptcy courts should use their equitable powers to protect post-confirmation creditors. Bankruptcy courts' powers include lifting or modifying the stay when the equities favor a particular post-confirmation creditor.<sup>91</sup> In addition, courts need not punish post-confirmation creditors violating the stay because they were not aware of debtor's pending bankruptcy case. Courts should not fine or hold in contempt post-confirmation creditors who unwittingly violate the stay, particularly when the plan is not jeopardized.<sup>92</sup>

Although the conclusion that post-confirmation property always receives the stay's protection, as the *Aneiro* court stated, corresponds with the policy of debtor rehabilitation, this rule completely ignores the competing interest of creditors' rights.<sup>93</sup> The *Aneiro* court engaged in no equitable analysis, merely stating that property vesting in debtor remains property of the estate, protected by the stay until the case is closed, dismissed, or converted. The *Aneiro* court's reasoning has several ramifications with respect to the two forms of post-confirmation property.<sup>94</sup> First, all property acquired after confirmation constitutes property of the estate and is automatically protected by the stay. Second, property already property of the estate remains so after confirmation, with full protection of the stay. Third, and most significant, courts need not engage in an equitable analysis by examining the relative rights of the particular debtor and creditor involved. As a result, although the stay protects debtor throughout the pending bankruptcy case, the stay barring enforcement of all actions against property of the estate potentially harms post-confirmation creditors.

The *Aneiro* rule does not consider why debtor incurred the post-confirmation debt or the type of creditor involved. The *Aneiro* rule may cause debtor to abuse the stay's protection by incurring large amounts of unnecessary debt. Therefore, the stay should remain in effect to prevent creditors' actions against property necessary for debtor's rehabilitation. This conclusion further supports the *Schewe* approach that property of the estate includes all property necessary to carry out debtor's repayment plan, which may include property

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91. See *supra* note 75 and accompanying text.

92. See, e.g., Johnson & O'Leary, *supra* note 25, at 618 (it is generally agreed that one who has no actual notice of the stay cannot be held in contempt of court).

93. For facts and discussion of *Aneiro*, see *supra* notes 65-70 and accompanying text.

94. For a discussion of the two types of post-confirmation property, see *supra* notes 38-39 and accompanying text.

acquired after confirmation but not listed in the plan. Rather than applying a rigid rule as the *Aneiro* court did, a balancing test guides bankruptcy courts when deciding whether the stay protects post-confirmation property.

*B. Balancing Test Ensures Equity Between Debtor and Creditor*

Use of a balancing test can serve both debtor's and creditor's interests.<sup>95</sup> For example, the approach adopted by the *Schewe* court acknowledges bankruptcy law's dual goals to rehabilitate debtor and preserve creditors' rights.<sup>96</sup> The court in *Schewe* considered the status of debtors' residence after confirmation. Debtors would have lost the family home if creditor could have proceeded against the residence without court intervention.<sup>97</sup> After balancing both debtors' and creditor's interests, the *Schewe* court held that debtor's possessory interest in residential real property remains property of the estate after confirmation. The automatic stay, therefore, applies both before and after confirmation.<sup>98</sup>

Although the nature of the property in *Schewe* was different than in *Mason* or *Root*, identical policy concerns apply. The *Schewe* court wanted to prevent post-confirmation creditors from disrupting debtor's rehabilitation efforts.<sup>99</sup> This concern applies even more strongly to debtor's post-confirmation wages funding the repayment plan.

A balancing test to determine whether the stay protects post-confirmation wages ensures that debtor can fund the repayment plan, which in turn ensures that creditors provided for in the plan obtain their fair share of debtor's assets. Post-confirmation creditors should not automatically garnish debtor's wages. Bankruptcy courts should utilize their power to intervene and determine whether the facts warrant modifying, annulling, terminating, or lifting the stay.

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95. Some courts already reach equitable solutions, while purporting to follow rigid rules established by earlier decisions. For example, one court agreed with the *Mason* court's reasoning, but balanced the equities between debtor and creditor. *In re Osei*, 90 Bankr. 910, 912 (Bankr. N.D. Ill. 1988) (debtor not harmed by allowing creditor to pursue satisfaction of its post-petition debt because the stay was already lifted once).

96. For facts and discussion of *Schewe*, see *supra* notes 71–79 and accompanying text.

97. *In re Schewe*, 94 Bankr. 938, 945 (Bankr. W.D. Mich. 1989).

98. *Id.* at 946.

99. See *id.* at 945–46.



### 1. *The Balancing Test*

The court should weigh four factors when balancing debtor's and post-confirmation creditor's interests. First, the court must determine whether allowing the post-confirmation creditor's action to proceed against property of the estate will adversely affect debtor's ability to perform under the confirmed plan. Allowing one creditor's collection suit may not upset debtor's performance, but allowing several creditors to do so will. Therefore, the court should resist opening the door to multiple creditors' actions. Otherwise, debtor and the creditors listed in debtor's plan all suffer the consequences, thereby defeating both purposes of Chapter 13 proceedings.

Second, the court must determine whether debtor needs the property at issue to complete plan payments. Certainly, the stay should protect property used to fund the plan, such as post-confirmation wages in the amount of plan payments. In addition, rehabilitation requires that debtor retain the family residence, whether or not listed in the plan. Post-confirmation wages not used to fund the plan also warrant the stay's protection. Debtor needs available income for daily living expenses as well as emergencies. However, the court may discontinue the stay when the post-confirmation creditor seeks income not used to fund the plan or necessary for daily needs. The court must determine whether the action disrupts debtor's plan payments.

