

11 U.S.C. 1307(b)  
11 U.S.C. 1307(c)  
dismissal  
conversion

CUMIS Mutual Insurance Society v. Byers et. al (In Re Byers)  
B.A.P. # OR-97-1879-JDMe  
Main Case # 696-65664-aer13

5/12/98

B.A.P. (aff'g Radcliffe)

Unpublished\*

After a Chapter 13 plan had been confirmed, completed, discharge entered and the case closed, the case was reopened on a creditor's motion. Creditor sought various forms of relief, including conversion to Ch. 7.

Debtors filed a motion to dismiss and agreed to have their discharge vacated. While the creditor's request for conversion was pending, the Bankruptcy Court vacated the discharge, granted debtors' motion and dismissed the case,

On appeal, the 9th Circuit Bankruptcy Appellate Panel (BAP) affirmed, holding that the right of a Chapter 13 debtor to dismiss under § 1307(b) is absolute (even in the face of a motion to convert) provided the case had not converted previously into Chapter 13 under §§ 706, 1112, or 1208. That the case had been reopened after closure was immaterial.

The BAP noted in dicta that a Ch. 13 debtor may be sanctioned for bad faith acts in conjunction with a motion to dismiss.

\*On occasion the court will decide to publish an opinion after its initial entry (and after submission of this summary). Please check for possible publication in WESTLAW, West's Bankruptcy Reporter, etc.

E98-5(12)

1  
2 **NOT FOR PUBLICATION**

3 UNITED STATES BANKRUPTCY APPELLATE PANEL

4 OF THE NINTH CIRCUIT

5 In re ) BAP No. OR-97-1879-JDMe  
6 DONALD A. BYERS; CATHLEEN J. ) BK No. 96-65664-aer13  
7 BYERS, )  
8 Debtors. )  
9 CUMIS MUTUAL INSURANCE )  
10 SOCIETY, INC. )  
11 Appellant, )  
12 v. )  
13 DONALD A. BYERS; CATHLEEN J. )  
14 BYERS; FRED LONG, Trustee; )  
15 UNITED STATES TRUSTEE, )  
16 Appellees. )

**FILED**

MEMORANDUM<sup>1</sup> MAY 12 1998 *ec*

NANCY B. DICKERSON, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

16 Argued and Submitted on March 19, 1998  
17 at Portland, Oregon

18 Filed - May 12, 1998

19 Appeal from the United States Bankruptcy Court  
20 for the District of Oregon

Honorable Albert E. Radcliffe, Bankruptcy Judge, Presiding

21  
22 Before: JONES, DONOVAN<sup>2</sup>, AND MEYERS, Bankruptcy Judges.

23  
24  
25 <sup>1</sup> This disposition is not appropriate for publication and  
26 may not be cited to or by the courts of this Circuit except when  
27 relevant under the doctrines of the law of the case, res  
28 judicata, or collateral estoppel. See BAP Rule 13 & Ninth  
Circuit Rule 36-3.

<sup>2</sup> Hon. Thomas B. Donovan, Bankruptcy Judge for the Central  
District of California, sitting by designation.

E98-5(12)

1 Creditor appeals from the bankruptcy court's order  
2 vacating the Debtors' discharge and dismissing the Debtors'  
3 chapter 13<sup>3</sup> case. The creditor claims the bankruptcy court erred  
4 in dismissing the case when the creditor's motion to convert the  
5 case to a chapter 7 proceeding was pending. We **AFFIRM**.

6  
7 **I. FACTS**

8 Pre-petition, Cathleen Byers had been employed with  
9 Oregon Urban Rural Credit Union ("OUR"). While in her capacity  
10 as General Manager of OUR, Mrs. Byers embezzled money from her  
11 employer. On March 16, 1995, a grand jury for the United States  
12 District Court for the District of Oregon issued an eighty-four  
13 count indictment against Mrs. Byers. While the criminal case was  
14 pending, Mrs. Byers was free on her own recognizance. Due to  
15 Mrs. Byers embezzlement, Appellant CUMIS Mutual Insurance  
16 Society, Inc. ("CUMIS") paid OUR \$537,077.10 pursuant to an  
17 "employee dishonesty" insurance policy.

