AMERICAN BANKRUPTCY INSTITUTE

2020 Consumer Bankruptcy Forum

# It Ain't Over 'Til It's Over: Identifying and Addressing Issues Arising at the End of Chapter 13 Cases

Presented by NCBJ


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CONCURRENT SESSION

2020

# *It ain't over till it's over*:

# Identifying and Addressing Issues Arising at the End of Chapter 13 Cases

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# I. Strategic Considerations When Dealing with Debtors in Default

## A. Dismissal and Refiling

1. Voluntary dismissal and 180-day bar to refiling in 11 U.S.C. § 109(g)(2):

    a. If the Chapter 13 debtor voluntarily dismisses under § 1307(b), "following the filing of a request for relief from the automatic stay provided by section 362," the debtor is ineligible to commence another bankruptcy case within 180 days.

    b. Debtor's counsel must review docket carefully before voluntary dismissal – is § 109(g) triggered?

    c. Even if relief from the stay was denied or resolved by agreement, when the debtor voluntarily dismisses, the literal language of § 109(g)(2) will bar a refiling within 180 days.

2. Various Approaches to Enforcing § 109 (g).

    a. Courts have various approaches to when a dismissal is "following" the MFR.

    b. Strict approach v. causal connection.

3. When dismiss / refile strategy may be useful.

    a. Experienced a financial disaster after filing a Chapter 13 case.

    b. Catastrophic illness during a Chapter 13 case may produce post-petition claims.

    c. Modification of the plan may not be helpful, especially if the post-petition claim holders fail or refuse to file proofs of claim.

    d. Sometimes 180-day bar is okay. In a jurisdiction where state law requires more than 180 days to complete a foreclosure, § 109(g) may not give creditors enough time.

    e. Dismissal sometimes used when the debtor's financial condition improves and the debtor no longer needs the Chapter 13 case to pay creditors, e.g., refinance or other payment arrangement.

    f. Dismissal sometimes necessary to take advantage of code or state law exemption changes.

g. Moving from "No Discharge" case to a "full discharge" case.

h. Sometimes it is the only "chance" to save home, property, etc.

4. Strategies for Debtors.

a. Debtor must accomplish dismissal involuntarily, on the request of some other party, to avoid the 180-day bar of § 109(g)(2).

b. May debtor "prompt" dismissal at the request of a party in interest but with the blessings of the debtor.

c. May a debtor cease a wage deduction order for cause?

d. Is intentional "default" to prompt a TMTD a willful failure to comply with a court order, which would trigger the 180-day bar to refiling in § 109(g)(1)

5. Concerns for Creditor.

a. Should creditor that has filed a request for relief from the stay alert Trustee.

b. Should the Creditor oppose the Trustee's motion to dismiss.

6. Impact of BAPCPA § 362(c)(3): 30-DAY STAY TERMINATION upon "re-filing."

a. Proof of good faith.

b. Presumption of lack of good faith.

c. What does the "stay" apply to – property of the estate? What does that mean?

**B. <u>Conversion</u>**

1. Does the debtor require a Chapter 13 "superdischarge" under § 1328(a) or is a Chapter 7 discharge with § 523 exceptions sufficient?

2. Are there any pre-petition assets the debtor wishes to retain that could be at risk upon conversion to a Chapter 7? A Chapter 13 trustee does not have the Chapter 7 trustee's § 707(a)(1) duty to collect and reduce to money property of the estate. If the debtor has a pre-petition cause of action, the Chapter 7 trustee may keep the estate open, potentially keeping the debtor from a fresh start including new extensions of credit or refinancing of existing debt.

3. Has there been a change in facts such that the debtor no longer needs to protect property from liquidation?

a. Was the debtor trying to protect as asset that they no longer want or no longer own?

b. Has the value of an asset the debtor sought to protect decreased or have debts with previously unknown liens against the asset surfaced such that the asset has no equity?

4. Are the Debtor and attorney willing to jump through the conversion hoops?

a. Amended bankruptcy documents.

b. Another § 341 meeting.

5. Will conversion antagonize a particular creditor or creditors?

6. Are there post-petition, pre-conversion debts the debtor can include in a Chapter 7 discharge? 11 USC § 348(d).

7. Is the debtor eligible for a Chapter 7 discharge?

## C. Hardship Discharge

1. Does the debtor require a Chapter 13 "superdischarge" or is a discharge limited to only unsecured debt that would be dischargeable in a Chapter 7 discharge sufficient?

2. Has the Debtor "completed payments" under the plan? Section 1328(b) limits discharge to a debtor that has not completed payments under the plan.

3. Does the Debtor meet all three standards for hardship discharge?

a. The debtor's failure to complete payments is due to circumstances for which the debtor cannot justly be held accountable.

b. Unsecured creditors have received as much as they would had the case been filed as a Chapter 7 liquidation?

c. Modification of the plan is not practicable

4. Deceased debtors. Although a deceased debtor may meet the technical requirements for a hardship discharge, does the debtor's attorney have a client who can move for this relief? To whom is the Court granting the discharge?

### D. Modifying Plans

1. A request to modify a plan after confirmation must be made before completion of payments under the plan? What is "completion of payments?"

   a. The plan duration has passed?

   b. The debtor has tendered all the payments due to the trustee?

   c. The debtor has tendered all the payments due to the trustee and to be paid directly to creditors?

   d. The trustee has made all payments to creditors as set forth in the plan?

2. Can the debtor extend the time for payments?

   a. If the applicable commitment period is 36 months, is there cause for the Court to approve a longer period?

   b. Can a modified plan allow payments after the 60th month has passed since the first payment was due?

   c. Does § 1329(d)(1) apply such that the debtor may extend the time for plan payments to seven years?

      i. The debtor is experiencing or has experienced material financial hardship due to Covid-19

      ii. A previous plan has been confirmed prior to March 27, 2020

      iii. The request to extend the plan duration can be filed prior to March 27, 2021.

## II. CARES Act and Impact on Chapter 13

### A. Bankruptcy Changes.

1. § 1325(b)(2) amended to exclude from “disposable income” payments made under Federal law related to the national emergency declared by the President with respect to COVID-19.

2. § 1325(b)(2):

> For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor **(other than payments made under Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID–19)**, child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended—
> (A)
> (i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and
> (ii) for charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to a qualified religious or charitable entity or organization (as defined in section 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and
> (B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

3. Also, any coronavirus-related payments, such as the stimulus funds, are not to be included in calculating "current monthly income."

   a. Definition of Current Monthly Income.

> § 101(10A) The term "current monthly income"—
> …
> (B)
> (i) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent); and
> (ii) **excludes—**
> **…**

> **(V ) Payments made under Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID–19).**

b. This provision applies to any case filed before or after enactment of the CARES Act.

c. The CARES Act does not create an exemption for stimulus payments. Depending on timing, they may be property of the estate.

d. Are there other exemptions available to the debtor to protect these funds?

4. Plan Modifications.

a. For individuals already in bankruptcy, and who have confirmed plans, the CARES Act created § 1329(d), which provides that confirmed plans may be extended to 7 years, after notice and a hearing, if a debtor "is experiencing or has experienced a material financial hardship due, directly or indirectly, to the coronavirus disease (2019 (COVID-19) pandemic."

> (d)
> (1) Subject to paragraph (3), for a plan confirmed prior to the date of enactment of this subsection, the plan may be modified upon the request of the debtor if—
> (A) the debtor is experiencing or has experienced a **material financial hardship due, directly or indirectly, to the coronavirus disease** 2019 (COVID–19) pandemic; and
> (B) the modification is approved after notice and a hearing.
> (2) A plan modified under paragraph (1) may not **provide for payments over a period that expires more than 7 years after the time that the first payment under the original confirmed plan was due**.
> (3) Sections 1322(a), 1322(b), 1323(c), and the requirements of section 1325(a) shall apply to any modification under paragraph (1).

b. Applicable for 1 year. The chance to extend the plan to seven years ends after March 27, 2021.

c. If the debtor does not have a confirmed plan at the time of the enactment of the CARES Act, however, the debtor may not seek to extend beyond a 60-month term. See, e.g., *In re Errico*, 2020 Bankr. LEXIS 1625, *11, n.50 (Bankr. M.D. Fla. June 22, 2020).

d. What proof is required for "material financial hardship?"

B. **Best Practices Related to Debtors' Attorneys**.

1. Consider requesting a report of payment delinquencies from the Chapter 13 Trustee. Also, track debtor payment delinquencies with ndc.org,

2. Communicate with your clients.

a. The 7-year change is huge. Clients need to know their options and possibilities for relief.

b. Get ahead of the demand for plan modifications that will likely increase when unemployment benefits end.

C. **Mortgage Forbearances in Bankruptcy**.

1. Contact clients immediately upon receipt of Notice of Forbearance.

a. Did the client request the forbearance?

b. Does the client have a need for the forbearance? Has there been a drop in income or other financial hardship?

c. Is the client continuing to make payments notwithstanding the forbearance?

d. What is the client's understanding of the terms of the forbearance?

2. How will the missed payments be addressed?

a. Does the Notice of Forbearance provide guidance?

b. Reach out to the servicer's attorney.

c. Is Court approval required? Is it effectively a loan modification?

d. Impact on discharge being dependent on all direct-by-debtor payments being made under the plan.

e. Does plan need modification to recognize forbearance and does the forbearance free up disposable income?

3. Are there additional costs associated with the forbearance?

   a. Is anything being charged to the debtor?

   b. Disclosure issues?

4. Conduit payments under plans.

   a. Know your Chapter 13 Trustee's position on how to handle NOF in a conduit case.

   b. A quick plan modification likely required to take advantage of the forbearance.

   c. But are there grounds to modify? Was there a substantial and unanticipated change in financial circumstances? Or, was the client offered a forbearance without actual financial need?

5. Did the Debtor request the forbearance? See the class action complaint filed June 26, 2020, against mortgage lender to address alleged cases where the lender has put a loan in forbearance without the request or consent of the debtor. *Harlow, et al, v. Wells Fargo*, (AP #20-07028) (Bankr. W.D. Va. J. Black).

**D. <u>CARES Act Forbearance Rights.</u>**

1. Under the CARES Act, homeowners with federally backed mortgage loans affected by COVID-19 can request and obtain forbearance from mortgage payments for up to 180 days, and then request and obtain additional forbearance for up to another 180 days.

