2020 No. 12 Norton Bankr. L. Adviser NL 1

Norton Bankruptcy Law Adviser | December 2020

Volume 2020, Issue 12

Norton Bankruptcy Law Adviser
Brent D. Meyer

A Tale of Two Sales: Post-Confirmation Sales of Non-Exempt Assets

Introduction
The Bankruptcy Appellate Panel of the Ninth Circuit recently decided two Chapter 13 cases in which all property of the estate vested in debtors at confirmation of the plans, yet in one, the "windfall" from a post-confirmation sale of non-exempt assets went to the debtors and in the other, the "windfall" was captured by the trustee for the benefit of unsecured creditors. These opinions are difficult to reconcile, and given the conflicting outcomes, almost certainly will result in closer scrutiny of the universally embraced conclusion that § 1329(a)(1)[1] authorizes modification of a confirmed plan to capture a postpetition increase in disposable income for the benefit of unsecured creditors—especially in jurisdictions that have adopted the "estate termination approach" to address the inherit tension between §§ 1306(a) and 1327(b).

Sale One: *Black v. Leavitt (In re Black)*[2]
On April 9, 2014, Richard Black filed a Chapter 7 petition, with the assistance of a bankruptcy petition preparer. Mr. Black scheduled real property located in Las Vegas, Nevada at $52,300 and claimed a homestead exemption of $52,300 in the property. The Chapter 7 Trustee objected to Mr. Black's homestead exemption because he did not live in the property, but rather, rented it to tenants for $850 per month.

With the assistance of counsel, Mr. Black moved to convert to Chapter 13, which was ultimately granted, but prior to conversion, the bankruptcy court sustained the Chapter 7 trustee's objection to the claimed homestead exemption. As a result, Mr. Black filed amended schedules, which identified the property as rental property, removed the homestead exemption claim, and reduced the value of the property to $44,000.

In his initial Chapter 13 plan, Mr. Black proposed payments of $250 per month for 59 months, with a balloon payment of $41,000 in the fourth year of the plan from a sale or refinance of the property. The Chapter 13 trustee objected to confirmation, asserting that the Chapter 13 plan did not satisfy the "best interest of creditors," 11 U.S.C.A. § 1325(a)(4), based on non-exempt equity of $44,000 in the property.

In his amended Chapter 13 plan, Mr. Black again proposed payments of $250 per month for 59 months, but to satisfy the "best interest of creditors," he increased the balloon payment to $45,000 from a sale or refinance of the property. The Chapter 13 trustee did not object to this amended Chapter 13 plan, which was confirmed by the bankruptcy court.

Three years later, Mr. Black moved to sell the property for $107,000, from which he proposed to pay $45,000 to unsecured creditors pursuant to the confirmed plan and to retain the remaining net proceeds ($50,689) for himself. The Chapter 13 trustee opposed the motion, arguing (perhaps, narrowly) that Mr. Black could not retain the net proceed of sale from the property because those net proceeds were property of the estate (11 U.S.C.A. § 1306(a)(1)), and Mr. Black did not claim an exemption in the property.

The bankruptcy court found that the property was property of the estate, but since the sale was a reasonable exercise of Mr. Black's business judgment, granted the motion, and ordered that $49,000 should be paid to the Chapter 13 trustee with the remaining net proceeds held by counsel for Mr. Black pending further order.

Thereafter, pursuant to 11 U.S.C.A. § 1329(a), the Chapter 13 trustee moved to modify the confirmed Chapter 13 plan to require Mr. Black to make payments of: (a) $250 per month for 59 months; (b) $49,000[3] from the sale of the property; and (c) $52,000 as the remaining net proceeds of sale from the property.

