By Michael Miller

Vesting in the Windy City

Debtors Should Decide How to Vest Property Under Chapter 13

Debtors seeking to file for bankruptcy under chapter 13 must determine how they want to address vesting of the property of their estate. The Bankruptcy Code gives a debtor the choice of what property to vest in or out of the estate, and this should remain the debtor's choice.

The question of vesting property is an important consideration for any debtor because of its ability to stay potential future post-petition creditors from taking collection actions against a debtor's property that is needed to fund the plan. Section 1321 clearly states the debtor shall file a plan, and § 1322(b) lists what things a plan may do, making this section permissive. Under § 1322(b)(9), a debtor may provide for the vesting of property of the estate, either at confirmation or at a later time in the debtor. So, the Code lays out that it is the debtor's choice — not the creditor's or trustee's choice — of how to vest property of the estate.

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Who Has Standing to Object?

While § 1324 states that "any party in interest" may object to a plan confirmation, many courts have held that this does not give a creditor an unlimited right to object to anything, and it must be shown that the objection is directly affecting that creditor's pecuniary interest.[1] So, if a creditor objects to how a debtor is choosing to vest property, that creditor must show that the vesting specifically affects its pecuniary interest.

Since confirmation of a plan occurs so early in the case, any objection will most likely be from a pre-petition creditor. While a pre-petition creditor may have bases to object to confirmation on other grounds under §§ 1322 and 1325, a pre-petition creditor should not have standing to object to a debtor vesting property based on being a hypothetical post-petition creditor.[2]

The Four Approaches to Vesting

A problem arises when a creditor with standing objects to confirmation, or the plan or confirmation order is silent on vesting. The bankruptcy court is faced with a quandary regarding what property is part of the estate at confirmation because of the conflict between §§ 1306 and 1327(b), which has caused courts to wrestle with different vesting approaches.

Four main vesting approaches have emerged through the years. The first two approaches — estate termination and preservation — are more extreme. The estate-termination approach vests all pre- and post-confirmation property back to the debtor at confirmation.[3] This approach allows the debtor the benefit of transferring or selling property, or incurring debt without the court's permission. However, the debtor loses the opportunity to protect important property, such as wages, from post-petition creditors. This approach has been criticized as failing to give effect to § 1306(a), which mandates that post-petition property and earnings be included in property of the estate.[4] This approach has also been attacked for failing to leave any property in the estate for a chapter 13 trustee to administer its post-confirmation duties under § 1302(b)-(c).[5] Moreover, this approach eviscerates § 348(f)(1)(A) by not leaving any property in the estate in the event that the debtor converts to a chapter 7.[6]

The estate-preservation approach vests all pre- and post-confirmation property in the estate.[7] This approach allows the debtor the benefit of protection for all property of the estate for the duration of the case, thereby allowing a super automatic stay from future post-petition creditors. However, the debtor must seek permission from the court to sell or transfer property, and must seek permission to finance new debt.

Courts have attacked this approach for ignoring the language of § 1327(b), which states that all property vests in the debtor at confirmation unless otherwise provided by the plan or confirmation order.[8] Courts have also cut down this approach

1 *Jensen v. Froio (In re Jensen)*, 369 B.R. 210, 226 (Bankr. E.D. Pa. 2007) ("Section 1324 ... says that any 'party in interest' may object to the confirmation of a chapter 13 plan. The Code does not define this term, but courts in this district have generally construed it to include anyone 'whose pecuniary interest is directly affected by the bankruptcy proceeding.'").

2 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (court held that a requirement for standing is injury be "actual or imminent" and not "hypothetical").

3 *California Franchise Tax Bd. v. Jones (In re Jones)*, 657 F.3d 921, 928-29 (9th Cir. 2011) (estate-termination approach "holds that § 1327(b) revests all property of the estate in the debtor upon plan confirmation, and any property acquired after confirmation likewise vests in the debtor unless the plan or confirmation provides otherwise").

4 *In re Zisumbo*, 519 B.R. 851, 856-57 ("Reading § 1327(b) in harmony with other provisions of the Bankruptcy Code makes it clear that the vesting provision does not extinguish the Chapter 13 estate as argued in the estate-termination approach.").

5 *Fritz Fire Prot. Co. v. Chang (In re Chang)*, 438 B.R. 77, 82 (Bankr. M.D. Pa. 2010) ("Courts criticizing this approach have held that the estate must exist post-confirmation for a Chapter 13 trustee to fulfill the duties mandated by the Code.").

6 *Zisumbo* at 857 ("From the plain reading of § 348(f)(2), whether before or after confirmation, the Chapter 13 estate exists until the closure, conversion, or dismissal of the case.").