2. During a period of forbearance, no fees, penalties, or interest shall accrue on the borrower's account beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the mortgage contract.

3. The applicable period appears to be during the emergency or until December 31, 2020, whichever is earlier.

4. Remember state law protections may also exist for homeowners in addition to the protections under the CARES Act.

E. **Determining if a Mortgage Loan Is Federally Backed**.

1. Fannie Mae, Freddie Mac, Federal Housing Administration (FHA), Veterans Affairs (VA), and the U.S. Department of Agriculture's Rural Home Service (RHS).

2. Freddie Mac – use website: https://ww3.freddiemac.com/loanlookup.

3. Fannie Mae – use website https://www.knowyouroptions.com/loanlookup#.

4. To determine if a loan is FHA-insured, call HUD's National Servicing Center at 877-622-8525.

5. A VA-guaranteed loan has specific language in the note and mortgage identifying it as a VA loan, and there are fees paid to the VA noted in closing documents.

F. **CARES Act Relief for Federal Student Loan Borrowers**.

1. CARES Act § 3513 provides relief for student loan borrowers with non-defaulted Direct Loans and FFEL loans currently owned by the U.S. Department of Education.

    a. Loans are suspended / "Administrative Forbearance"
    b. Through 9/20/2020
    c. Loans will not accrue any interest.
    d. Borrowers may also ask their servicer to refund any payments made during the COVID-19 suspension.

2. Borrowers with Perkins loans or FFEL loans held by banks or guaranty agencies are not protected by the CARES Act.

3. For purposes of public service loan forgiveness, income driven repayment plans, and loan rehabilitation, loans treated as though payments continue for purposes of continuity of payments. See, § 3513(b), (c).

4. Involuntary collection of covered loans suspended —no wage garnishments, tax intercepts, offset of federal benefits, or any other collection activity will occur through September 30, 2020. See, § 3513(d), (e).

5. Beginning August 1, 2020, the Department will send out a minimum of six notices alerting borrowers loans are about to re-enter repayment. See, § 3513(g).

# III. Denial of Discharge for Failure to Make Direct Payments During Plan[1]

## CONSUMER BANKRUPTCY

### DENIAL OF DISCHARGE FOR A DEBTOR'S FAILURE TO MAKE DIRECT PAYMENTS: DOES THE PUNISHMENT FIT THE CRIME?

*By David Cox*[*]

Across the country, many chapter 13 debtors looking forward to the fresh start they expect after completing three to five years of plan payments to their chapter 13 trustees are opening their mail to find motions to dismiss their cases instead of final discharge orders.[1] Why? Some courts are construing the "payments under the plan" that are the prerequisite for the issuance of a discharge under § 1328(a) to

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[1]This paper addresses an issue that is presently dividing bankruptcy courts: whether denying a chapter 13 discharge is appropriate when a debtor fails to make direct payments to creditors required by his or her plan. At least one court determined that such a "punishment does not fit the crime." *In re Gibson*, 582 B.R. 15, 23 (Bankr. C.D. Ill. 2018) ("Where, as here, a debtor's conduct was truly innocent and unsecured creditors were not harmed, denial of discharge is not an appropriate remedy. The punishment does not fit the crime."). But see, e.g., In re Daggs, Case No. 10-16518 (Bankr. D. Colo. Jan. 6, 2014) ("Because the Debtor did not make the direct payments to Bank of America that were set forth in . . . her Plan, she has not completed all payments under the Plan. She is not entitled to entry of a discharge under § 1328(a)."). This paper is an update and expansion of an article originally published in the ABI Journal, Don't Move the Goalposts — Section 1328 Should Not Deny Discharge to Debtor Who Completes Payments to Trustee, but Is Behind on Direct Payments. 37 Am. Bankr. Inst. J. 20, 52 (May 2018).

[1] The article in Part III is reprinted from Norton Annual Survey of Bankruptcy Law, 2019 Ed. With permission of Thomson Reuters. 

include more than just the payments a debtor makes *to the trustee* pursuant to his or her plan.[2]

The statutory language causing the problem is found in § 1328(a) which triggers the issuance of a discharge as follows.

> [A]s soon as practicable after completion by the debtor of all *payments under the plan,* . . . the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title . . .[3]

Although the relevant language has been in place since the passage of the Bankruptcy Code in 1978, a number of cases began interpreting the meaning of "payments under the plan" in this section to include payments made directly by the debtor to creditors, such as a debtor's regular monthly mortgage payments required to be paid by the plan.[4] Consequently, in some cases where courts have been made aware[5] of debtors' defaults in direct payments to creditors,[6] the debtors have lost their discharges and suffered the dismissal, conversion, or unceremonious closing of their cases.[7]

Part I of this article provides an overview of the pertinent statutory provisions related to the administration of chapter 13 cases generally and an examination of those sections that control plan provisions, including the authority of a debtor to make payments directly to creditors in some instances. Part II explores the sudden emergence of the new line of cases

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[2]See, e.g., *In re Heinzle*, 511 B.R. 69 (Bankr. W.D. Tex. 2014); *In re Hanley*, 575 B.R. 207 (Bankr. E.D. N.Y. 2017); *In re Thornton*, 572 B.R. 738, 77 Collier Bankr. Cas. 2d (MB) 1935 (Bankr. W.D. Mo. 2017); *In re Evans*, 543 B.R. 213 (Bankr. E.D. Va. 2016), aff'd Evans v. Stackhouse, 564 B.R. 513 (E.D. Va. 2017).

[3]11 U.S.C.A. § 1328(a) (emphasis added).

[4]See, e.g., Heinzle, 511 B.R. at 83; Evans, 543 B.R. at 234; *In re Doggett*, 2015 WL 4099806, *3 (Bankr. D. Colo. 2015).

[5]The inconsistent manner by which a default in direct payments might become "known" to the court is a large part of the problem and is further discussed in greater detail later in this article.

[6]For purposes of this article, terms such as, "direct payments" and "direct-by-debtor payments" refer to the payments a chapter 13 debtor pays directly to his or her creditors and not to the chapter 13 trustee.

[7]See, e.g., *In Matter of Kessler*, 655 Fed. Appx. 242, 244 (5th Cir. 2016); *In re Ramos*, 540 B.R. 580, 596 (Bankr. N.D. Tex. 2015); *In re Formaneck*, 534 B.R. 29, 33 (Bankr. D. Colo. 2015).

interpreting § 1328(a) and the reasons for why this issue has recently arisen. Part III of this article reviews the majority position that quickly developed thereafter to deny the issuance of chapter 13 discharges to debtors who failed to remain current in their post-petition direct payments. Part IV of this article reviews the developing minority position. The article concludes with an explanation of why this author supports the minority interpretation of § 1328(a) that assures the debtor's discharge upon completion of payments to the trustee.

## PART I — Pertinent Statutory Provisions

A chapter 13 bankruptcy offers individuals with regular income the opportunity to propose a plan to address all or part of their debts over a three to five-year period.[8] When an individual files a chapter 13 petition, a trustee is appointed to administer the case.[9] In addition to generally overseeing many of the administrative duties related to the case, the chapter 13 trustee's primary function is to collect payments from the debtor and distribute funds to creditors in accordance with the provisions of the debtor's plan.[10] As compared to chapter 7, many debtors find chapter 13 a more attractive option in certain situations because it allows them to retain nonexempt assets, restructure payments on secured debts, satisfy priority tax claims over time, discharge certain debts that would be nondischargeable under chapter 7, and cure defaults in order to prevent foreclosures and repossessions of their homes and vehicles.[11]

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[8]The requirement of "regular income" is found in 11 U.S.C.A. § 109(e). Historically, chapter 13 plans were referred to as "wage earner plans;" however, debtors in chapter 13 are not required to be employed. They simply need regular income to fund a plan. Section 1325(a) provides that the court shall confirm a plan if a number of conditions are met, including, in subsection (6), that "the debtor will be able to make all payments under the plan and to comply with the plan."

[9]11 U.S.C.A. § 1302(a).

[10]11 U.S.C.A. § 1302(b). See also, 11 U.S.C.A. § 1326(c) ("Except as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan."). Note that in North Carolina and Alabama, bankruptcy administrators perform the functions of the chapter 13 trustee.

[11]Although the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 reduced the extent of the differences between a chapter 7

Under § 1301, the debtor proposes a plan with the filing of the petition or within 14 days thereafter, unless the court extends the time for filing a plan for cause.[12] The debtor must begin making plan payments to the trustee within 30 days after filing the bankruptcy case, regardless of whether the debtor's plan has been confirmed by the court.[13] The court's review of the debtor's plan happens quickly in chapter 13, with the confirmation hearing held between 20 and 45 days after the date of the § 341(a) meeting of creditors.[14] Upon confirmation of the plan, the chapter 13 trustee begins distributions to creditors "as soon as is practicable,"[15] and if the court declines to confirm the plan, the debtor may propose a modified plan.[16]

Sections 1322 and 1325 address required and permitted provisions of a plan. If the debtor's current monthly income is less than the applicable state median, § 1322(d)(2) requires that the debtor's plan may only provide for a three-year plan term unless the court approves a longer period "for cause."[17] However, if the debtor's current monthly income exceeds the applicable state median, the "applicable commitment period" is five years.[18] Section 1325(b)(1)(B) requires a chapter 13 debtor's plan to pay all projected disposable income over the

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and 13 discharge, certain debts remain dischargeable under § 1328(a) that are not dischargeable in chapter 7, including debts for willful and malicious injury to property, debts incurred to pay nondischargeable tax obligations, and debts arising from property settlements in divorce or separation proceedings. 11 U.S.C.A. § 1328(a). Eligibility for chapter 13 relief is limited to individuals with unsecured debts of less than $419,275 and secured debts of less than $1,257,850. 11 U.S.C.A. § 109(e). These amounts are adjusted periodically to reflect changes in the consumer price index and are accurate as of the most recent adjustment effective April 1, 2019.

[12]See Fed. R. Bankr. P. 3015.

[13]11 U.S.C.A. § 1326(a)(1).

[14]11 U.S.C.A. § 1324(b).

[15]11 U.S.C.A. § 1326(a)(2).

