

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF COLORADO  
Honorable Howard R. Tallman**

**In re:** )  
 )  
**KELVIN DEMONE NICHOLSON and** ) **Case No. 09-32292 HRT**  
**KIMBERLEE KAE NICHOLSON,** )  
 ) **Chapter 7**  
**Debtors.** )  
 )  
\_\_\_\_\_ )

**ORDER GRANTING THE UNITED STATE’S TRUSTEE’S MOTION  
TO DENY DEBTORS A DISCHARGE PURSUANT TO 11 U.S.C. § 727(a)(8)**

This case comes before the Court on the United States Trustee’s *Motion to Deny the Debtors a Discharge Pursuant to* 11 U.S.C. § 727(a)(8) (docket #54) (the “Motion”).

The Court has reviewed the Motion and the Debtor’s response (docket #56). The United States Trustee (“UST”) has filed *Movant’s Certificate of Contested Matter and Request for Hearing* (docket #61). The issue before the Court is a purely legal issue and is directly controlled by clear statutory language. A hearing on the matter would not materially advance the Court’s understanding of the issue.

Debtors filed a prior bankruptcy case under chapter 7 on January 19, 2003. The Debtors received chapter 7 discharges in that prior case. The current case was filed under chapter 13 on October 21, 2009. On January 21, 2011, Debtors filed a notice of voluntary conversion from chapter 13 to chapter 7 and the case was converted effective that date.

The Debtors filed their petition commencing the current case 6 years and 9 months following the commencement of their prior chapter 7 case. They converted their case from chapter 13 to chapter 7 just over 8 years following commencement of their prior chapter 7 case.

Debtors would have the Court re-set the date they filed their petition commencing the current case to the date the case was converted from chapter 13 so they may qualify for chapter 7 discharges under 11 U.S.C. § 727(a)(8). There is no reasonable reading of the statutory language that could produce such a result.

In relevant part, the Code provides that

[t]he court shall grant the debtor a discharge [under chapter 7], unless – the debtor has been granted a discharge under [section 727 of this title], under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within 8 years before *the date of the filing of the petition . . . .*

11 U.S.C. § 727(a)(8) (emphasis added).

The Bankruptcy Code directly addresses the effect of conversion:

Conversion of a case from a case under one chapter of this title to a case under another chapter of this title constitutes an order for relief under the chapter to which the case is converted, but, except as provided in subsections (b) and (c) of this section, *does not effect a change in the date of the filing of the petition*, the commencement of the case, or the order for relief.

11 U.S.C. § 348(a) (emphasis added). Section 348(a) is quite clear that *the date of the filing of the petition* is unaffected by conversion of the case from one chapter to another unless § 348(b) or § 348(c) provides otherwise.

Subsection (b) of § 348 only addresses the date of the *order for relief* in a converted case. It has no effect on *the date of the filing of the petition*. Subsection (c) of § 348 addresses the application of two specific sections of the Code to converted cases; neither of which is applicable to the granting of a discharge under § 727. Section 348(c) applies, by its express terms, only to §§ 342 and 365(d) and effects no change to *the date of the filing of the petition*.

*The date of the filing the petition* is the specific event that § 727(a)(8) refers to in prohibiting entry of a chapter 7 discharge in a case commenced within 8 years of the commencement of a prior case in which a chapter 7 discharge was entered. Under the provisions of § 348 *the date of the filing of the petition* in this case was unaffected by the Debtors' conversion from chapter 13 to chapter 7.

The Debtors' argument confuses *the date of the filing of the petition* with the date of the order for relief. They are not synonymous. Certainly, *the date of the filing of the petition* and the order for relief can – and most often do – fall on the same date. For example, the filing of a voluntary petition constitutes an order for relief. 11 U.S.C. § 301(b). But in other cases, most notably involuntary petitions, the case is commenced by filing a petition but, if an order for relief is to be entered, it will not be entered until after the alleged debtor has received notice and an opportunity for hearing. If the petition is contested, the court must hold a trial to determine if an order for relief should be entered or the petition should be dismissed. 11 U.S.C. § 303(h). Thus, even though *the date of the filing of the petition* and the date of the order for relief are frequently the same, the terms have very different and distinct meanings. One area where the distinction is highlighted is in a converted case. In a converted case, the conversion may give rise to a new order for relief, under the chapter the case has been converted to, but it effects no change to *the date of the filing of the petition*. 11 U.S.C. § 348(a).