7 *Annesse v. Kolenda (In re Kolenda)*, 212 B.R. 851, 853 (W.D. Mich. 1997) (under estate-preservation approach, "vesting under section 1327(b) is understood to remove no property from the estate.").

8 *Zisumbo* at 857 ("Basic statutory interpretation requires that a statute not be construed, if possible, to render any portion of it inoperable. In this Court's opinion, the estate preservation approach does just that to § 1327(b).").

on the basis that holding all of a debtor's property in the estate through discharge causes a bankruptcy court to have too much jurisdiction over all of a debtor's assets, including inconsequential property.[9]

The next two approaches are more balanced, giving effect to both §§ 1306 and 1327(b). The third approach is the modified estate-preservation approach, which vests pre-confirmation property in the debtor and vests all post-confirmation property in the estate.[10] Courts have criticized this approach for lacking logical consistency in harmoniously applying §§ 1306 and 1327(b) because there is nothing in § 1327(b) that suggests that post-confirmation property should not vest back to the debtor and stay in the estate.[11]

The fourth approach is the estate-transformation approach, which vests all estate property in the debtor at confirmation and only retains property in the estate that is necessary to carry out the plan.[12] This approach gives effect to both §§ 1306 and 1327(b) by keeping some property in the estate and some out of it. However, unlike the modified estate-preservation approach, the estate-transformation approach looks to pre- and post-confirmation property, but only keeps property in the estate that is essential to the chapter 13 plan performance. This approach has been criticized for adding a subjective-analysis component that is not found in §§ 1306 and 1327(b).[13]

The Seventh Circuit and *Steenes*

The Seventh Circuit has never ruled on a particular vesting approach. However, vesting has come up on at least two occasions. In *Heath*, the debtor put a provision in his plan to only keep property in the estate that was necessary to fulfill the plan.[14] The Seventh Circuit ruled that a $50 post-confirmation paycheck deduction was not necessary per the plan provision, but it did not take a stance on a vesting approach.[15] However, with strong *dicta*, the Seventh Circuit greatly detailed how it would be an abuse of discretion to keep more property in the estate than is reasonably necessary to fulfill the plan; thus, the transformation approach was born.[16] Many courts have embraced the transformation approach through the years because it resolves the conflict with §§ 1306 and 1327(b) by giving effect to both provisions.[17]

More recently, the Seventh Circuit in *Steenes* was dealing with a local form confirmation order in the Northern District of Illinois that vested all property to the estate through the closing of the case.[18] The City of Chicago challenged several chapter 13 cases using this local confirmation order because of its concern that debtors obtaining post-petition tickets would prevent Chicago from collecting its parking-ticket debts against any of the debtors' vehicles, which remained protected by the automatic stay, unless it filed motions to lift the stay.[19] The Seventh Circuit reversed in favor of Chicago on the grounds that none of the chapter 13 cases had a "case-specific order, supported by good case-specific reasons," to keep all property inside the estate, and thus vested all of the debtors' property back to the debtors.[20] In its reasoning, the Seventh Circuit only focused on § 1327(b), which it believes gives bankruptcy courts the discretion to hold property in the estate only with good reason.[21]

Did the Seventh Circuit Create a New Vesting Approach in *Steenes*?

The Seventh Circuit did not use one of the four main vesting approaches; however, many of the attributes of its holding resemble the estate-termination approach. However, instead of allowing the debtor to use the plan to keep property out of the estate, it confers discretion in the judge, thereby creating a "modified estate-termination approach" that would read like this: All property vests back to the debtor at confirmation, except property that the bankruptcy judge determines for good cause should stay in the estate.

The problem with this approach is that it ignores two very fundamental canons of statutory interpretation: (1) courts must give effect to all statutory language;[22] and (2) words of a statute must be read in their context and with a view to their place in the overall statutory scheme.[23] The *Steenes* court places too much weight on § 1327(b) and fails to give effect to § 1306, which states that all property and earnings stay in the estate. The *Steenes* court also ignored § 1329(b)(9), which allows a debtor to choose where to vest property, thereby not resolving the conflict that has caused courts nationwide to struggle with the vesting of property.

Other concerns with the *Steenes* rationale include a misapplication of § 1327(b) by the Seventh Circuit not forcing Chicago to meet its burden of proof. First, the Seventh Circuit interpreted § 1327(b) as vesting all property in the estate as a statutory presumption, unless a bankruptcy judge has good reason to keep assets in the estate.[24] However, upon closer inspection, §§ 1327(b) and 1329(b)(9), when read together, are in complete harmony because § 1329(b)(9) states that a

9 *In re Jemison*, 2007 Bankr. LEXIS 3107 at *20-22 (Bankr. N.D. Ala. Sept. 6, 2007) ("It is equally important to mention that the retention of all property in the estate during the life of a case is not practical, and a literal and unqualified interpretation of Section 1322(b)(9) and 1327(b) leads to an absurd result.").