[16]11 U.S.C.A. § 1323.

[17]Section 101(10A) defines a debtor's "current monthly income" as the average monthly income received over the six full calendar months preceding the petition, with the exception of benefits under the Social Security Act, and includes regular contributions to household expenses from nondebtors and income from the debtor's spouse if a joint petition is filed.

[18]The issue of whether the applicable commitment period defines the actual time a debtor must remain in chapter 13 is beyond the scope of this article. Further information on that debate may be found at Keith M.

applicable commitment period if the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan. Chapter 13 does not require the full payment of unsecured creditors as long as the plan satisfies the aforementioned disposable income requirements and the distributions under the plan paid to the allowed unsecured creditors meet or exceed the amount that would be paid to such creditors if the estate of the debtor were liquidated under chapter 7.[19]

As noted above, a common use of chapter 13 is to save a debtor's home from the threat of foreclosure by allowing the debtor to cure any default in mortgage payments over time. In addressing the mortgage claim, though, the debtor's plan must provide for both the resumption of ongoing mortgage payments and the curing of any arrearages over a reasonable period of time.[20] Typically any arrearage claim is paid by the trustee in accordance with the plan's terms; however, the plan may provide for either the debtor or the trustee to complete the ongoing and future monthly mortgage payments directly to the lender.[21] Debtors who elect to pay directly to creditors rely on § 1326(c) which contemplates that a plan may provide for payments to creditors other than by the Chapter 13 trustee: "[e]xcept as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan."[22]

Particularly in the context of mortgage payments, the issue of whether a debtor should be permitted to make direct pay-

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Lundin & William H. Brown, Chapter 13 Bankruptcy, 4th Edition, § 493.1, at ¶ 22, Sec. Rev. Mar. 28, 2006, www.Ch13online.com.

[19]11 U.S.C.A. § 1325(a)(4).

[20]11 U.S.C.A. § 1322(c).

[21]Since debts secured only by a security interest in real property that is the debtor's principal residence cannot be modified in the many ways that other secured debts can be modified under § 1322(b)(2), the regular, ongoing mortgage payments must be paid according to the underlying note, particularly when the last payment under such note is due after the date on which the final payment under the plan is due. See 11 U.S.C.A. § 1322(b)(2) and (b)(5).

[22]Section 1322(b)(5) permits a debtor to cure any default and maintain payments on a secured or unsecured claim on which the last payment is due after the conclusion of the plan.

ments to his or her creditors has been heavily debated.[23] In fact, in recent years, some courts have adopted local rules requiring that a chapter 13 debtor's plan must provide for the trustee to make the debtor's regular, ongoing mortgage payments to the creditor.[24] Such plans are called "conduit" plans because the trustee serves essentially as an intermediary, collecting payments from the debtor and distributing them to the mortgage creditor without modification of the creditor's claim. In contrast, under "non-conduit" plans, the debtor makes his or her normal mortgage payments directly to the lender, bypassing the trustee.[25] Even without local rules, many trustees encourage conduit plans. According to the Final Report of the ABI Commission on Consumer Bankruptcy published in April of 2019, just under half of the chapter 13 trustees are primarily administering plans providing for conduit mortgage payments.[26]

The trustee or a party in interest may request the dismissal or conversion to chapter 7 of a debtor's case for cause under 1307(c), including the "material default by the debtor with respect to a term of a confirmed plan."[27] Upon the debtor's completion of all payments under the plan, a chapter 13 debtor is entitled to a discharge under 1328(a).[28] The § 1328(a) discharge releases the debtor from all debts provided for by

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[23]See, e.g., Gordon Bermant & Jean Braucher, Making Post-Petition Mortgage Payments Inside Chapter 13 Plans: Facts, Law, Policy, 80 AM. BANKR. L.J. 261 (2006).

[24]See, e.g., *In re Ayodele*, 590 B.R. 342 (Bankr. E.D. N.C. 2018) (Applying and upholding local rule, E.D.N.C. R. 3070-2, which requires that unless excused by order of the court, "Chapter 13 Debtors shall remit all Mortgage Payments owed by them to the Chapter 13 Trustee for disbursement to the Real Property Creditor.").

[25]In bypassing the trustee, of course, the debtor also avoids paying the commission that would otherwise be required by the trustee on the portion of the plan payments necessary for the trustee to make the debtor's regular, ongoing mortgage payments. See 11 U.S.C.A. § 326(b) (authorizing a court to allow reasonable compensation "for a trustee's services, payable after the trustee renders such services, not to exceed five percent upon all payments under the plan.").

[26]Final Report of the ABI Commission on Consumer Bankruptcy (2019) at p. 185.

[27]11 U.S.C.A. § 1307(c)(6).

[28]Section 1328 sets forth additional requirements for a chapter 13 discharge, including the debtor's certification that all domestic support obliga-

the plan or disallowed under § 502, with limited exceptions detailed in the statute, including long term debts provided for under § 1322(b)(5), such as most home mortgages and some vehicle loans.[29]

Debtors must carefully navigate through all of these provisions, from plan confirmation through case administration, to complete their cases and receive a discharge under § 1328(a). It is at this final, critical step in the chapter 13 process where the courts' competing interpretations of the discharge requirements of § 1328(a), discussed in this article, can result in dramatically different consequences for debtors who have fallen behind in direct payments to their creditors.

## PART II — A Problem Emerges

### *A. Post-petition Direct Payment Default Precludes Discharge*

One of the most often cited early cases holding that a debtor's default in post-petition direct payments precludes the entry of a discharge under § 1328(a) is from the Bankruptcy Court for the Western District of Texas, *In re Heinzle*, on May 29, 2014.[30] In that case, the chapter 13 trustee filed a motion to deny discharge and dismiss the debtors' case after learning that the debtors were in default in paying their post-petition mortgage payments to the extent of $33,467.35.[31] The trustee asserted that the direct payments to the mortgage lender constituted payments "under the plan," and as such, the debtors were not entitled to a discharge under § 1328(a) because they

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tions that came due during the case have been paid and the debtor's completion of an approved course in financial management. See 11 U.S.C.A. § 1328(a) and (g)(1).

[29]See footnote 17, supra.

[30]Notwithstanding the frequency with which Heinzle is cited, the first reported case specifically interpreting the "payments under the plan" language of § 1328(a) to include all direct cure-and-maintain post-petition payments of the debtor appears to have been from the Bankruptcy Court for the District of Colorado. In re Daggs, Case No. 10-16518 (Bankr. D. Colo. Jan. 6, 2014) ("[T]he Court is persuaded by a long line of cases holding that payments made directly from a debtor to a creditor are nevertheless payments 'under the plan.' ").

[31]Heinzle, 511 B.R. at 71.

failed to make all payments due under the plan, specifically including all of their mortgage payments.[32]

The *Heinzle* court focused quickly on the issue:

> [T]he linchpin question that the Court must answer is whether [direct] payments pursuant to § 1322(b)(5) constitute "payments under the plan." If § 1322(b)(5) payments are deemed "under the plan," Chapter 13 debtors must maintain their post-petition mortgage payments in order to be entitled to receive a discharge upon completion of the plan's term. If § 1322(b)(5) payments are not considered "under the plan," then debtors may receive a discharge notwithstanding their failure to maintain their post-petition mortgage payments.[33]

In ultimately siding with the trustee, the court in *Heinzle* relied heavily on the Fifth Circuit's opinion in *In re Foster*.[34] In *Foster*, the debtor's plan provided that the mortgage arrearage would be paid by the trustee "under the plan" and the mortgage payments due post-petition on both the first and second mortgages would be paid by the debtor "outside the plan" according to the terms of the notes and deeds of trust. The bankruptcy court denied confirmation of the plan because it proposed to pay certain claims "outside the plan."

The Fifth Circuit agreed with those courts holding that the Code allows a chapter 13 debtor to make direct disbursements "under the plan" pursuant to § 1326(b) and concluded that the designation of the debtor as a disbursing agent is a matter left to the discretion of the bankruptcy court.[35] The Fifth Circuit held that "a plan cannot provide that the current portion of a mortgage claim will be made 'outside the plan,' as that phrase was used by the bankruptcy court, when the arrearages on the mortgage claim are being cured under § 1322(b)(5)."[36] Although the *Foster* court was addressing the specific question of whether a plan provision was considered "inside" or "outside" of the plan for purposes of plan confirmation, the *Heinzle* court concluded that the Fifth Circuit's analysis supported the chapter 13 trustee's contention that pay-

[32] 511 B.R. at 72.

[33] 511 B.R. at 75.

[34] *Matter of Foster*, 670 F.2d 478, 8 Bankr. Ct. Dec. (CRR) 1316, 6 Collier Bankr. Cas. 2d (MB) 285, Bankr. L. Rep. (CCH) P 68899 (5th Cir. 1982).

[35] 670 F.2d at 486.

[36] 670 F.2d at 488.

ments made directly to a mortgage lender are payments made "under the plan."[37]

Numerous courts, in relatively quick succession, addressed the issue and reached conclusions consistent with *Heinzle*'s holding that a chapter 13 discharge may not issue when the debtor has defaulted in his or her post-petition direct payments.[38] By the end of 2017, a uniform view throughout the published opinions developed that interpreted the "payments under the plan" language of § 1328(a) to include all payments a chapter 13 debtor is to complete directly to any creditors. It would not be until 2018 that an opinion would be issued by a bankruptcy court taking a contrary position and concluding that a default in direct payments was not a ground for denying a debtor a discharge under § 1328(a).[39] The court in *In re Gibson* initiated the split that would form the basis of the minority position on this issue.

### *B. Why the Influx of New Cases? The Unintended Consequences of Rule 3002.1*

The impetus for the new line of cases was not a sudden shift in the mortgage paying habits of debtors.[40] Instead, the root of these cases may be traced to the adoption of Rule 3002.1 in

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[37]Heinzle, 511 B.R. at 81.