Mr. Black objected to the proposed modification on various grounds, all of which were rejected. The bankruptcy court confirmed the modified plan. Specifically, the bankruptcy court held that "[t]urnover of the proceeds from the sale of property … to the [Chapter 13] Trustee is appropriate because the proceeds are not exempt property of the bankruptcy estate under 11 U.S.C. § 541(a)."[4]

Relying on its prior decision in *McDonald v. Burgie (In re Burgie)*,[5] the Bankruptcy Appellate Panel reversed and held that post-confirmation appreciation in the value of prepetition assets (the property) that revested in Mr. Black upon confirmation inure to the benefit of debtors and not the bankruptcy estate.

Further, the Bankruptcy Appellate Panel again rejected *Barbosa v. Solomon*,[6] and the "modified estate preservation approach"—which holds that notwithstanding plan provisions revesting property in the debtor upon confirmation, "[t]he estate does not cease to exist however, and it continues to be funded by the [d]ebtors' regular income and postpetition assets as specified in section 1306(a)"—and reaffirmed adoption of the "estate termination approach" as originally articulated by the Bankruptcy Appellate Panel in *California Franchise Tax Board v. Jones (In re Jones)*.[7]

Sale Two: *Berkley v. Burchard (In re Berkley)*[8]

On June 14, 2014, Stephen Berkley filed a Chapter 13 petition. In his second amended Chapter 13 plan, Mr. Berkley proposed payments of $1,233.02 per month for 60 months, with an anticipated 1% dividend to unsecured creditors, which was confirmed by the bankruptcy court in April 2015. The standard-form Chapter 13 plan in the district provided that "[p]roperty of the estate will revest in Debtor upon confirmation."

At the time Mr. Berkley initially filed the case, he was a self-employed software developer earning $5,000 per month. In October 2016, after confirmation, Mr. Berkley ceased self-employment and was hired as the Chief Executive Officer of a technology company. In 2018, Mr. Berkley began receiving stock options as part of his compensation package.

On March 20, 2019, in the 57th month of the confirmed plan, counsel for Mr. Berkley voluntarily notified the Chapter 13 trustee that Mr. Berkley "is currently employed with a company that is being sold pursuant to a merger agreement initiated by the majority shareholder. As part of this employment with the company, [Mr. Berkley] has been issued stock in a minority position, and his shares will be part of the purchase to effect the merger … and [Mr. Berkley] is expected to see a gross sales price of $3,800,000.00."[9]

Further, in the letter to the Chapter 13 trustee, Mr. Berkley advised that "[t]he reason for the disclosure is that while the sale proceeds are not property of the bankruptcy estate, it does not appear to absolve the debtor's obligation to disclose material changes in his financial condition. [Mr. Berkley] was not yet received any of these funds, and the sale is still pending at this time."

On April 18, 2019, seven days *before* Mr. Berkley received a wire transfer of $3,800,000 for his minority interest (9.2%) in the company, pursuant to 11 U.S.C.A. § 1329(a), the Chapter 13 trustee moved to modify the confirmed Chapter 13 plan to require Mr. Berkley to make a balloon payment of $202,603.80 in the 60th month (June 1, 2019), which would result in a 100% dividend for all allowed unsecured claims.[10]

Mr. Berkley objected to the proposed modification on multiple grounds, but his primary argument was that all estate property vested in him on confirmation, precluding the trustee's motion to compel an increase in plan payments based on receipt of post-confirmation stock options and the subsequent proceeds of sale.

The bankruptcy court rejected Mr. Berkley's argument, and confirmed the modified Chapter 13 plan, observing that his argument would effectively nullify 11 U.S.C.A. §§ 1306 and 1329. Specifically, the bankruptcy court explained "[y]ou're trying to say we can ignore 1306 and … if a Plan gets confirmed with revesting, you can't file a modification—ever—and 1329 is meaningless, and that's just not the law."[11]

The Bankruptcy Appellate Panel affirmed the bankruptcy court, finding that although the Bankruptcy Code does not enumerate circumstances in which modification is proper pursuant to 11 U.S.C.A. § 1329(a), "the bankruptcy court may consider a change in circumstances in the exercise of its discretion" and "[a]n unexpected increase in income is one such change that could warrant a plan modification to increase payments."[12]