10 *Waldron v. Brown (In re Waldron)*, 536 F.3d 1239, 1243 (11th Cir. 2008) ("[C]onfirmation returns so much of the property to the debtor," and "new assets that a debtor acquires unexpectedly after confirmation by definition do not exist at confirmation and cannot be returned to him then."); *see also Barbosa v. Soloman*, 235 F.3d 31, 37 (1st Cir. 2000).

11 *Fritz*, 438 B.R. at 83 (court held that this approach's weakness is that it does not "harmonize § 1306(a) and § 1327(b) perfectly" because it must assume that "property acquired after confirmation is not subject to § 1327(b) because it was not in existence at confirmation").

12 *Telfair v. First Union Mortg. Corp.*, 216 F.3d 1333, 1340 (11th Cir. 2000) (only property "necessary for the execution of a plan as remaining property of the estate after confirmation"); *see also Black v. U.S. Postal Serv. (In re Heath)*, 115 F.3d 521, 524 (7th Cir. 1997).

13 *Barbosa* at 36 (court criticized this approach for "involving a subjective analysis not contemplated, or provided for, by the Code").

14 *Heath* at 524.

15 *Id.* ("The plan as confirmed by the bankruptcy court does not place all of Heath's income until the completion of the plan in the debtor's estate and so in the trustee's control, but only so much of the income (or her other property) as necessary to the fulfillment of the plan. We must therefore consider whether the $50 that the Postal Service deducted from her postal salary as a garnishment fee is necessary to the fulfillment of the plan — necessary, that is, to the payment in full of the creditors' allowed claims.").

16 *Id.* ("It would presumably be an abuse of discretion for the bankruptcy judge to confirm a plan that retained more of the property in the hands of the trustee than reasonably necessary to fulfill the plan, though we need not decide that in this case.").

17 *See Telfair* at 1339-40; *Jemison* at *20-22.

18 *In re Steenes*, 918 F.3d 554, 556 (7th Cir. 2019).

19 *Id.* at 557, 558.

20 *Id.* at 558 ("A case-specific order, supported by good case-specific reasons, would be consistent with § 1327(b), but none was entered in any of these cases.").

21 *Id.* at 557 ("Section 1327(b) gives bankruptcy judges discretion to hold assets in the estate in particular cases, but the exercise of this discretion — like the exercise of all judicial discretion — requires a good reason.").

22 *Jones*, 657 F.3d at 927 ("A statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous.").

23 *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

24 *Steenes* at 557.

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debtor may vest property in the estate, and § 1327(b) states that all property vests in the debtor "[e]xcept as otherwise provided in the plan." Since it is the debtor that proposes the plan under § 1321, and § 1329(b)(9) allows the debtor the choice to vest property at a later time, another way to read §§ 1329(b)(9) and 1327(b) is that all property vests back to the debtor unless the debtor chooses otherwise. It is possible that Congress intended for § 1327(b) to be a default in a case where the debtor failed to elect how to vest property of the estate, so courts, chapter 13 trustees, debtors and creditors would know the disposition of the property of the estate in the event that the debtor failed to choose how the property would vest.

Second, while the Seventh Circuit prescribed that a case-by-case reasoning should be used to keep property in the estate, this implies that the debtor bears the burden of proof. However, the burden for an objecting creditor to confirmation is on the creditor — not the debtor.[25] In the *Steenes* case, Chicago made a blanket statement that all of the debtors' property should vest back to the debtor at confirmation, but never adduced any arguments on why none of the debtors' property should stay in the estate. Instead, the burden appeared to be placed on the debtor or the bankruptcy court. So, in essence, the City of Chicago failed to meet its burden. Moreover, the *Steenes* approach added words to § 1327(b) by including a subjective analysis to allow the bankruptcy judge, for good cause, to keep property in the estate; however, the statute does not provide for such a thing.

One last conundrum is how the Seventh Circuit seemed to discount the City of Chicago's alternative remedies to collecting its post-petition debts, such as filing a motion to modify the stay under § 362(d), or dismissing the case for bad faith under § 1307(c).[26] While it is true that there is the practical concern of a filing fee for a creditor to file a motion to lift the stay, there is no such filing fee for a motion to dismiss. In addition, if a debtor has only accumulated a sparse number of post-petition tickets, it is possible that the City of Chicago can make a strategic decision to not pursue stay relief unless the ticket's dollar amount is large enough to where it is cost-effective to file a motion to modify the stay. Moreover, if the amount of the post-petition tickets is minimal, Chicago can decide to do nothing as the post-petition debt will survive discharge, then it can collect on the debt once the case closes.