[38]See, e.g., *In re Finley*, 2018 WL 4172599 (Bankr. S.D. Ill. 2018); *In re Dowey*, 580 B.R. 168 (Bankr. D. S.C. 2017); *In re Thornton*, 572 B.R. 738, 77 Collier Bankr. Cas. 2d (MB) 1935 (Bankr. W.D. Mo. 2017); *In re Gonzales*, 570 B.R. 788 (Bankr. S.D. Tex. 2017); *In re Coughlin*, 568 B.R. 461 (Bankr. E.D. N.Y. 2017); *In re Young*, 2017 WL 4174363 (Bankr. M.D. La. 2017); *In re Hoyt-Kieckhaben*, 546 B.R. 868, 76 Collier Bankr. Cas. 2d (MB) 639 (Bankr. D. Colo. 2016); *In re Evans*, 543 B.R. 213 (Bankr. E.D. Va. 2016); *In re Ramos*, 540 B.R. 580 (Bankr. N.D. Tex. 2015); *In re Gonzales*, 532 B.R. 828 (Bankr. D. Colo. 2015); *In re Kessler*, 2015 WL 4726794 (Bankr. N.D. Tex. 2015), subsequently aff'd, 655 Fed. Appx. 242 (5th Cir. 2016); *In re Doggett*, 2015 WL 4099806 (Bankr. D. Colo. 2015).

[39]*In re Gibson*, 582 B.R. 15 (Bankr. C.D. Ill. 2018) (Debtor's direct payments on a nonmodifiable, nondischargeable residential mortgage loan were not "payments under the plan" that had to be completed for debtor to be entitled to discharge.).

[40]Hoyt-Kieckhaben, 546 B.R. at 870 ("In the past year, however, this Court and others within this district have seen a new and disturbing trend emerge in chapter 13 cases. At the conclusion of the three- or five-year plan, the lender objects on the basis that it has not received the Direct Payments from the debtor, often over a substantial portion of the plan's term.").

2011.[41] Ironically, Rule 3002.1 was drafted in order to benefit debtors with mortgage payments by imposing certain disclosure requirements on residential mortgage holders.[42] The rule provides a framework for the bankruptcy court to address issues related to a mortgage holder's application of payments during a chapter 13 case and was "designed to prevent unexpected deficiencies in a mortgage when a case is completed and closed."[43] The rule was drafted, in part, to address the concern that debtors were emerging from chapter 13 only to face unknown defaults caused by post-petition loan payment changes and charges because of a fear of violating the automatic stay.[44]

Rule 3002.1(f) requires the chapter 13 trustee to file and serve on the residential mortgage lender a notice at the end of the debtor's plan stating that the debtor has paid in full the amount required to cure any default on the lender's claim. The lender then has 21 days after service of the trustee's notice to file a statement indicating:

> (1) [W]hether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with § 1322(b)(5) of the Code. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement.[45]

Prior to the adoption of Rule 3002.1, courts routinely granted discharges under § 1328(a) without any knowledge or certification of whether the debtor completed all direct payments to creditors.[46] As expressed by the *Gibson* court,

> It is safe to say that from 1978 until very recently, countless chapter 13 debtors received a discharge despite an uncured default in payments to a creditor made direct by the debtor, ei-

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[41] 546 B.R. at 870 ("Why this lender, and many others recently, have chosen to remain silent in the face of such substantial defaults remains a mystery to the Court. At any time, these lenders could seek relief from the automatic stay or file a motion to dismiss. Instead they do nothing until they respond to the Rule 3002.1 notice near the conclusion of the plan.").

[42] Gibson, 582 B.R. at 19.

[43] 9 Collier on Bankruptcy ¶ 3002.1.01 (16th 2019).

[44] *In re Rivera*, 599 B.R. 335, 343 (Bankr. D. Ariz. 2019).

[45] Fed. R. Bankr. P. 3002.1(f) & (g).

[46] 8 Collier on Bankruptcy ¶ 1328.02 (16th 2019).

> ther because the trustee was unaware of the default or because a default on direct plan payments was not viewed as a basis to seek dismissal without a discharge.[47]

Armed with responses to notices of final cure under Rule 3002.1(f) and (g) indicating default in direct mortgage payments by the debtors, trustees began filing objections to discharge and motions to dismiss.

## Part III — A Consistent Majority View Forms

### *A. Reasoning of the Majority*

The majority line of cases has developed rapidly since 2014, with courts initially finding little difficulty reading § 1328(a) in a manner that would require a debtor to complete all payments, without distinction as to the payee, in order to receive a discharge.[48] After all, if a plan requires a payment of any

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[47] In re Gibson, 582 B.R. at 19 (finding it "universally recognized" that Rule 3002.1 was intended to benefit debtors by providing a mechanism for review and a forum for resolving disputes over whether the debtor's obligations to the mortgage holder are current at the conclusion of the bankruptcy case).

[48] In re Gonzales, 532 B.R. at 833 ("[A]ll courts that have examined the question of whether payments required to be made directly to creditors under a confirmed chapter 13 plan are 'payments under the plan,' as that term is used in § 1328(a), have answered the question in the affirmative."). See also, In re Mrdutt, BAP No. NC-17-1256-BTaF at 13 (9th Cir. B.A.P. May 6, 2019); In re Finley, No. 18-4011 (Bankr. S.D. Ill. Aug. 28, 2018); In re Gelin, (Bankr. E.D.N.Y. Feb. 1, 2018); *In re Hanley*, 575 B.R. 207 (Bankr. E.D. N.Y. 2017); *In re Thornton*, 572 B.R. 738, 77 Collier Bankr. Cas. 2d (MB) 1935 (Bankr. W.D. Mo. 2017); *In re Coughlin*, 568 B.R. 461 (Bankr. E.D. N.Y. 2017); *In re Young*, 2017 WL 4174363 (Bankr. M.D. La. 2017); *In re Gonzales*, 570 B.R. 788 (Bankr. S.D. Tex. 2017); *In re Diggins*, 561 B.R. 782 (Bankr. D. Colo. 2016); In re Payer, No. 10-33656 HRT (Bankr. D. Colo. May 5, 2016); In re Strimbu, No. 10-19146-MER (Bankr. D. Colo. Mar. 31, 2016); In re Tumblson, (Bankr. E.D. Okla. Mar. 8, 2016); *In re Hoyt-Kieckhaben*, 546 B.R. 868, 871, 76 Collier Bankr. Cas. 2d (MB) 639 (Bankr. D. Colo. 2016); In re Cherry, 1:10-BK-25318 (Bankr. D. Colo. Jan. 19, 2016); *In re Evans*, 543 B.R. 213 (Bankr. E.D. Va. 2016), aff'd Evans v. Stackhouse, 564 B.R. 513 (E.D. Va. 2017); *In re Kessler*, 2015 WL 4726794 (Bankr. N.D. Tex. 2015), subsequently aff'd, 655 Fed. Appx. 242 (5th Cir. 2016); *In re Ramos*, 540 B.R. 580 (Bankr. N.D. Tex. 2015); *In re Formaneck*, 534 B.R. 29, 33 (Bankr. D. Colo. 2015); *In re Doggett*, 2015 WL 4099806 (Bankr. D. Colo. 2015); *In re Heinzle*, 511 B.R. 69 (Bankr. W.D. Tex. 2014); In re Furuiye, (Bankr. D. Colo. Apr. 7, 2014); In re Daggs, Case No. 10-16518 (Bankr. D. Colo. Jan. 6, 2014).

kind, would not that be a payment "under" that plan?[49] The answer was obvious to the first courts addressing the issue. Courts quickly dispensed with and dismissed alternative interpretations of § 1328(a) put forth by debtors in default, with views expressed similarly to those of the *Gonzales* court in June of 2015, explaining that, "this is not a matter of the Court choosing between two equally plausible interpretations of obscure language."[50] Adopting the "uncontroverted reasoning" of the courts before them, judges struggled to find any authority for accepting the argument that payments made directly to a creditor under a confirmed chapter 13 plan were not "under the plan" and were not required to be completed in order for a chapter 13 debtor to be entitled to discharge under 11 U.S.C.A. § 1328(a).[51]

1. ***Plain Meaning***

Typically, courts following the majority view expressed in *Heinzle* begin their analysis with a review of the plain meaning of the statute.[52] Those courts find that the language of § 1328(a) is clear, and contemplates as a payment "under the plan" any payment required by the plan.[53] Such language would include payments made directly to a creditor as well as payments made to the trustee.[54] As the court in *Evans v. Stackhouse* noted, "had Congress intended that discharge only be granted after completion by the debtor of *some* payments under a confirmed plan, Congress could have easily

[49]Kessler v. Wilson (In re Kessler), 655 Fed. Appx. at 244 ("Because the Kesslers failed to complete post-petition mortgage payments that fall under the plan, they do not qualify for discharge under the plain terms of § 1328(a), which instructs a court to grant discharge only after completion of *all* payments under the plan. 11 U.S.C.A. § 1328(a).").

[50]532 B.R. at 833.

[51]See, e.g., In re Formaneck, 534 B.R. at 34.

[52]See, e.g., *In re Doggett*, 2015 WL 4099806, *3 (Bankr. D. Colo. 2015) ("A discharge under § 1328(a) requires completion of all 'payments under the plan' and that language plainly embraces payment that a plan provides will be made directly by the debtor to a creditor.").

[53]In re Kessler, 6:09-BK-60247 ("Any payment made in accordance with the provisions of a chapter 13 plan is a payment under the plan; and a debt is provided for under the plan so long as a provision treats it").

[54]Evans v. Stackhouse, 564 B.R. at 525.

included such language limiting the payments that needed to be completed prior to receiving a discharge."[55]

### 2. *Support Found in Rake v. Wade*

In addition to the ostensible plain meaning of "payments under the plan," the majority relies on the Supreme Court's decision in *Rake v. Wade*, which applied a broad interpretation of a similar key phrase found in the latter part of § 1328(a).[56] There, the Court explained that the language, "provided for by the plan" means "to 'make a provision for' or 'stipulate to' something in a plan" and that "the phrase is commonly understood to mean that a plan 'makes a provision' for, 'deals with,' or 'refers to' a claim."[57] Accordingly, the majority also reads "payments under the plan" equally broadly to include both payments to the trustee and payment to any creditor directly by the debtor.[58] "It would hardly make sense to find that a plan 'provides for' a claim but that the provision for the claim is not a 'term' of the plan."[59]

### 3. *Historical Interpretations of Payments Plan Payments*

The majority also finds support in decisions which considered whether payments required to be made directly to creditors under a confirmed chapter 13 plan are "payments under the plan." Often cited cases include *In re Perez* and *In re*

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[55]564 B.R. at 525 (emphasis in original) ("[B]y drafting the language in this fashion, Congress made clear that this Court should grant a discharge only after completion of all of the payments under the Bankruptcy Court-confirmed plan.").