The Bankruptcy Appellate Panel reiterated adoption of the "estate termination approach" originally set forth in *In re Jones*,[13] but summarily rejected Mr. Berkley's argument that his post-confirmation windfall was beyond the trustee's reach, reasoning that "[u]nder § 1329, the bankruptcy court can approve a plan modification that increases the debtor's plan payments due to a postconfirmation increase in the debtor's income, whether or not the additional income is property of the estate."[14]

Analysis

Under the "estate termination approach," all property of the Chapter 13 estate vests in the debtor at confirmation. According to the Bankruptcy Appellate Panel of the Ninth Circuit, "the vesting of all estate property in the debtor at confirmation (unless the plan or confirmation order provides otherwise) and the concomitant termination of estate property gives effect to both [s]ections 1306 and 1327."[15] This approach "effectuates the important choice Section 1327(b) gives to the debtor as to whether property of the estate remains (and to what extent) after confirmation," and as such, "implements a major theme of Chapter 13 by preserving to the debtor the ability to have ownership, as well as possession, of all property."[16]

In adopting the "estate termination approach," the Bankruptcy Appellate Panel of the Ninth Circuit specifically rejected the "modified estate preservation approach" adopted by the First Circuit, which provides that property of the estate at the time of confirmation vests in the debtors free of any claims of creditors, but the estate does not cease to exist and continues to be funded by the debtor's regular income and post-petition assets as specified in § 1306(a) of the Bankruptcy Code.[17]

Under the "estate termination approach," when property of the estate revests in debtors at confirmation pursuant to § 1327(b)-(c), all property of the estate that existed prior to confirmation revests in debtors free and clear of all claims of creditors provided for by the plan; all post-confirmation appreciation in the value of these assets inures to the benefit of debtors and not the bankruptcy estate, irrespective of whether debtors claimed an exemption in the asset.[18]

Curiously, however, under the "estate termination approach" as applied in *Berkley*, there is an unexpected outcome when debtors acquire postpetition capital assets that are sold before completion of payments under a confirmed plan that can then be characterized as disposable income. To reach this conclusion, the BAP relied on two premises.

First, pursuant to § 1329(a), "the bankruptcy court may consider a change in circumstances in the exercise of its discretion" and "[a]n unexpected increase in income is one such change that could warrant a plan modification to increase payments."[19]

Second, in an attempt to reconcile its opinion with *Jones*, the BAP rejected the proposition that "unless the postconfirmation income is property of the estate, the debtor cannot be compelled to devote it to his plan," and supported this position by asserting that "[n]othing in the [Bankruptcy] Code provides that plan payments may only be funded by estate property."[20]

Assuming application of the "estate termination approach," significant questions exist regarding both of these premises, as the BAP relied on questionable authority to support what otherwise could be considered a result-oriented decision in *Berkley*.

1. Distinction Between Capital Assets and Disposable Income

As a threshold matter, the BAP determined, without analysis, that Mr. Berkley's stock options constituted disposable income, and not a capital asset. Under the circumstances, this may not have been the correct conclusion.

In *Black*, the BAP, citing *Burgie*, acknowledged that "'[t]he proceeds of the sale of a debtor's real estate[[21]] in a chapter 13 case *never* become disposable income for the purposes of chapter 13 … While a debtor may *voluntarily* use such proceeds to make payments to creditors under a chapter 13 plan, a debtor cannot be compelled to use the proceeds for this purpose.'"[22] In *Burgie*, the BAP held that "[t]he sale of a capital asset does not create 'disposable income' pursuant to § 1325 … as [d]isposable income under § 1325 is postpetition income received by the debtor that is not reasonably necessary for the maintenance or support of the debtor or a dependent of the debtor."[23]