18 Donald Byers and Cathleen Byers (collectively referred to  
19 as the "Debtors") filed for chapter 13 bankruptcy protection on  
20 November 6, 1996. Although the charges against Mrs. Byers were  
21 still pending, the Debtors did not list OUR or CUMIS on their  
22 schedules. The Debtors filed a plan which provided 100% payment  
23 to the listed creditors. The bankruptcy court confirmed the plan  
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26 <sup>3</sup> Unless otherwise indicated, all references to Chapters,  
27 et. seq., and to the Federal Rules of Bankruptcy Procedure, Rules  
28 1001, et seq.

1 on January 23, 1997.

2 On March 19, 1997, following a jury trial in the criminal  
3 case, Mrs. Byers was found guilty of embezzlement from OUR.  
4 Prior to the sentencing hearing, at some point in April of 1997,  
5 the Debtors sold their house and used the proceeds from the sale  
6 to fully fund their chapter 13 plan. The chapter 13 Trustee  
7 disbursed the proceeds, paying all listed creditors 100% of their  
8 claims. On May 12, 1997, the bankruptcy court entered an order  
9 discharging the Debtors.

10 CUMIS claims it discovered the existence of the  
11 bankruptcy case on June 5, 1997. Notwithstanding discovering the  
12 bankruptcy case, CUMIS never appeared or objected to the closing  
13 of the bankruptcy case. Consequently on July 10, 1997, the  
14 bankruptcy court entered an order closing the case.

15 On July 18, 1997, CUMIS filed a motion to reopen the  
16 bankruptcy case and concurrently filed an adversary action  
17 against the Debtors which requested: (1) revocation of the  
18 Debtors' discharge; (2) revocation of the confirmed plan; and (3)  
19 conversion of the case to a chapter 7 proceeding. The bankruptcy  
20 court granted the motion to reopen the case on August 12, 1997.

21 On August 28, 1998, the Debtors filed a motion to dismiss  
22 the case pursuant to § 1307(b). The Debtors sent notice of the  
23 motion to dismiss to the chapter 13 Trustee and the U.S.  
24 Trustee's office. CUMIS alleges it never received notice of the  
25 motion to dismiss.

26 Also on August 28, 1998, CUMIS filed a motion for default  
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1 judgment contending that the Debtors had failed to answer the  
2 adversary complaint CUMIS had filed concurrently with the motion  
3 to reopen the case.

4 On September 9, 1997, the bankruptcy court mailed a  
5 notice of the hearing on the Debtors' motion to dismiss to CUMIS.  
6 The hearing was set for October 2, 1997. CUMIS did not file a  
7 written objection to the Debtors' motion to dismiss.<sup>4</sup> Richard A.  
8 Sly represented CUMIS at the hearing on the motion to dismiss.  
9 At that hearing the bankruptcy court conducted an off-the-record  
10 conference with counsel for the trustee, Debtors and CUMIS. At  
11 the conclusion of the conference, and back on the record, the  
12 Debtors consented to the revocation of their discharge and a  
13 dismissal of their case. Counsel for CUMIS made no objection on  
14 the record. The bankruptcy court then orally vacated the  
15 Debtors' discharge and granted the Debtors' motion to dismiss.

16 On October 7, 1997, CUMIS filed an "Amended Objections to  
17 Dismissal Motion, Motion to Alter and Reconsider, and Motion for  
18 New Hearing." CUMIS alleged that the Debtors' motion to dismiss  
19 was never served on CUMIS. CUMIS further alleged that the only  
20 effective means to recover the Debtors' assets for redistribution  
21 was through the bankruptcy court.

22 On October 10, 1997, the bankruptcy court entered a  
23 written order vacating the Debtors' discharge and dismissing the  
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25 <sup>4</sup> Notwithstanding the bankruptcy court sending CUMIS a  
26 notice of a hearing on Debtors' motion to dismiss on September 9,  
27 1997, CUMIS claims it obtained a copy of the Debtors' motion to  
dismiss on September 29, 1997, only three days before the hearing  
on Debtors' motion.