[56]*Rake v. Wade*, 508 U.S. 464, 113 S. Ct. 2187, 124 L. Ed. 2d 424, 24 Bankr. Ct. Dec. (CRR) 533, 28 Collier Bankr. Cas. 2d (MB) 983, Bankr. L. Rep. (CCH) P 75275 (1993).

[57]508 U.S. 464.

[58]In re Hoyt-Kieckhaben, 546 B.R. at 873 (quoting Gonzales, 532 B.R. at 832) (explaining that a construction of the "payments under the plan" language in § 1328(a) narrowly to include only those payments directed to the chapter 13 trustee "is impossible to reconcile with the Supreme Court's broad construction of 'provided for by the plan,' in the same Code section, to include claims that are merely referred to by the plan.").

[59]546 B.R. at 874.

*Russell*.[60] *Perez* involved whether a debtor may confirm a plan that proposes to pay the debtor's mortgage lender directly as opposed to paying it through the trustee, and *Russell* addressed whether a debtor may pay the claim for a crammed down real estate loan directly and for a period extending beyond the term of the plan. Like *Foster*, discussed supra, the *Perez*[61] and *Russell*[62] opinions did not address the "payments under the plan" phrase specifically in the context of the discharge condition of § 1328(a), but the courts have nonetheless found the interpretation of the phrase persuasive.

4. ***Disposable Income***

Notwithstanding their strict enforcement of the statute, courts following the majority appear cognizant of the harsh impact of denying a debtor's discharge at the conclusion of a long chapter 13 plan after all payments have been made to the trustee.[63] The courts balance such concerns, in part, by questioning why the debtors should have the benefit of the disposable income that is created by their failure to make the required mortgage payments.[64] Is a debtor proceeding in good faith when that debtor fails to pay direct payments to a

[60] *In re Perez*, 339 B.R. 385, 390 n.4 (Bankr. S.D. Tex. 2006), aff'd, 373 B.R. 468 (S.D. Tex. 2007) ("The term 'under the plan' properly refers to any payment made pursuant to the provisions of a Chapter 13 plan, regardless of whether such payment is made through the trustee or by a debtor directly to a creditor."); *In re Russell*, 458 B.R. 731, 739 (Bankr. E.D. Va. 2010) ("[B]ecause payments are not being made through the trustee does not mean they are not being made 'under' the plan.").

[61] In Perez, the court addressed the language, "under the plan" for purposes of its opinion but did not specifically analyze those words as a condition for discharge under § 1328(a). Perez, 339 B.R. at 390.

[62] In Russell, the question addressed by the court was whether payments paid directly to a creditor were subject to the limitations of § 1322(d)(1) because, as the debtor unsuccessfully argued, the payments were not being made "under the plan." Russell, 458 B.R. at 739.

[63] In re Hanley, 575 B.R. at 210 ("While it might seem inequitable or draconian to deny the Hanleys their discharge after making Plan payments to the Trustee for five years, the equitable powers of the Court cannot override the statute or the specific provisions of a confirmed chapter 13 plan.").

[64] See, e.g., In re Kessler, 6:09-BK-60247 (Finding it inequitable to the debtor's creditors to allow a discharge of the remaining unsecured debt where the debtor had "the unfettered use of over $40,000.00 in disposable income.").

lender, despite the fact that such payments were included in their budget for plan calculation and confirmation purposes?[65]

Debtors facing the denial of their chapter 13 discharges are quick to assert that only the payees of their direct payments are impacted by their default and those creditors remain nondischargeable as § 1322 debts regardless of whether a § 1328(a) discharge is granted.[66] However, the courts in the majority cite the potential losses suffered by the general unsecured claimants.[67] Since a bankruptcy court may not approve a plan over trustee objection unless it provides for the full repayment of unsecured claims or "provides that all of the debtor's projected disposable income to be received" over the plan's duration "will be applied to make payments" in accordance with plan terms under § 1325(b)(1), then any change in a debtor's financial circumstances would impact the funds available for unsecured creditors.[68]

The court in *In re Coughlin* explained the unfairness to the creditors this way:

> Chapter 13 debtors who do not pay their post-petition mortgage payments are essentially claiming a deduction to which they are not entitled. If a debtor stated at confirmation that he did not intend to pay a mortgage and was surrendering the property securing the mortgage, he would not be able to deduct that

[65] See, e.g., In re Thornton, 572 B.R. at 742–743 ("Here, the Debtor has not made mortgage payments for over three years postpetition. She therefore did not have an actual expense for housing despite the fact that the schedules on file show that, with a mortgage expense, she had no disposable income for payment to unsecured creditors.").

[66] In re Heinzle, 511 B.R. at 74 (noting that § 1322(b)(5) claims are not discharged under § 1328(a)(1)). ("The Court agrees with the Debtors' assertion that a full discharge is not necessary to protect the interest of the mortgage lender.").

[67] In re Coughlin, 568 B.R. at 471.

[68] 11 U.S.C.A. § 1325(b)(1)(B); see also, e.g., In re Coughlin, 568 B.R. at 473–474; In re Formaneck, 534 B.R. at 34 ("The Debtors . . . assert this default does not harm the Trustee or any creditors other than Wells Fargo. The glaring concern with the Debtors' position is they failed to disclose or even address how they have been spending their income allocated for direct mortgage payments ranging from $4,711.38 to $5,061.38 per month over the latter half of their commitment period. . . . Had the Debtors sold or surrendered their residence, they would have had the ability to increase monthly plan payments and the overall distribution to unsecured creditors. To state it plainly, the Court finds the material default in this case clearly harms the other creditors in this case").

> mortgage payment . . . Similarly, if a debtor harbored an undisclosed intent to stop paying his mortgage post-confirmation, he should not be rewarded for clandestinely claiming a deduction to which he would otherwise not be entitled. However, if a debtor intending to pay his mortgage loses the ability to pay his mortgage post-confirmation because he lost his job or incurred unanticipated expenses, he could seek to modify the plan to better reflect his changed financial circumstances or, if applicable, seek a hardship discharge under § 1328(b).[69]

### 5. *Disparate Treatment*

Some courts in the majority note that reading "payments under the plan" to include any direct payments to creditors is required in order to avoid disparate, unfair treatment between debtors in conduit and non-conduit plans.[70] Conduit plans provide for the trustee to pay all post-petition mortgage payments, making it impossible for a debtor to fall behind in his or her mortgage without jeopardizing the completion of the plan and issuance of a discharge.[71] In contrast, the post-petition mortgage default of debtors with non-conduit plans might never become apparent to the court until a response is filed to the trustee's notice of final cure under Rule 3002.1 or a motion for relief is filed by the intended recipient of the direct payments. The *Coughlin* court addressed the unequal treatment such a system would cause between debtors if chapter 13 discharges were not made contingent on debtors remaining current in the post-petition direct payments:

> The Bankruptcy Code should not be read to allow the anomalous result which would ensue if post-petition mortgage payments made directly by the debtor were not considered pay-

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[69] Coughlin, 568 B.R. at 473–474.

[70] In re Mrdutt, BAP No. NC-17-1256-BTaF, at *13 ("And we perceive some flaws with interpreting the phrase 'payments under the plan' to include only those payments made to the trustee. One is the different outcomes that would result in conduit versus non-conduit jurisdictions."); see also, Coughlin, 568 B.R. at 474. For a further discussion of conduit and nonconduit plans, see Part I of this article and footnotes 24 — 27, supra.

[71] Heinzle, 511 B.R. at 73 n.3 (explaining "conduit" plans and stating, "[t]he Chapter 13 trustee acts as the disbursing agent to the mortgage lender. The rationale behind such a practice is that it ensures debtors remain current on both plan and mortgage payments. It also allows the Chapter 13 trustee the ability to monitor changes in escrow accounts and verify if the mortgage lender is asserting unwarranted charges during the pendency of the case.").

> ments under the plan, whereas the same payments required to be made in a conduit district would unquestionably be payments under the plan.[72]

Pointing to principles of fairness, courts in the majority warn against an interpretation of the Code that would permit a direct-pay debtor to receive a discharge when a conduit debtor would not.[73]

### *B. Majority Interpretation of 1328(a) Leads to a Variety of Outcomes for Debtors*

#### 1. *Dismissal, Conversion and Denial of Discharge*

Courts siding with the majority view have the challenge of determining how to conclude the defaulted debtors' cases. The court in *Evans* decided that "under the Bankruptcy Code, there are three ways to conclude a Chapter 13 case: 'discharge pursuant to § 1328, conversion to a Chapter 7 case pursuant to § 1307(c) or dismissal of a Chapter 13 case 'for cause' under § 1307(c).' "[74] Several other courts, however, have opted to simply close the debtor's case without a discharge as a fourth option.[75] The *Heinzle* court specifically avoided the entry of an order denying discharge, though, because of the risk of confusion it believed such an unusual conclusion to a chapter 13 case might cause.[76] Noting that a denial of discharge "would require creditors to determine the legal effect of [such action] on future bankruptcy filings," the *Heinzle* court simply dismissed the debtor's case instead.[77]

Upon finding that the debtor's default in post-petition direct payments precludes discharge under § 1328(a), most courts limit the debtor's outcome to two options: dismissal under § 1307(c) or conversion to a chapter 7 under § 1307(a). As the

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[72]Coughlin, 568 B.R. at 474.

[73]Mrdutt, supra, at *15, quoting Coughlin, 568 B.R. at 474 ("Such a result 'is inconsistent both with the words and intent of chapter 13' ").

[74]Evans, 543 B.R. at 235, quoting *In re Leavitt*, 171 F.3d 1219, 1223, 34 Bankr. Ct. Dec. (CRR) 111, 41 Collier Bankr. Cas. 2d (MB) 1035, Bankr. L. Rep. (CCH) P 77916 (9th Cir. 1999).

[75]In re Kessler, 6:09-BK-60247 (Bankr. N.D. Tex. June 9, 2015); *In re Doggett*, 2015 WL 4099806 (Bankr. D. Colo. 2015); In re Daggs, Case No. 10-16518 (Bankr. D. Colo. Jan. 6, 2014).