Rather, "[u]nder the lump asset doctrine, if the exempt asset in question is an anticipated stream of payments, it is included in projected disposable income; if the exempt asset is other than a stream of payments, it is not included."[24] This label is a misnomer, as the Panel clarified that "[t]he proper inquiry regarding the assets in question is whether they are income or income substitutes, not whether the debtor receives them in bulk or in installments."[25]

In *Berkley*, in a conclusory manner, the BAP determined that Mr. Berkley's stock options were "income" earned as part of his compensation package, but *never* addressed the tests articulated in *Burgie* for determining whether the sale of a capital asset transmutes into disposable income.[26] Curiously, in *Berkley*, the BAP panel *never* cited or addressed *Burgie*, although *Burgie* figured prominently in the decision in *Black*, decided less than four months earlier, and Judge Faris authored both the *Black* and *Berkley* opinions for the BAP.

Were Mr. Berkley's stock options correctly determined to be "income" for purposes of § 1329(a)? The Chapter 13 trustee moved to modify the confirmed Chapter 13 plan seven days *before* Mr. Berkley's stock options were sold and he actually received the $3.8 million proceeds. Was the trustee's motion premature, and if not, when did Mr. Berkley's capital asset (stock options) actually transmute into disposable income: the date that he received the grant of the stock options from his employer; the date that he exercised his stock options; or the date that he received the proceeds of sale? Does the fact that Mr. Berkley did not voluntarily sell his stock, but was compelled as a minority shareholder to sell his stock to effectuate a merger impact the analysis?

Alternatively, assume that Mr. Berkley's stock options were valued at $3.8 million based on an internal valuation by his employer, but there was no merger in which Mr. Berkley would receive a cash distribution of $3.8 million. Could the Chapter 13 trustee still seek modification of the confirmed Chapter 13 plan because the award of stock options was part of Mr. Berkley's compensation package? What would the result be if Mr. Berkley did not have available resources to make a lump-sum payment of $202,603.80 in the 60th and final month of his plan? Could the Chapter 13 trustee compel Mr. Berkley to sell his vested shares to make that payment? What if the stock options were for a private closely-held company with no available public market to sell the shares?

These questions highlight important considerations regarding acquisition of stock options, and whether they are appropriately considered disposable income for purposes of § 1329(a)(1), and more importantly, whether the Chapter 13 trustee can capture the value of stock options for the benefit of general unsecured creditors. *Berkley* failed to consider these questions.

Berkley also opens the door for other capital assets to be considered disposable income. For example, if the debtor inherits real property, would rental income be considered disposable income? What if the debtor sells the inherited real property, are the net proceeds of sale disposable income? Would the outcome depend on whether the debtor rented out the property prior to sale? How about the debtor holding a $1 million lottery ticket, does the debtor have to cash in the ticket for it to be considered disposable income? Does it matter whether the debtor used his own $5 from employment wages to buy the ticket, or would the outcome change if the debtor used a $5 birthday gift from mom to buy the ticket? How about a car salesman who wins a brand-new car for being salesman of the year? What happens if he sells the car? With *Berkley*, the distinction in *Burgie* between "lump sum" and "periodic payments" appears to be eroding and may no longer have any relevance to the outcome.

2. Modification of a Confirmed Chapter 13 Plan Under the "Estate Termination Approach" to Capture Increases in Disposable Income

Section 1329(a) specifies the manner in which a confirmed Chapter 13 plan may be modified. Section 1329(a)(1) provides that "[a]t any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to … increase or reduce the amount of payments on claims of a particular class provided for by the plan."[27] Unfortunately, § 1329(a)(1) does not enumerate the circumstances under which modification is appropriate.