In the case of *Standiferd v. U.S. Trustee*, \_\_\_ F.3d \_\_\_, 2011 WL 1368773 (10th Cir. Apr. 12, 2011), the Tenth Circuit Court of Appeals reached the same conclusion. It said

Under § 348(a), the conversion of a case from one chapter of the Code to another “constitutes an order for relief under the chapter to which the case is converted, but ... does not effect a change in the date of the filing of the petition, *the commencement of the case*, or the order for relief.” § 348(a) (emphasis added). In other words, a converted case is commenced on the date the initial bankruptcy petition was filed, not on the date it was converted.

*Id.* at \*5 (emphasis in original). That case involved whether a debtor could be denied a discharge under § 727(a)(6). But the case was decided based on the distinction between the date a case was commenced by filing the petition and the new order for relief in the converted case. The Debtors’ argument ignores that distinction.

Finally, the case relied on by the Debtors, *In re Willis*, 408 B.R. 803 (Bankr. W.D. Mo. 2009), is unhelpful to them. That case addressed the interpretation of different language than what is under consideration in this case. It analyzed the phrase “a case filed by an individual debtor under this chapter.” 11 U.S.C. § 707(b)(1). That phrase has indeed been found to be ambiguous. *Willis*, 408 B.R. at 805-806. There is no such ambiguity in the references to “*the date of the filing of the petition*” appearing in §§ 348(a) and 727(a)(8).

In reference to the first sentence the Debtors quote from the *Willis* opinion, to the extent that the *Willis* court intended to suggest that the terms “filing of the petition,” “commencement of the case” and “order for relief” are synonymous, *Willis*, 408 B.R. at 808 (quoting *In re Kerr*, 2007 WL 2119291 at \*3 (Bankr. W.D. Wash. July 18, 2007)), this Court must respectfully disagree for the reasons stated above. The Court doubts that was the *Willis* court’s intent.

The logic of the second quoted sentence supports the UST and not the Debtors. The *Willis* court quoted language from another court reasoning that “[b]ecause Section 707(b) is not mentioned in either subsection (b) or (c) of Section 348, it follows that the original filing date is retained upon conversion, but the case is otherwise treated as if the debtor had originally filed under the converted chapter.” *Willis*, 408 B.R. at 808 (quoting *Kerr*, 2007 WL 2119291 at \*3). By the same logic, the fact that because § 727(a)(8) “is not mentioned in either subsection (b) or (c) of Section 348, it follows that the original filing date is retained upon conversion . . . .” *Id.* With that, the Court agrees. It is impossible to read § 348(a) and come to any different conclusion. Unfortunately, it is that original filing date that determines the Debtors’ eligibility for discharge in their current case.

Finally, the Debtors have directed the Court to no cases – in any district – that have considered the question currently before the Court and decided the issue in a manner helpful to the Debtors. Nor has the Court discovered such a case. There simply is no mechanism by which a chapter 7 debtor can create eligibility for a chapter 7 discharge when the current case was filed less than 8 years following the filing of a prior case in which the debtor received a chapter 7

discharge. The filing of the petition commencing the Debtors' current case occurred within 8 years of the date they filed the petition commencing their prior bankruptcy case. As a consequence, § 727(a)(8) does not permit the Court to grant the Debtors a chapter 7 discharge in the current case.

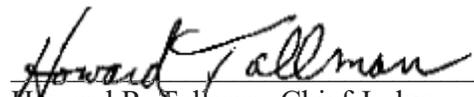
Therefore, it is

**ORDERED** that the United States Trustee's *Motion to Deny the Debtors a Discharge Pursuant to 11 U.S.C. § 727(a)(8)* (docket #54) is GRANTED. It is further

**ORDERED** that the Clerk of the Court is hereby directed not to enter a chapter 7 discharge in the current bankruptcy case.

Dated this 10th day of May, 2011.

**BY THE COURT:**

  
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Howard R. Fallman, Chief Judge  
United States Bankruptcy Court