[76]Heinzle, 511 B.R. at 83.

[77]511 B.R. at 83.

*Evans* court ultimately concluded after finding that the debtor failed to complete all direct payments required under her plan, "[a] review of the Bankruptcy Code strongly suggests that there is no sufficient statutory authorization to simply close the case as proposed by the Trustee."[78]

Where there is a material default, "dismissal or conversion is not automatic, but rather a matter of the Court's discretion."[79] Courts electing between the options of dismissal or conversion consider the best interests of the creditors and the estate to determine which path to follow.[80] In practice, though, courts often simply leave it to the debtor to determine his or her fate by permitting a debtor a short period of time to convert before the case is thereafter automatically dismissed if no action is taken by the debtor.[81]

### 2. *Debtors' Efforts to Salvage Cases*

Some debtors who have defaulted in their direct payments have avoided the loss of their discharges by last ditch efforts to come into compliance with § 1328(a) by seeking loan modifications,[82] curing the defaults quickly,[83] or by proposing modified plans to cure the defaults through the trustee or by sur-

[78]Evans, 543 B.R. at 235.

[79]8 Collier on Bankruptcy ¶ 1307.04 (16th 2019).

[80]Formaneck, 534 B.R. at 35 ("Section 1307(c)(6) provides after a material default under the terms of a confirmed plan is established, the determination of dismissal or conversion rests within the sole discretion of the Court. Thus, the only remaining issue is whether, in this Court's discretion, the Debtors' material default warrants dismissal or conversion under § 1307(c)(6), turning on which path is in the best interests of creditors and the estate.").

[81]See, e.g., In re Thornton, 572 B.R. at 743 ("The Debtor is not entitled to a Chapter 13 discharge. But while the Debtor failed to make payments to Select Portfolio for an extended period of time, Select Portfolio also sat on its hands and allowed the debt to grow without taking any action. Therefore, the Debtor should be allowed to either convert the case to Chapter 7, or have it dismissed."); In re Ramos, 540 B.R. at 596 (granting debtors who had petitioned for a discharge but failed to complete direct payments under chapter 13 plan ten days to convert their plan to a chapter 7 one or face dismissal without prejudice).

[82]See, e.g., *In re Diggins*, 561 B.R. 782 (Bankr. D. Colo. 2016).

[83]See, e.g., In re Payer, No. 10-33656 HRT, (Bankr. D. Colo. May 5, 2016).

rendering the collateral securing the defaulted loans.[84] Courts have limited these options, though, as such efforts often impact other requirements of the Code.

a. ***Mortgage Modification***

Many debtors turn to consensual loan modifications when they face default, but the court in *Hanley* nonetheless denied for procedural reasons the debtors' discharges notwithstanding any purported loan modification that would have arguably cured their default.[85] Although debtors may be able to cure a default in post-petition mortgage payments, the *Hanley* court insisted, "the cure must be accomplished by a consensual loan modification approved by the court, or through a modification of the debtor's chapter 13 plan" and required that "either of these options must be approved by the Court prior to the expiration of the chapter 13 plan term."[86] Citing the debtors' delay, the court in *In re Strimbu* declined to consider the pending loan modification that the debtors alleged was in its trial period. Facing a post-petition default by the debtor reported at $163,361.00, the *Strimbu* court found "unavailing the debtors' argument that they would have been current at the time of the Trustee's Motion if their mortgage modification had been approved earlier."[87] The court criticized the debtors for neglecting to seek modification earlier as they failed to make payments for years.[88]

Other courts have been more flexible in permitting loan modifications to resolve default in direct payments.[89] When the debtor's mortgage lender in *In re Diggins* filed its Rule 3002.1 response noting the post-petition delinquency in direct

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[84]See, e.g., *In re Coughlin*, 568 B.R. 461, 474 (Bankr. E.D. N.Y. 2017).

[85]In the Hanley case, the Debtors had been approved for trial loan modification but apparently did not return it signed prior to the deadline imposed by the mortgage company. The mortgage company thereafter formally declined the loan modification, but the court said even if the loan modification were enforceable, it would need to be approved prior to the 60th month of the plan term. In re Hanley, 575 B.R. at 210.

[86]575 B.R. at 210.

[87]In re Strimbu, No. 10-19146-MER (Bankr. D. Colo. Mar. 31, 2016).

[88]Strimbu, No. 10-19146-MER.

[89]For another example of a loan modification salvaging the debtor's discharge, see *In re Young*, 2017 WL 4174363, *3 (Bankr. M.D. La. 2017) ("Ms. Young is not at the end of her plan period. Time remains for her to

payments, the lender also explained that, "[t]he Debtor is in the process of completing a Loan Modification. If the Loan Modification process is completed and approved the Debtors will then be current with mortgage payments."[90] The court concluded it would be inequitable to deny discharge in such a unique situation after finding that the debtor regularly paid her mortgage for four years of her plan and acted promptly to modify the mortgage as soon as her income dropped.[91] The *Diggins* court explained,

> Even if this Court believed that Debtor's temporary inability to make payments to Carrington as they worked out a modification was a default, it was not material under 11 U.S.C.A. § 1307(c)(6) . . . Any default was technical and temporary, and has since been cured to the lender's satisfaction.[92]

While the issue remained under review, the mortgage lender updated its response to state that the loan modification had been finalized, and the court entered the debtor's discharge.[93]

b. ***Plan Modification***

Courts are similarly divided on plan modifications intended to salvage a debtor's § 1328(a) discharge by proposing to cure the post-petition default or to surrender the underlying collateral as a means of providing for the secured claim. Under § 1329(a), plan modification is permitted, "at any time after confirmation of the plan but before completion of payments under such plan."[94] Although arguably, according to the majority view, payments under the plan are not complete if the direct payments are in default, § 1329(c) adds a further limitation that a "plan modified under this section may not provide for payments over a period that expires after the applicable commitment period . . . unless the court, for cause, approves a longer period, but the court may not approve a pe-

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modify the confirmed plan to account for the approved loan modification that cured the post-petition arrearages.").

[90] In re Diggins, 561 B.R. at 784.

[91] 561 B.R. at 787.

[92] 561 B.R. at 787.

[93] 561 B.R. at 787–88.

[94] 11 U.S.C.A. § 1329(a).

riod that expires after five years after such time."[95] Mindful of these limitations, the court in *In re Coughlin* allowed modification of the debtor's plan because she filed for the modification prior to her final payment to the trustee and prior to the conclusion of the 60th month of her plan.[96] The court, however, admonished the debtor for waiting over 18 month after ceasing mortgage payments to file an amended plan to surrender the property and bring the matter to the court's attention.[97]

c. ***Cure of Default***

Even when permitting the debtor to cure the default by lump sum or catch up payments, some courts require such resolution of the default to occur prior to the end of the plan's term.[98] Notwithstanding the conclusion of the plan's term, the court in *In re Cherry*, however, delayed entry of discharge and gave the debtors 30 days to cure their default in direct payments.[99] Other courts find greater flexibility for cure under the circumstances at the end of the case. The court in *In re Diggins* found some flexibility for the debtors notwithstanding the five-year limitations of §§ 1322 and 1325 because it concluded that those sections "do not mandate dismissal of a bankruptcy case if a debtor needs a reasonable period of time to cure an unanticipated arrearage incurred during the sixty-month period."[100]

## Part IV- A Minority View Develops

At its core, the majority position with respect to denial of discharge based on a debtor's default in direct payments is premised on the interpretation of the phrase "payments under the plan" to be plain and unambiguous in encompassing all

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[95] 11 U.S.C.A. § 1329(c).

[96] Coughlin, 568 B.R. at 474.

[97] 568 B.R. at 474.

[98] Gonzales, 570 B.R. at 797–798 (The court held that the debtors were entitled to a discharge because they caught up all mortgage payments by month 60 of their plan despite their default at the time of the trustee's filing of a Notice of Completion of Plan payments at month 53).

[99] In re Cherry, 1:10-BK-25318 (Bankr. D. Colo. Jan. 19, 2016) (The court was "loathe" to deny the debtors a discharge based on the failure to make a single payment to one secured creditor.).

[100] Diggins, 561 B.R. at 787–788, citing *In re Handy*, 557 B.R. 625, 628 (Bankr. N.D. Ill. 2016).

payments referred to in the confirmed plan. But is the meaning of the phrase, "payments under the plan" really so clear? In early 2018, one court disagreed and held that a chapter 13 debtor's direct payments on a nonmodifiable, nondischargeable residential mortgage loan, provided for under § 1322(b)(5), are not "payments under the plan" for purposes of § 1328(a).[101] The court in *In re Gibson* further concluded that, "[a] debtor's failure to complete all such direct payments is not grounds to dismiss the case without a discharge," and granted the debtors a "full compliance discharge under section 1328(a)."[102]

In *Gibson*, the chapter 13 trustee sought to block the debtor's discharge and dismiss the case pursuant to § 1307(c)(6), in light of the second mortgage holder's response to the notice of final cure indicating a default of nearly $19,000.00 in postpetition direct payments.[103] The court recognized the weight of authority that had developed finding such default to preclude discharge under § 1328(a) but disagreed that such a mandate was clear from the statute.[104] Finding it plausible that "payments under the plan" could refer to trustee payments alone or both trustee and direct payments, the court deemed the statute ambiguous and ultimately concluded that the debtor's successful completion of all payments to the trustee triggered the entitlement to a full compliance discharge under § 1328(a).[105] Adding weight to the developing minority view, the court in *In re Rivera* followed suit one year later on March 28, 2019, finding dismissal without a discharge for a debtor whose sole offense was a default in post-

[101] Gibson, 582 B.R. at 18 ("In this Court's view, whether direct payments are payments "under the plan" for purposes of section 1328(a) is not discernible from the statutory text. Either interpretation is plausible, meaning the statute is ambiguous. A general policy is recognized favoring resolution of ambiguities in the Bankruptcy Code in favor of debtors and even more so where the provision at issue affects a debtor's right to a discharge.").

[102] 582 B.R. at 24.

[103] 582 B.R. at 18.

[104] 582 B.R. at 18.