Section 1329(b) lists and limits the provisions of Chapter 13 applicable to modification after confirmation. Section 1329(b) provides that only "[s]ections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section." Since § 1329(b) specifically excludes reference to § 1325(b), the BAP has held that "the plain language of § 1329(b) does not mandate satisfaction of the disposable income test of 1325(b)(1)(B) with respect to modified plans."[28]

If, as recognized in *Sunahara*, § 1329(b) specifically excludes application of the "disposable income" test in § 1325(b)(1)(B) at modification under § 1329(a)(1), then what is the statutory basis for capturing increases in post-confirmation disposable income for the benefit of unsecured creditors?

The first major premise of *Berkley* was that an increase in post-confirmation disposable income can be captured for unsecured creditors, and to support this premise, the BAP cited six cases: *Danielson v. Flores (In re Flores)*, 735 F.3d 855 (9th Cir. 2013) (*en banc*); *Anderson v. Satterlee (In re Anderson)*, 21 F.3d 355, 358 (9th Cir. 1994); *In re Escarcega*, 573 B.R. 219 (B.A.P. 9th Cir. 2017); *Mattson v. Howe (In re Mattson),* 468 B.R. 361, 369 (B.A.P. 9th Cir. 2012); *Fridley v. Forsythe (In re Fridley)*, 380 B.R. 538, 543 (B.A.P. 9th Cir. 2007); *Powers v. Savage (In re Powers)*, 202 B.R. 618, 623 (B.A.P. 9th Cir. 1996).

Although conventional wisdom would likely concur and fully support this premise, a careful reading of these decisions calls into question the accuracy of the premise. *Mattson*, *Powers*, and *Fridley* all cite *Anderson*, with approval, and hold that an increase in postpetition disposable income can be captured pursuant to § 1329(a)(1) for the benefit of unsecured creditors. However, in *Anderson*, the Ninth Circuit merely addressed the propriety of requiring a "best efforts certification" to pay actual rather than "projected" disposable income to general unsecured creditors in conjunction with confirmation. The issue whether a postpetition modification pursuant to § 1329(a)(1) could capture an increase in disposable income was not before the Ninth Circuit, as the bankruptcy court refused to confirm the proposed Chapter 13 plan without execution of the certification.[29] At best, *Anderson* represents *dicta* on the issue.

Of the six cited cases, *Powers* is the only decision that actually addressed the post-confirmation modification based on increased income. In *Powers*, the BAP affirmed confirmation of a requested modification brought by the Chapter 13 trustee, which increased monthly plan payments by $500 for 13 months, based on a post-confirmation increase (48%) in debtor's income.[30] In support of this holding, the Panel relied on *In re Witkowski*,[31] finding that "[m]odification is discretionary under § 1329 and is reviewed for an abuse of discretion." The Panel did not otherwise articulate how an increase in post-confirmation disposable income can be captured pursuant to § 1329(a)(1).

All of the cited cases assumed, without thoughtful or reasoned analysis, that § 1329(a)(1) authorizes modification to capture a post-confirmation increase in disposable income, and more importantly, none of these cases examined (or addressed) the impact of the "estate termination approach" on the propriety of a requested modification.

The second major premise of *Berkley* was that debtors can be compelled to contribute "income" that is not property of the estate to payment of creditors. In support of this premise, the BAP cited *In re Deutsch*,[32] and *In re Feiling*.[33] Both of these decisions hold that debtors may voluntarily fund Chapter 13 plan payments with contributions from family and gifts from third parties. Neither case discusses whether debtors can be compelled to use non-estate property to fund plan payments. Voluntary contribution of non-estate funds by debtors to fund Chapter 13 plan payments is uncontroversial and markedly different than compelled contributions of non-estate funds by debtors to increase plan payments. The cited decisions simply do not support the latter.

Further, in a conclusory manner, and without citation to any authority, the BAP in *Berkley* summarily held that "[u]nder § 1329, the bankruptcy court can approve a plan modification that increases the debtor's plan payments due to a postconfirmation increase in the debtor's income, whether or not the additional income is property of the estate."[34] Confusedly, in *Black*, the BAP held that "[t]he proceeds of the sale of a debtor's real estate in a chapter 13 case *never* become disposable income … . While a debtor may *voluntarily* use such proceeds to make payments to creditors under a chapter 13 plan, a debtor cannot be compelled to use the proceeds for this purpose."[35]

What is the statutory basis for differentiating between non-estate property and non-estate disposable income? *Berkley* raises many more questions than it answers.