Third, the court should evaluate the possible damage to the post-confirmation creditor if it delays collection by declaring the action void.<sup>100</sup> Creditors rarely incur significant damage by waiting a few days for the court to evaluate whether their claims warrant lifting the stay. The court also should determine whether creditor knew of the pending bankruptcy and yet proceeded against debtor's property without first seeking relief from the stay. The court should not declare void actions brought by post-confirmation creditors who unwittingly

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100. Some commentators argue that the automatic stay provisions of the Code erode the rights of secured creditors. White, *The Recent Erosion of the Secured Creditor's Rights Through Cases, Rules and Statutory Changes in Bankruptcy Law*, 53 MISS. L.J. 389 (1983); Comment, *Automatic Stay Under the 1978 Bankruptcy Code: An Equitable Roadblock to Secured Creditor Relief*, 17 SAN DIEGO L. REV. 1113 (1980). Although the issue of unsecured versus secured creditor status does not arise in cases discussing whether the stay protects property after confirmation, secured creditor status provides a possible argument for post-confirmation creditors seeking to bypass the automatic stay. Congress, however, recognized that giving secured creditors absolute rights may seriously impair debtor's rehabilitation. See 1978 SENATE REPORT, *supra* note 9, at 5839. In addition, alternative provisions of the Code protect secured creditors where necessary for the rehabilitative process. *Id.*; see also 11 U.S.C.A. § 1305 (West 1979) (allowing creditors to file post-petition claims for consumer debts arising after the case is commenced); 11 U.S.C.A. § 362 (West 1979 & Supp. 1989) (creditors may seek relief from stay).

violate the stay, especially those with small claims.<sup>101</sup> However, the court may penalize post-confirmation creditors intentionally violating the stay.<sup>102</sup> A balancing test allows the court to hold that the stay does not apply should injury to the post-confirmation creditor outweigh debtor's ability to complete plan payments.

Fourth, bankruptcy courts should consider whether debtor genuinely attempts to follow the plan, or instead abuses the stay's protection. The equities may favor post-confirmation creditors if debtor abuses the stay's protection by incurring large amounts of unnecessary debt. Bankruptcy courts should not encourage debtor to use the stay to incur additional debt while avoiding creditors. The stay's continued protection should not extend to the debtor who fails to carry his weight during the rehabilitation process. In addition, by discouraging debtor from abusing the stay, creditors gain incentive to extend credit to the responsible Chapter 13 debtor.

## 2. *Equitable Results Outweigh Unpredictability*

A balancing test's benefits outweigh its drawbacks. Balancing tests do not provide predictable, uniform results. As the discussed case law illustrates, however, although courts apply inconsistent reasoning, the trend of authority recognizes that balancing the equities achieves fair results.<sup>103</sup> A test balancing the competing interests of debtors and creditors enables bankruptcy courts to evaluate on a case-by-case basis whether the stay applies to post-confirmation property.<sup>104</sup>

Courts should decide the stay's duration on a case-by-case basis, rather than by a rigid legislative rule. Rigid rules ultimately result in inequitable decisions. Courts applying a balancing test achieve the equity between debtors and creditors intended by bankruptcy laws.

Bankruptcy courts should formulate bankruptcy policy. Bankruptcy courts' jurisdiction includes suits between debtor and creditors arising during administration of debtor's estate.<sup>105</sup> Unlike courts of general jurisdiction, bankruptcy courts understand the policies underlying bankruptcy law and the law's impact on individual debtors and creditors.

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101. See *In re Lewis*, 33 Bankr. 98, 101 (Bankr. W.D.N.Y. 1983) (where lawsuit for post-petition debts does not catastrophically affect the plan, creditor may pursue its remedies in a state forum).

102. See *supra* note 25.

103. See *supra* notes 71–79, 96 and accompanying text.

104. See Comment, *supra* note 100, at 1122–34 (discussing case-by-case development of law regarding automatic stay and adequate protection for secured creditors).

105. *Katchen v. Landy*, 382 U.S. 323, 327 (1966).

#### IV. CONCLUSION

Because of the ambiguity created by sections 1306 and 1327(b) of the Code, courts disagree whether the automatic stay protects debtor's property after confirmation of a Chapter 13 repayment plan. Courts addressing this issue generally adopt rigid rules with results benefiting either debtor or creditor. These decisions open the door to abuse of the stay's protection by debtors, and harassment of debtors by creditors. Better reasoned decisions, however, balance the equities of the particular debtor and creditor before the court, while attempting to carry out the dual goals of debtor rehabilitation and equitable treatment of creditors.

Using a balancing test, bankruptcy courts should address four factors to decide whether the stay protects property after confirmation: whether post-confirmation creditors' actions adversely effect debtor's ability to complete plan payments, whether debtor's performance under the plan requires the property at issue, whether continuation of the stay irreparably harms the post-confirmation creditor, and whether debtor carries his weight in the rehabilitation process by not abusing the stay's protection.

A balancing test enables bankruptcy courts to resolve the current disagreement over whether the automatic stay protects post-confirmation property. A balancing test allows courts to evaluate on a case-by-case basis whether the stay should remain in effect after confirmation. Although rigid rules are predictable, a balancing test enables bankruptcy courts to use their broad equitable powers to carry out the policies underlying Chapter 13 bankruptcy proceedings.

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