[105] 582 B.R. at 23.

petition direct payments to be an "unnecessary draconian result" not supported by the Rules or Code.[106]

### *A. Reasoning of the Minority*

#### 1. *"Payments Under the Plan" Should be Interpreted Consistently in Chapter 13*

The courts following the minority view note that interpreting "payments under the plan" as the plan payments to be paid to the trustee pursuant to the terms of a confirmed plan is consistent with how the Code has been implemented since its inception and how these words are interpreted elsewhere under chapter 13.[107] For example, § 1325(b) requires the plan to provide that all of the debtors' projected disposable income "to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make *payments under the plan*."[108] The phrase "payments under the plan" here clearly refers to the debtor's payments to the trustee, as these payments are calculated on the basis of the debtor's projected disposable income, and are distributed by the trustee to allowed claimants.[109]

In addition, § 1329(a) limits any modification of a plan after confirmation to be filed "before the *completion of payments under such plan*."[110] In the *Gibson* case, Judge Perkins found it "well settled that 'completion of payments' under this provision occurs when the debtor pays to the trustee the full amount required by the confirmed plan."[111] Even the chapter 13 trustee's compensation is tied to a percentage of "payments under the plan."[112] Under § 326(b), the court may allow reasonable compensation "for a trustee's services, payable after the trustee renders such services, not to exceed five percent

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[106] *In re Rivera*, 599 B.R. 335, 347 (Bankr. D. Ariz. 2019). But see, In re Mrdutt, BAP No. NC-17-1256-BTaF at 12 (9th Cir. B.A.P. May 6, 2019) ("While *Gibson* and *Rivera* are thoughtful and well-intentioned decisions, we respectfully disagree.").

[107] Gibson, 582 B.R. at 20; Rivera at 340.

[108] 11 U.S.C.A. § 1325(b) (emphasis added).

[109] Rivera, 599 B.R. at 340.

[110] 11 U.S.C.A. § 1329(a) (emphasis added).

[111] Gibson, 582 B.R. at 20.

[112] 11 U.S.C.A. § 326(b).

upon all *payments under the plan*."[113] In all of these examples, as well as others, the concept of "payments under the plan" refers to the payments to be paid to the trustee by the debtor under the plan, and such interpretation should be understood consistently with § 1328(a) according to the minority view.[114]

### 2. *Rake v. Wade Supports a Distinction Between Payments "provided for by the plan" and "payments under the plan"*

Like the majority, courts in the minority also find support in *Rake v. Wade* for their interpretation of § 1328(a).[115] The *Gibson* court relied on the distinction between two phrases under § 1328(a). Although the phrases may sound similar, they are worded differently and have different purposes: "all payments under the plan" triggers the issuance of a discharge, whereas "provided for by the plan" describes the scope of that discharge. As such, the Code uses these different phrases to describe when a plan is complete and which claims a plan covers. The Supreme Court weighed in on the meaning of "provided for by the plan," construing the words to mean that a plan "makes a provision" for, "deals with," or even "refers to" a claim.[116] According to the *Gibson* court, the words, "under the plan," were "intended to have a narrower effect, allowing for the possibility that not all creditors holding debts provided for by the plan are receiving payments under the plan."[117] If Congress intended for a debtor to complete all payments "provided for by the plan" before receiving a discharge, those words would have been used to trigger the discharge instead of the more limited phrase requiring simply the completion of "payments under the plan." The distinction, according to minority view, indicates that in the context of

[113] 11 U.S.C.A. § 326(b) (emphasis added).

[114] Gibson, 582 B.R. at 20; Rivera, 599 B.R. 989 at 340.

[115] Gibson, 582 B.R. at 19.

[116] 582 B.R. at 20 (citing *Rake v. Wade*, 508 U.S. 464, 474, 113 S. Ct. 2187, 124 L. Ed. 2d 424, 24 Bankr. Ct. Dec. (CRR) 533, 28 Collier Bankr. Cas. 2d (MB) 983, Bankr. L. Rep. (CCH) P 75275 (1993)).

[117] 582 B.R. at 20.

§ 1328(a), payments "under the plan" mean the payments required to be paid to the trustee.[118]

### 3. *Congress Never Intended Discharge to Be Contingent on Direct Payments*

Courts supporting the minority view also point to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 as further support for their interpretation of chapter 13 discharge requirements.[119] As part of those amendments in 2005, Congress added specific language in § 1328(a) to require that the debtor complete all post-petition domestic support obligations and certify the same to the court as a prerequisite to receiving a chapter 13 discharge.[120] Not only does the statute, as amended, clearly require the payment of all post-petition support payments as a condition of discharge, but it also outlines a mechanism for reporting the same to the court and all parties by certification so that the debtor's compliance with the provision and entitlement to relief may be confirmed at the conclusion of the case.[121] Had Congress intended for a debtor's discharge also to be contingent upon the payment of all direct-by-debtor payments, it could have done so in the same manner.[122] Of course, the Code does not require a similar certification, nor has it ever required such.

### 4. *Reading "Payments Under the Plan" to Include Direct Payments Will Result in Disparate Treatment Between Debtors*

Fundamental fairness and the equal application of the law require that similarly situated debtors deserve equal treatment under the applicable provisions of chapter 13 of the Bankruptcy Code.[123] Without a rule requiring verification that all post-petition direct payments have been made, such as the

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[118]Gibson, 582 B.R. at 20; Rivera, 599 B.R. at 340.

[119]582 B.R. at 20; Rivera, 599 B.R. 989 at 344.

[120]Of course, the legislative intent behind this provision is obvious as the Code elevates domestic support obligations to first priority claims.

[121]11 U.S.C.A. § 1328(a).

[122]11 U.S.C.A. § 1328(a).

[123]See, e.g., Charles Seligson, The Code And The Bankruptcy Act, 42 N.Y.U. L. Rev. 292 (1967) ("A cornerstone of the bankruptcy structure is the principle that equal treatment for those similarly situated must be achieved.").

end-of-case domestic support obligation certification of § 1328(a), courts will necessarily deny discharges in an inconsistent manner among debtors.[124] In fact, courts will typically have no knowledge of the status of a direct-pay loan unless a Rule 3002.1 response is filed by the lender. As noted by the recent ABI Commission on Consumer Bankruptcy, there remains confusion around Rule 3002.1, and in practice many cases close without the filing of such a response.[125] Furthermore, other direct-pay creditors, such as lenders for long term car loans, rental properties, or homeowners' associations, have no mechanism for or duty to report post-petition delinquencies to the court.[126]

Accordingly, fairly and consistently applying an interpretation of § 1328(a) to deny discharges equally to all defaulted debtors becomes a difficult task for the courts. Some debtors will receive their discharges while others will make the same three to five years of payments only to have their cases dismissed and face the reinstatement of collections from their creditors. In the absence of the occasional anonymous "tip" phoned in or filed by a concerned but disgruntled associate of the debtor,[127] neither the trustees nor the courts will be privy to information about the status of direct payments other than

[124]Gibson, 582 B.R. at 22.

[125]Rule 3002.1 requires a mortgage creditor with a lien on the debtor's principal residence to respond to a notice filed by the chapter 13 trustee reporting the final cure payment made by the trustee toward the arrearage claim of the creditor. Rule 3002.1(f). In its response to the notice of final cure notice, the mortgage creditor reports whether the loan is current post-petition. Rule 3002.1(g). But see, Final Report of the ABI Commission on Consumer Bankruptcy (2019) at p. 80 ("The intent was both for the trustee to file a notice of final cure in every case containing a mortgage on the debtor's principal residence and for the debtor to have the opportunity to file a notice of final cure if the trustee failed to do so. But, in the experience of the Commission, there are many cases in which neither the trustee nor the debtor files a notice of final cure. Although the rule mandates a response, there are also many cases in which the trustee files a notice of final cure, but the creditor does not file a response or makes an incomplete response. As a result, there are many cases in which the creditor does not report the status of the loan at the end of the case").

[126]Gibson, 582 B.R. at 22.

[127]Consumer debtor lawyers have come to know these "helpful tipsters" as the "ex" factors, that is, ex-spouses, ex-business partners, ex-landlords, etc.

domestic support payments and "cure and maintain" mortgage payments subject to Rule 3002.1.

### 5. *Default in Direct Payments Does Not Warrant Loss of Discharge*

Chapter 13 does not include the same list of "bad acts" found in § 727 that lead to denial of the discharge of a chapter 7 debtor, but similar conduct may result in the revocation of a chapter 13 discharge.[128] Specifically, a chapter 13 debtor's discharge may be revoked if obtained by the debtor through fraud under § 1328(e). This provision, however, involves misconduct and would not typically implicate, of course, a debtor who defaults on a direct payment under the plan.[129] The court in *Rivera* considered the denial of a chapter 13 discharge solely for the debtor's default in direct payments to be a particularly punitive result supported by neither the Code nor the Rules.[130] Congress did not need nor intend to punish debtors with the denial of their entire discharge when they may have simply fallen behind in payments on a car or mortgage during a long chapter 13 plan. Such a severe penalty as the loss of discharge is typically reserved for the most egregious debtor behavior.[131]

Interestingly, the creditors affected by a debtor's default in direct payments would not typically benefit from the denial of the debtor's discharge.[132] The direct payments that a debtor makes in chapter 13 under § 1322(b)(5) are excepted from discharge, and those creditors would not need the extraordinary

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[128] See, e.g., 11 U.S.C.A. § 727(a)(2) to (7) (debtor malfeasance such as concealment, fraud, and false oath).

[129] Gibson, 582 B.R. at 23.

[130] Rivera, 599 B.R. at 347.

[131] Gibson, 582 B.R. at 23.

[132] *In re Starkey*, 2016 WL 3034738, *2 (Bankr. D. D.C. 2016) (unpublished) (Acknowledging that if a claim were viewed as having been provided for under § 1322(b)(5), then § 1328(a)(1) would except the claim from discharge. Under such circumstances, "[i]t would not matter to that creditor whether the debtor receives a discharge, and the lack of payments to that creditor would not be a concern of other creditors. Denying a discharge in that circumstance would seem silly.")

protection offered by the denial of discharge.[133] In fact, such debts are typically secured and nondischargeable, leaving the aggrieved creditor the additional option of enforcing its security agreement in the post-discharge collection of its debt.[134] Denying a discharge of the debtor's other debts could actually harm such a secured creditor, by enlarging the field of creditors competing for the debtor's limited resources.