1 Debtors' chapter 13 case. The bankruptcy court's conclusions of  
2 law recited that the "Debtors were not required to serve CUMIS  
3 with their motion. FRBP 1017(d); FRBP 9013." The bankruptcy  
4 court also found that "CUMIS, through counsel, received adequate  
5 notice of the October 2, 1997, hearing." Further, the bankruptcy  
6 court concluded CUMIS' motion to convert was erroneously brought  
7 in "'Count III' of the adversary proceeding, instead of by  
8 motion. FRBP 1017(d)." The bankruptcy court concluded that the  
9 Debtors had a right to dismiss their bankruptcy petition.  
10 Consequently the bankruptcy court overruled CUMIS' Amended  
11 Objections and dismissed the Debtors' chapter 13 case. The  
12 bankruptcy court also dismissed the adversary proceeding filed by  
13 CUMIS as moot.

14 CUMIS timely appeals.  
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## 16 II. ISSUE

17 Whether the bankruptcy court erred in dismissing the  
18 Debtors' chapter 13 proceeding while CUMIS had a pending motion  
19 to convert the case to a chapter 7 proceeding.  
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## 21 III. STANDARD OF REVIEW

22 We review the bankruptcy court's conclusions of law de  
23 novo. In re Jess, 215 B.R. 618, 619 (9th Cir. BAP 1997).  
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## 25 IV. DISCUSSION

26 The bankruptcy court below concluded that the Debtors  
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1 have a right to dismissal pursuant to § 1307(b). That section  
2 provides in pertinent part: "On request of the debtor at any  
3 time, if the case has not been converted under section 706, 1112  
4 or 1208 of this title, the court shall dismiss a case under this  
5 chapter." 11 U.S.C. § 1307(b). As the Debtors' case had not yet  
6 been converted pursuant to the Appellant's "motion",<sup>5</sup> the  
7 bankruptcy court concluded that the Debtors were entitled to  
8 dismiss their voluntary chapter 13 case.

9 The Appellant urges on appeal that § 1307(b) is tempered  
10 by § 1307(c) which provides that:

11 on request of a party in interest or the United  
12 States trustee and after notice and a hearing, a  
13 court may convert a case under this chapter to a  
14 case under chapter 7 of this title, or may  
15 dismiss a case under this chapter, whichever is  
16 in the best interests of creditors and the  
17 estate, for cause. . . .

18 11 U.S.C. § 1307(c). Appellant argues that their pending motion  
19 to convert this case to a chapter 7 proceeding was "for cause"  
20 and therefore the bankruptcy court erred in granting the Debtors'  
21 motion to dismiss.

22 Whether § 1307(c) indeed modifies the language in  
23 § 1307(b) is a question of law this panel reviews de novo. Jess,  
24 215 B.R. at 619. In reviewing the case law on the question, we  
25 find that there is a split of authority on this issue.

26 In In re Harper-Elder, 184 B.R. 403, 404 (Bankr. D.C.

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28 <sup>5</sup> There remains a procedural question as to whether "Count  
29 III" in Appellant's adversary complaint constitutes a proper  
30 motion for conversion. However, because we hold that the  
31 bankruptcy court properly applied § 1307(b) in dismissing the  
32 Debtors' bankruptcy petition, we need not reach this question.

1 1995), the bankruptcy court for the District of Columbia analyzed  
2 numerous cases detailing this split of authority. The court  
3 noted that "Some courts have held that the debtor's right to  
4 dismiss is an absolute right and that the court has no discretion  
5 to consider the creditor's pending motion to convert under  
6 § 1307(c) when faced with the debtor's motion to dismiss under  
7 § 1307(b)." Id. (citations omitted). The bankruptcy court then  
8 quotes from this Panel's holding in In re Beatty, 162 B.R. 853,  
9 857 (9th Cir. BAP 1994) wherein we stated that "[t]his view  
10 comports with the plain language of section 1307[b] which states  
11 that the court 'shall' dismiss the case upon the debtor's request  
12 as well as the purposes of Chapter 13 and the voluntary nature of  
13 the relief under that Chapter."

14 The Harper-Elder court also notes that other courts "have  
15 held that they do have the discretionary authority to grant a  
16 pending motion to convert a chapter 13 case in the face of a  
17 debtor's competing request for dismissal, particularly where  
18 there is evidence of improper conduct by the debtor." Harper-  
19 Elder, 184 B.R. at 404 (citations omitted). These courts reason  
20 that "Congress could not have intended to 'give the debtor  
21 unfettered power to prevent conversion under § 1307(c) by simply  
22 filing a motion to dismiss whenever conversion was requested.'" Id.  
23 quoting In re Gaudet, 132 B.R. 670, 676 (D. R.I. 1991).

