



**FLORIDA BANKRUPTCY COURT- FUNDS HELD BY CHAPTER 13 TRUSTEE ARE  
SUBJECT TO GARNISHMENT WHEN THE CASE IS DISMISSED**

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According to a case recently decided in the United States Bankruptcy Court for the Middle District of Florida the holding, when a Chapter 13 case is dismissed, a creditor may subject the Trustee to a writ of garnishment under Florida law and require the Trustee to turn over to the creditor all postpetition payments made by the Debtor pursuant to a proposed repayment plan. The case, *In re Fischer*, No. 6:09-bk-07498-KSJ, 2010 WL 2947165 (Bkrtcy. M.D. Fla. July 16, 2010), is available [here](#).

The relevant background is not particularly complicated: the Debtor filed a Chapter 13 Bankruptcy case, and at some point, the case was dismissed because the Debtor could no longer make the plan payments. The court entered an order dismissing the case and requiring the Trustee to return to the debtor the money that the debtor previously paid to the Trustee, as required by [11 U.S.C.A. §1326\(a\)\(2\)](#), which provides:

*"A payment made under paragraph (1)(A) shall be retained by the trustee until confirmation or denial of confirmation. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan as soon as is practicable. If a plan is not confirmed, the trustee shall return any such payments not previously paid and not yet due and owing to creditors pursuant to paragraph (3) to the debtor, after deducting any unpaid claim allowed under section 503(b)."*

After the case was dismissed, but before the Trustee got around to finalizing the administration of the estate and returning the money to the Debtor, a Florida judgment creditor ran to state court and obtained a writ of garnishment, requiring the Trustee to turn over the money in its possession belonging to the Debtor to the creditor.

While the Bankruptcy case is pending, obviously that wouldn't work, because any money in the possession of the Trustee at that time would be *in custodia legis*, and because the automatic stay under [§362 of the Bankruptcy Code](#) would prevent the creditor from obtaining the writ of garnishment in the first place. According to the *Fischer* court, however, the stay is lifted when the dismissal order is entered, and as a result, the Trustee essentially becomes a general debtor of the Debtor at that point, which means it may be subject to garnishment under state law. The court didn't feel compelled to discuss the issue at length, but it did cite a number of cases, some allowing the garnishment and some refusing to allow it.

The courts refusing to allow the garnishment generally looked no further than the plain language of [§1326\(a\)\(2\)](#) - "the trustee shall return any such payments not previously paid and not yet due and owing to creditors pursuant to paragraph (3) to the debtor, after deducting any unpaid claim allowed under section 503(b)." This language, 'shall return,' appears absolute and qualified only by the requirement to deduct administrative expenses. Some of these courts also ruled on policy grounds, finding that dismissal of the Chapter 13 case is supposed to leave the creditors on equal footing as they were before the Bankruptcy was filed, and promoting a race to the Trustee would not further the policies of encouraging debtors to file Chapter 13 or ensuring orderly and efficient disposition of the Bankruptcy case.

Additionally, resort was made to presuming that Congress likely foresaw that creditors would attempt to make claims on funds held by the Trustee under the circumstances at hand, and that through the language requiring the Trustee simply to return the funds to the Debtor, Congress intended to foreclose this possibility. Some courts also held that returning the money to the Debtor does not conflict with state law, because any lien on the funds could follow the funds to the Debtor and be adjudicated in state court

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subsequent to the Trustee's disbursement. Most of these arguments are compelling, save, in my opinion, for the last. We all know that as soon as the money is returned to the Debtor, it will if at all possible be gone before the creditor can get back to state court, especially where the Debtor knows the creditor will attempt to make a claim. Here are the cases available on Google Scholar: [\*In re Sexton\*, 397 B.R. 375 \(Bkrcty. M.D. Tenn. 2008\)](#); [\*In re Inyamah\*, 378 B.R. 183 \(Bkrcty. S.D. Ohio 2007\)](#); [\*In re Bailey\*, 330 B.R. 775 \(Bkrcty. D. Ore. 2005\)](#); [\*In re Oliver\*, 222 B.R. 272 \(Bkrcty. E.D. Va. 1998\)](#); [\*In re Walter\*, 199 B.R. 390 \(Bkrcty. C.D. Ill. 1996\)](#); [\*In re Clifford\*, 182 B.R. 229 \(Bkrcty. N.D. Ill. 1995\)](#).

The courts allowing the garnishment generally relied on the interplay between §1326(a)(2) on one hand, and the automatic stay, which is lifted immediately upon entry of the dismissal order, and the definition of the estate, which is terminated upon dismissal, on the other. Interestingly, many of these cases dealt with Federal Tax liens, for which the analysis should be different, since there is no question of Supremacy and since the Federal Tax law is very clear: "Notwithstanding any other law of the United States, no property or rights shall be exempt from levy other than the property specifically made exempt by subsection (a). [26 U.S.C.A. §6334\(c\)](#). The cited cases that are available on Google Scholar can be read at the following links: [\*In re Mischler\*, 223 B.R. 17 \(Bkrcty. M.D. Fla. 1998\)](#); [\*In re Schlapper\*, 195 B.R. 805 \(Bkrcty. M.D. Fla. 1996\)](#); [\*In re Steenstra\*, 307 B.R. 732 \(B.A.P. 1st Cir. 2004\)](#); [\*In re Beam\*, 192 F.3d 941 \(9th Cir. 1999\)](#); [\*In re Brown\*, 280 B.R. 231 \(Bkrcty. E.D. Wis. 2001\)](#); [\*In re Doherty\*, 229 B.R. 461 \(Bkrcty. E.D. Wa. 1999\)](#).

Whether you agree with the former group of cases or the latter, one thing is clear, especially given that all the Florida cases cited above have allowed the garnishment- the Florida creditor should diligently monitor the progress of the debtor's Bankruptcy case and should seek the advice of counsel with respect to the protection and enforcement of its rights and remedies in and out of Bankruptcy Court to the fullest extent allowable by law.