Does the "estate termination approach" preclude modification under § 1329(a)(1) to capture postpetition increases in disposable income? Pursuant to § 1306(a), there is no meaningful distinction between postpetition acquisition of property and wages, as both constitute property of the estate.[36] However, under the "estate termination approach," post-confirmation appreciation in capital assets inures to the benefit of debtors (*In re Black*), while post-confirmation increases in disposable income inures to the benefit of unsecured creditors (*In re Berkley*). Under the "estate termination approach," all property revests in debtors on confirmation. It is intellectually inconsistent to draw a distinction between post-confirmation acquisition of property and increases in disposable income, as no such distinction exists in § 1306(a).

Finally, if § 1329(b)(1) specifically precludes application of the disposable income test in § 1325(b)(1)(B) to modifications under § 1329(a),[37] then what is the statutory basis for a Chapter 13 trustee to capture postpetition increases in disposable income?

A review of §§ 1322(a), 1322(b), 1323(c) and 1325(a) suggests that one potential source of authority is § 1322(b)(8), which permissively authorizes Chapter 13 debtors to use non-estate property to pay claims.[38] Section 1322(b)(8) is not mentioned in *Berkley* or *Black* and has never been cited by any other court as authority for the capture of postpetition income through modification of a confirmed Chapter 13 plan. In *Powers*, the BAP suggests that the bankruptcy court has discretion to approve the capture of postpetition increases in disposable income by modifications under § 1329(a)(1). It is perplexing that this discretion is not expressly enumerated in the statute.

In *Berkley*, the bankruptcy court and the BAP both rejected the argument advanced by Mr. Berkley that if all property of the estate revests in debtors upon confirmation, then § 1329(a)(1) prohibits modification to capture postpetition increases in disposable income. This argument was summarily rejected because "Mr. Berkley's argument would effectively nullify § 1329" and render "[it] meaningless, and that's just not the law."[39] However, under the "estate termination approach," perhaps Mr. Berkley's argument is not so far-fetched. Section 1329(a)(1) would still be applicable when debtors elect to overcome the revesting effect at confirmation, not rendering the section meaningless.

3. The Race for Collection of Disposable Income

Once property revests in debtors, the automatic stay "does not stay collection activities by postpetition creditors against property of the debtor."[40] Without the benefit of § 362(a), the "estate termination approach" positions Chapter 13 trustees and postpetition creditors as adversaries, equally authorized to rush to separate courthouses for the capture of capital assets or disposable income.

For example, assume Mr. Berkley owed postpetition taxes to the Franchise Tax Board not provided for in his confirmed plan. Once Mr. Berkley received the net proceeds of sale from the stock options, the Franchise Tax Board could have levied on his bank account, without commencement of litigation, without obtaining relief from the automatic stay, and without notice to the Chapter 13 trustee. Although this approach may seem untenable, this is preciously the collection action advocated by the Ninth Circuit in *Jones*—once property revests in debtors, "the [Franchise Tax Board] was not precluded from collecting the post-petition tax debt from property that revested in [debtor] upon plan confirmation."[41] Given the notice requirements for modifications under § 1329(a), the Franchise Tax Board likely would have beat the Chapter 13 trustee in the race for Mr. Berkley's disposable income to the detriment of general unsecured creditors of the estate.

Mr. Berkley likely had sufficient funds to pay the demands of the Chapter 13 trustee and postpetition creditors, but there are countless other examples in which there would be insufficient funds to satisfy both demands. The race to the courthouse is a fundamental principle that the Bankruptcy Code sought to avoid, and curiously the "estate termination approach" now creates a new race where prepetition and postpetition creditors are equally authorized to capture the same disposable income that revested in debtors at confirmation, and the estate is without meaningful tools like § 547(b) to protect its interests. There is something very unsettling about this disorderly administration.