24 We conclude that on the facts of this case, the  
25 bankruptcy court did not err in dismissing the Debtors' case.  
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1           *The language of the statute.*

2           The interpretation of a statutory provision begins with  
3 "the language of the statute itself." Pennsylvania Public  
4 Welfare Dep't v. Davenport, 495 U.S. 552, 558 (1990) (citing  
5 Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985). If  
6 the statutory language is unambiguous, the court does not need to  
7 inquire further. Connecticut Nat'l Bank v. Germain, 503 U.S.  
8 249, 254 (1992).

9           The language of § 1307(b) provides that the court "shall"  
10 dismiss a debtor's chapter 13 case upon the debtor's request.  
11 The word "shall" has traditionally been held to be a "word of  
12 command" In re Benediktsson, 34 B.R. 349, 350 (Bankr. W.D. Wash.  
13 1983) (citing, U.S. ex rel. Siegel v. Thoman, 156 U.S. 353  
14 (1895)), which "allows the trial court no discretion." In re  
15 Green, 64 B.R. 530, 531 (9th Cir. BAP 1986) (citing, Matter of  
16 Hearn, 18 B.R. 605, 606 (D. Neb. 1982).

17           The only limitation on a debtor's right of dismissal is  
18 that dismissal will be granted "if the case has not been  
19 converted under section 706, 1112, or 1208 of this title." 11  
20 U.S.C. § 1307(b). In the present case, the Appellant does not  
21 dispute that the Debtors' case had not been converted prior to  
22 the Debtors' motion to dismiss. As the Debtors' case had not  
23 been converted, the bankruptcy court did not err in dismissing  
24 the Debtor's case.

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1           *The Legislative History of § 1307(b).*

2           The legislative history of § 1307(b) also supports the  
3 bankruptcy court's dismissal of the Debtor's case. The House of  
4 Representatives Report on § 1307(b) notes that: "Subsection (b)  
5 [of § 1307] requires the court, on request of the debtor, to  
6 dismiss the case if the case has not already been converted from  
7 chapter 7 or 11." H.Rep. 95-595, 95th Cong., 1st Sess. 428  
8 (1977), reprinted in Norton Bankruptcy Law and Practice 2d,  
9 William L. Norton, Jr., ed., 1996-97 edition. (Emphasis added.)  
10 The Senate agreed with this reasoning stating: "Subsections (a)  
11 and (b) confirm, without qualification, the rights of the Chapter  
12 13 debtor to . . . have the chapter 13 case dismissed." S.Rep.  
13 95-989, 95th Cong., 1st Sess. 428 (1977), reprinted in Norton  
14 Bankruptcy Law and Practice 2d, William L. Norton, Jr., ed.,  
15 1996-97 edition. (Emphasis added.) This legislative history  
16 demonstrates that the drafters of § 1307(b) intended that a  
17 debtor in a voluntary chapter 13 case may dismiss the case, as  
18 long as the case had not already been converted.

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20           *Case law in this circuit supports the bankruptcy court.*

21           Finally, a review of the case law in this circuit reveals  
22 that, without discovered exception, the courts in the Ninth  
23 Circuit have uniformly held that debtors may dismiss their  
24 chapter 13 petitions.

25           In In re Nash, 765 F.2d 1410 (9th Cir. 1985), the Ninth  
26 Circuit was asked to determine whether wages which had been  
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1 deducted from the debtor's paycheck after the debtor's chapter 13  
2 case had been dismissed were properly distributed by the chapter  
3 13 trustee. As a preliminary step the Ninth Circuit noted that  
4 the case had been properly dismissed because under § 1307(b) "a  
5 debtor has an absolute right to dismiss." Id. at 1413. See also,  
6 In re Anderson, 21 F.3d 355, 358 n.8 (9th Cir. 1994) (noting in  
7 dicta that "[b]ecause bankruptcy under chapter 13 is voluntary,  
8 the [debtor] would always have the option of terminating the plan  
9 . . .").