Conclusion

Barring Congress amending the Bankruptcy Code to resolve the conflicts among §§ 1306, 1327(b) and 1329(b)(9), or the Seventh Circuit communicating a different vesting approach, *Steenes* is not the end of the road for debtors who want to vest important property (*e.g.*, a vehicle) in the estate. The *Steenes* court seemed to hint that if the bankruptcy court would have made specific findings, it might have ruled differently, meaning that the *Steenes* case was limited only to the specific facts it had in front of it. Attorneys for debtors should make sure that if a creditor is objecting to vesting any property in the estate, they request that the court make specific factual findings and enter an order stating said reasons as to why it would allow certain property to vest in the estate. After all, factual findings are reviewed for clear error, which means that bankruptcy judges have large deference that is difficult to get an appellate court to disturb.[27]

The Seventh Circuit holds that it takes more to overturn a lower court's findings than the idea that another court might have reached a different result.[28] Instead, the lower court's decision must be "dead wrong," with "the force of a five-week-old, unrefrigerated fish."[29] It is apparent that several bankruptcy judges in the Northern District of Illinois (who overruled objections from Chicago in unrelated cases dealing with Chicago's failure to return impounded vehicles) understand how important a debtor having a vehicle is in the Chicago area and would most likely find, at a minimum, a good fact-specific reason that a vehicle should vest in the estate.[30]

In addition, other courts have found vehicles to be considered necessary for fulfillment of the plan when faced with the question of whether a car should stay vested in the estate following the transformation approach.[31] Moreover, attorneys for debtors should also consider raising a standing objection if a creditor who is objecting to vesting is not owed a post-petition debt. Thus, the Bankruptcy Code gives the debtor authority and latitude on how property of the estate is vested, and debtor's counsel should keep that in mind when faced with objections.

In re Davis is currently pending in the Seventh Circuit, which can be characterized as a continuation of the *Steenes* case.[32] In the aftermath of *Steenes*, the local confirmation order was eliminated, and now the City of Chicago is objecting to debtors using the plan to choose how to vest property. It will be interesting to see whether the Seventh Circuit will reconcile the conflicts among §§ 1306, 1327(b) and 1322(b)(9) in this case. abi

25 *See In re Chesney*, 2005 Bankr. LEXIS 1791 at *8-11 (Bankr. N.D. Ind. May 25, 2005) ("The Objectant has the initial burden of coming forward with the evidence in support of its Objection to a Plan.").

26 *Steenes* at 558 ("Nor should it be necessary, before a public body can collect a $50 parking ticket, for it to pay the cost of counsel to file a motion to lift the automatic stay ... or dismiss the whole case for abusive conduct.").

27 *Telfair* at 1337 ("We review the bankruptcy court's finding of facts for clear error.").

28 *Parts & Elec. Motors Inc. v. Sterling Elec. Inc.*, 866 F.2d 228, 233 (7th Cir. 1988) (under clearly erroneous standard, "a decision must strike us as more than just maybe or probably wrong, it must, as one member of this court recently stated during oral argument, strike us as wrong with the force of a five-week-old, unrefrigerated fish").

29 *Id.*

30 *In re Fulton*, 2018 Bankr. LEXIS 1555 at *12 (Bankr. N.D. Ill. May 31, 2018) ("It is abundantly clear that the City is ignoring the procedural requirement of *Thompson*, and making life unnecessarily difficult for debtors who need their vehicles in order to get to work, earn money, and make payments in their Chapter 13 plans."); *In re Peake*, 588 B.R. 811, 816 (Bankr. N.D. Ill. 2018) (court acknowledged debtor worked 45 miles from his home, and difficulty of not having vehicle to get to work); *In re Shannon*, 590 B.R. 467, 477 (Bankr. N.D. Ill. 2018) (citing *Thompson v. GMAC LLC*, 566 F.3d 699, 707 (7th Cir. 2009)) (court held that if debtor was unable to retrieve car from creditor, it would "hamper [the] debtor from either attending or finding work"); *see also In re Scott*, 584 B.R. 252 (Bankr. N.D. Ill. 2018).

31 *McGlocking v. Chrysler Fin. Co. LLC (In re McGlockling)*, 296 B.R. 884, 887-88 (Bankr. S.D. Ga. 2003) (court found debtor's car was necessary for successful reorganization); *In re Powell*, 223 B.R. 225, 236 (N.D. Ala. 1998).

32 *See City of Chicago v. Lucinda Davis*, No. 19-1534 (7th Cir.).