Conclusion

As *Black* suggests, there are strategic benefits to revesting property in debtors—to preserve personally post-confirmation appreciation of prepetition capital assets, but as *Berkley* suggests, there are also strategic benefits to revesting property in the estate—to protect post-confirmation disposable income from postpetition creditors and require relief from the automatic stay before commencement of collection activities.

However, instead of providing clarity, *Black* and *Berkley* create more confusion in an already murky area of Chapter 13 practice. Both decisions provide valuable lessons and cautionary tales for debtors and trustees.

First, the election of where to revest property of the estate at confirmation could materially impact whether post-confirmation appreciation of capital assets inures to the benefit of debtors or the bankruptcy estate. If Mr. Black had elected to revest all property in the bankruptcy estate on confirmation of his Chapter 13 plan, then all post-confirmation appreciation of his rental property would have remained property of the estate, and Mr. Black likely would have been required to make an additional plan payment of $50,689 to general unsecured creditors to account for the net proceeds of sale.

Debtors should closely examine the default provisions of the standard-form plan in their jurisdiction and carefully elect where to revest property of the estate on confirmation, especially in cases where debtors own real property that may increase in value during the plan term.

Second, disclosure of capital assets acquired post-confirmation or increases in disposable income could materially impact distributions to unsecured creditors. If Mr. Berkley did not have a duty to disclose his post-confirmation acquisition of stock options, it is unlikely that the Chapter 13 trustee would have acquired knowledge of the stock options in sufficient time to request a modification, and Mr. Berkley likely would not have been required to make an additional payment of $202,603.80 in the final month of his confirmed Chapter 13 plan.

Debtors should carefully consider whether there is a continuing requirement to amend bankruptcy schedules or a duty to disclose post-confirmation assets or changes in disposable income prior to making a disclosure that could result in modification of their confirmed Chapter 13 plan.[42]

Third, if the Chapter 13 trustee or other party in interest becomes aware of the acquisition of a capital asset or an increase in disposable income post-confirmation, § 1329(a)(1) does not necessarily mandate payment of that "windfall" to unsecured creditors. Debtors should carefully consider whether the "estate termination approach" precludes modification of a confirmed Chapter 13 plan to capture post-confirmation assets or income. Sections 1306(a)(1)-(2) do not distinguish between assets and income, and §§ 1322(a), 1322(b), 1323(c) and 1325(a) do not specifically require debtors to contribute non-estate property to unsecured creditors.

Footnotes

1 Unless otherwise specified in this article, all statutory references herein are to the United States Bankruptcy Code (11 U.S.C.A. §§ 101, *et seq*.).

2 *Black v. Leavitt (In re Black)*, 609 B.R. 518 (B.A.P. 9th Cir. 2019).

3 Although not identified in the opinion, presumably the *Order Granting Motion to Sell Property* required Mr. Black to make a payment of $49,000 to the Chapter 13 trustee, which represented the liquidation value of the Property ($44,000) and the applicable fees ($5,000) payable to the Chapter 13 trustee pursuant to 28 U.S.C.A. § 586.

4 *In re Black*, 609 B.R. at 523 (quoting bankruptcy court).

5 *McDonald v. Burgie (In re Burgie)*, 239 B.R. 406 (B.A.P. 9th Cir. 1999). Ironically, the Chapter 13 trustee in *Burgie* and *Black* was the same person, one of the standing trustees in Las Vegas, Kathleen Leavitt.

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

7 *In re Burgie*, 239 B.R. 529-30 (citing *Cal. Franchise Tax Bd. v. Jones (In re Jones)*, 420 B.R. 506 (B.A.P. 9th Cir. 2009)).