10 This Panel has also adhered to the plain meaning of  
11 § 1307(b) in holding that the debtor may dismiss a chapter 13  
12 proceeding. In Beatty, 162 B.R. at 857, this Panel was  
13 confronted with the question of whether a debtor's motion to  
14 dismiss which was made after a bankruptcy court's oral ruling  
15 converting the case to a chapter 7 proceeding, mandated dismissal  
16 of the case. This panel held that because § 1307(b) mandates  
17 dismissal "at any time" before conversion, and because conversion  
18 is only effective upon the entry of a written order, the debtor's  
19 motion to dismiss pursuant to § 1307(b) mandated dismissal of the  
20 chapter 13 petition. Id. at 858. See also, In re Green, 64 B.R.  
21 530, 531 (9th Cir. BAP 1986) (noting in dicta that § 1307(b)  
22 "gives the debtor an absolute right to dismiss").

23 Finally, bankruptcy courts in California, Oregon and  
24 Washington have all issued opinions noting that the court may  
25 dismiss the debtor's voluntary petition upon the debtor's motion.  
26 In re Turiace, 41 B.R. 466, 466 (Bankr. Or. 1984); In re

1 Benediktsson, 34 B.R. 349, 350 (Bankr. W.D. Wash. 1983); In re  
2 Davenport, 175 B.R. 355, 360 (Bankr. E.D. Cal. 1994) (holding that  
3 the debtor has an absolute right to dismissal of a chapter 12  
4 proceeding under § 1208(b) which is nearly identical to  
5 § 1307(b)).

6           The foregoing authority demonstrates that courts in the  
7 Ninth Circuit have consistently held that debtors may dismiss  
8 their chapter 13 petitions. Nevertheless, the Appellant attempts  
9 to distinguish the foregoing cases by noting that in this  
10 particular case the chapter 13 case had already been closed. The  
11 Appellant seems to argue that since the case had already been  
12 closed, the subsequent reopening of the bankruptcy case by the  
13 Appellant fundamentally alters the nature of the chapter 13  
14 proceeding thereby eviscerating the Debtors' right to dismiss  
15 their chapter 13 case. However, this Panel is unable to accept  
16 Appellant's attempts to distinguish the foregoing cases. Each of  
17 the foregoing cases, although not having identical facts to the  
18 ones presented here, note that a debtor has the right to dismiss  
19 the chapter 13 petition. While a debtor may be sanctioned by the  
20 bankruptcy court for bad faith acts in conjunction with the  
21 motion to dismiss, Davenport, 175 B.R. at 361, the result in each  
22 of the foregoing cases is that the debtor's case must still be  
23 dismissed. Consequently, the Appellant's attempt to distinguish  
24 the prevailing Ninth Circuit authority is unavailing.

25           We also note that the Debtors' dismissal does not  
26 preclude the Appellant from seeking state court remedies against  
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1 the Debtors. In fact by dismissing their case the Debtors  
2 indicate that they are "prepared to limit [their] rights and  
3 remedies to those available in state court." Hearn, 18 B.R. at  
4 606. Consequently the Appellant is still free to pursue any  
5 state law remedy it has against the Debtors.

6  
7 **V. CONCLUSION**

8 In light of the mandatory language of § 1307(b), as well  
9 as that section's legislative history and relevant case law from  
10 this circuit, the bankruptcy court properly dismissed the  
11 Debtors' chapter 13 petition upon the Debtors' request. We

12 **AFFIRM.**  
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U.S. Bankruptcy Appellate Panel  
of the Ninth Circuit Court of Appeals  
125 South Grand Avenue  
Pasadena, California 91105  
(626) 583-7906

NOTICE OF ENTRY OF JUDGMENT

BAP No. OR-97-1879-JDMe

RE: DONALD A. BYERS adn CATHLEEN J. BYERS

A separate Judgment was entered in this case on 5/12/98.

BILL OF COSTS:

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken. Also see, Federal Rule of Appellate Procedure 39.

ISSUANCE OF THE MANDATE:

The mandate, a certified copy of the judgment sent to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. See Federal Rule of Appellate Procedure 41.

APPEAL TO COURT OF APPEALS:

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the \$100 filing fee. Checks may be made payable to the U.S. Court of Appeals for the Ninth Circuit. See Federal Rules of Appellate Procedure 6 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.