8 *Berkley v. Burchard (In re Berkley)*, 613 B.R. 547 (B.A.P. 9th Cir. 2020).

9 *See In re Berkley*, Case No. 14-30941-DM (Bankr. N.D. Cal. 2014), Dkt. No. 46-2, p.4, Exh. A, *Declaration of Thomas P. Kelly III in Support of Debtor's Opposition to Trustee's Motion to Modify Chapter 1*3 Plan.

10 *See In re Berkley*, Case No. 14-30941-DM (Bankr. N.D. Cal. 2014), Dkt. No. 42, *Trustee's Motion to Modify Chapter 1*3 Plan.

11 *In re Berkley*, 613 B.R. at 550.

12 *In re Berkley*, 613 B.R. at 551.

13 *In re Jones*, 420 B.R. 506.

14 *In re Berkley*, 613 B.R. at 553.

15 *In re Jones*, 420 B.R. at 515.

16 *In re Jones*, 420 B.R. at 515 (citing 8 Collier on Bankruptcy ¶ 1327.03, 1327-11 (15th ed. rev. 2008)).

17 *See Barbosa*, 235 F.3d at 36-7.

18 *See In re Black*, 609 B.R. at 528-30.

19 *In re Berkley*, 613 B.R. at 551 (citation omitted).

20 *In re Berkley*, 613 B.R. at 551.

21 The real property at issue in *Black* was rental property, and Mr. Black did not live in the property and did not claim an exemption in the property. *In re Black*, 609 B.R. at 521. However, in a conclusory manner, the Bankruptcy Appellate Panel held that the rental property was a capital asset, and not disposable income, for purposes of § 1329(a)(1), notwithstanding that Mr. Black rented the property and earned $850 per month of disposable income, which presumably was used (in part) to fund his confirmed Chapter 13 Plan. *In re Black*, 609 B.R. at 526-27.

22 *In re Black*, 609 B.R. at 526 (emphasis added) (quoting *In re Burgie*, 239 B.R. at 409).

23 *In re Burgie*, 239 B.R. at 410.

24 *In re Burgie*, 239 B.R. at 411.

25 *In re Burgie*, 239 B.R. at 411.

26 *See In re Berkley*, 613 B.R. at 553-54, n.3.

27 11 U.S.C.A. § 1329(a)(1).

28 *Sunahara v. Burchard (In re Sunahara)*, 326 B.R. 768, 781 (B.A.P. 9th Cir. 2005).

29 *See Anderson*, 21 F.3d at 356-57.

30 *In re Powers*, 202 B.R. at 623.

31 *In re Witkowski*, 16 F.3d 739, 743 (7th Cir. 1994).

32 *In re Deutsch*, 529 B.R. 308, 312 (Bankr. C.D. Cal. 2015).

33 *In re Feiling*, No. 11-71474 MEH, 2013 WL 2451333, at *5 (Bankr. N.D. Cal. June 6, 2013).

34 *In re Berkley*, 613 B.R. at 553.

35 *In re Black*, 609 B.R. at 526 (emphasis added) (quoting *In re Burgie*, 239 B.R. at 409).

36 *See* 11 U.S.C.A. § 1306(a)(1)-(2).

37 *See In re Sunahara*, 326 B.R. at 781.

38 *See* 11 U.S.C.A. § 1322(b)(8) ("the plan may—provide for the payment of all or part of a claim against the debtor from property of the estate or property of the debtor").

39 *In re Berkley*, 613 B.R. at 550 & 554.

40 *In re Jones*, 657 F.3d at 927 (citing *Severo v. Comm'r*, 586 F.3d 1213, 1216 (9th Cir. 2009)); *see also* 11 U.S.C.A. § 362(c)(1) ("the stay of an act … under subsection (a) of this section continues until such property is no longer property of the estate").

41 *In re Jones*, 657 F.3d at 928-29.

42 *See In re Boyd*, 618 B.R. 133 (Bankr. D.S.C. 2020).

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