### *B. Other Remedies Remain Under Minority View*

Notwithstanding their holdings, the *Gibson* and *Rivera* opinions are careful to leave open the possibility, if warranted by the facts of a particular case, of the denial or revocation of a debtor's discharge under chapter 13 when the debtor has defaulted in direct payments to creditors.[135] However, these courts would look to other mechanisms under the Code to address the failings of a debtor in default, "taking into account the debtor's state of mind and the effect on creditors."[136] In her *Rivera* opinion denying the trustee's motion to dismiss, Judge Wanslee was careful to note that she found no evidence or allegation of "gamesmanship, bad faith or other mischief" by the debtor and that "creditors and Chapter 13 trustees may always move to deny a discharge if evidence of wrongdoing, fraud or other grounds exist."[137]

Both *Gibson* and *Rivera* reject an "absolutist view" that § 1328(a) should be interpreted so as to make every uncured default on a direct payment grounds for dismissing the case without a discharge and instead would review appropriate situations on a "case-by-case" basis.[138] Ultimately, these courts in the minority seek to retain some discretion when evaluating a debtor's default in direct payments, and to balance such failing against the loss of a discharge. As one commentator

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[133]Section 1328(a)(1) excepts from a chapter 13 discharge long term debt under § 1322(b)(5). Section 1322(b)(5) permits the debtor to cure arrears and maintain directly those long term secured or unsecured claims on which the last payment due is payable after the final payment due under the plan.

[134]The most common direct-pay creditors are vehicle loans and mortgage loans.

[135]Gibson, 582 B.R. at 23; Rivera, 599 B.R. 989 at 347.

[136]Gibson, 582 B.R. at 23; Rivera, 599 B.R. 989 at 345.

[137]Rivera, 599 B.R. 989 at 347.

[138]Gibson, 582 B.R. at 23; Rivera, 599 B.R. 989 at 345.

explained in reviewing *Rivera*'s rejection of the "absolutist" majority view: "[b]right-line rules are convenient, but they convert judges into robots and deprive them of the ability to be courts of equity."[139] Other remedies do exist under the Code to address a debtor's default in direct payments, including stay relief sought by the aggrieved creditor under § 362(d) or revocation of discharge under § 1328(e) if such discharge was obtained by fraud. Dismissal under § 1307(c)(6) may also be appropriate, if the debtor is in material default in payments and if the trustee or a party in interest raises the issue prior to the completion of payments to the trustee.

## Conclusion

As borne out by the split in the caselaw, the meaning of "payments under the plan" can lead to conflicting interpretations. As Judges Lundin and Brown explained in their treatise on chapter 13 bankruptcy, "[t]he Bankruptcy Code is silent with respect to when the 'completion . . . of all payments under the plan' occurs for purposes of discharge under § 1328(a)."[140] Although the Code may be unclear, historically the words "payments under the plan," as used in § 1328(a), have been understood to mean the debtor's payments to the trustee.[141] Particularly in this context, and consistent with fundamental bankruptcy precepts favoring the resolution of such ambiguities in favor of protecting the debtor's discharge, the minority's position that "payments under the plan" refers to the debtor's payments *paid to the trustee* pursuant to the plan's terms is the most sound.[142]

Critics may argue that any payments a plan provides for a

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[139]Rochelle's Daily Wire, Arizona Judge Grants Discharge Despite Default on Direct-Pay Mortgage, April 8, 2019, https://www.abi.org/newsroom/daily-wire/arizona-judge-grants-discharge-despite-default-on-direct-pay-mortgage.

[140]Keith M. Lundin & William H. Brown, Chapter 13 Bankruptcy, 4th Edition, § 343.1, at ¶ 2, Sec. Rev. July 22, 2004, http://www.Ch13online.com.

[141]Gibson, 582 B.R. at 18 ("While the statutory term, "all payments under the plan" has been in place in section 1328(a) since the Bankruptcy Code became effective in 1978, it had not previously been construed as a basis for dismissal without discharge where direct payments were in arrears.").

[142]582 B.R. at 18, citing *New Neighborhoods, Inc. v. West Virginia Workers' Compensation Fund*, 886 F.2d 714, 719, 19 Bankr. Ct. Dec. (CRR)

debtor to make *in the plan* must also be a payment *under the plan* for purposes of triggering discharge. However, simply concluding that any payment provisions found within the four corners of a plan document are "payments under the plan" for purposes of § 1328(a) oversimplifies the chapter 13 process, ignores rules of statutory interpretation, and fails to recognize how chapter 13 functions. Just because a plan may have provisions that require direct payments by a debtor to a creditor, that does not transform those payments to the "payments under the plan" that ultimately control the total a debtor must pay to complete his chapter 13 plan. Put another way, it is not inconsistent to acknowledge that while a plan may require payments to the trustee and payments to be paid directly to a creditor, only the payments to the trustee are the "payments under the plan" that determine the amount to be paid to receive a discharge.

While chapter 13 offers a debtor a number of benefits in exchange for the commitment of all projected disposable income over a three to five-year period, most chapter 13 debtors are working exclusively toward one goal: the ultimate discharge of their unsecured debts. The fresh start offered by such a discharge "is the essence of modern bankruptcy law."[143] Once a debtor has completed all payments under a plan, Congress has established few hurdles to discharge under chapter 13 other than certifying the payment of domestic support obligations and completing a course in personal financial management.[144]

Perhaps one reason so few final hurdles exist is a recognition of the significant efforts required of a debtor to complete his or her plan over this lengthy three to five-year period in exchange for a discharge. Much of the scrutiny in chapter 13 occurs, as it should, at confirmation, when rigor may be necessary to ensure the protection of the creditors that will be most impacted by the case, such as any secured creditors being crammed down or unsecured creditors promised less than

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1470, Bankr. L. Rep. (CCH) P 73157 (4th Cir. 1989) and *In re Trentadue*, 837 F.3d 743, 749, 76 Collier Bankr. Cas. 2d (MB) 532, Bankr. L. Rep. (CCH) P 83007 (7th Cir. 2016).

[143] H.R. Rep. No. 95-595, at 117 (1977).

[144] 11 U.S.C.A. § 1328(a).

full payment.[145] As such, the conclusion of a plan in chapter 13 becomes more administrative, simply requiring the fulfilment of payments to the trustee and the certification of the limited requirements specifically set forth in the Code.[146] It would not seem logical that at the eleventh hour of a case any default in payments to the very creditors that are not discharged by the bankruptcy and that often have liens that pass through the case unaffected could lead to the denial of the discharge of a debtor.

In chapter 7, the denial of discharge under § 727(a) has been described as "the death penalty of bankruptcy," in part, because any debts of the debtor at that time would suddenly also become nondischargeable in any subsequent chapter 7 case pursuant to § 523(a)(10).[147] Denying a chapter 13 discharge after a debtor spends three to five years of his or her life devoting all disposable income of the household and completing all trustee payments required of a chapter 13 plan is arguably an even harsher sanction as it deprives the debtor of years of effort and his or her family of thousands of dollars of income committed to an ultimately fruitless attempt to rehabilitate financially. Denying a debtor's discharge in the final moments of a long repayment plan for default in direct payments when there is no evidence or allegation of fraud, "gamesmanship, bad faith or other mischief"[148] by the debtor would be a devastating sanction worthy of the moniker, "the death penalty of chapter 13" and certainly a punishment not fitting of the crime.

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[145]See, e.g., § 1325(a) & (b).

[146]See, e.g., the local form certification required for chapter 13 debtors in the U.S. Bankruptcy Court for the Western District of Virginia, Form 4004-1A, Debtor's Certification of Compliance with 11 U.S.C.A. § 1328 (requiring confirmation that the debtor: (1) completed the § 111 personal financial management course, (2) has not received a prior bankruptcy discharge within the time limitations that would preclude discharge of the present case, (3) does not have equity in excess of the statutory amounts noted in § 522(p)(1), (4) is not guilty of a felony described in § 522(q)(1)(A) or liable for a debt of the kind described in § 522(q)(1)(B), and (5) is current in all pre and post-petition domestic support obligations under § 101(14A)).

[147]*In re Hudson*, 420 B.R. 73, 100 (Bankr. N.D. N.Y. 2009), aff'd, Bankr. L. Rep. (CCH) P 81954, 2011 WL 867024 (N.D. N.Y. 2011), citing Levine v. Raymonda (In re Raymonda), No. 99-13523, Adv. Pro. No. 99-91199, slip op. at 4 (Bankr. N.D.N.Y. Feb. 16, 2001).

[148]See Rivera, 599 B.R. 989 at 347.

Chapter 13 debtors are bound by a plan that, by definition, consumes all of their disposable income for three to five years. There is little room for error or for life's unexpected events and expenses. Should such debtors fall behind on any direct payments on the way to completing their plans, negating everything they have worked for and forcing them to start again imposes on them an unfortunate and formidable task neither contemplated by the Code nor warranted under the circumstances. Instead, courts should interpret "payments under the plan" as only the debtor's plan payments to the trustee. Such an interpretation not only follows the historical understanding and application of the words as used throughout chapter 13 but also produces a result that is consistent with concepts of equity and fairness under the Code.


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March 12, 2020

NOTICE TO CLIENTS

We recognize that COVID-19 is a concern for everyone, especially with family, friends, work, travel, and the financial instability we are facing. We are actively monitoring the situation, working with our Courts, the Office of the United States Trustee, and following the latest guidance from the Centers for Disease Control and Prevention (CDC).

We held a firm meeting today to review our emergency plan, policies, and protocol if we are put on quarantine. We are fortunate to already have a technologically advanced office. We can continue to work remotely at the same efficient and effective pace. Our systems are encrypted to ensure the most powerful security measures for our industry. We already operate on cloud-based software. Our telephone system can be accessed from anywhere with Internet service. In addition, our team has worked together for many years. We are a well-oiled machine.

Our office remains open from 8:00 a.m. to 5:00 p.m., Monday through Friday (subject to change). However, some of our most vulnerable clients are elderly and/or those who suffer from serious medical conditions and compromised immune systems. Therefore, we are asking you voluntarily limit your in-person visits to the office. If you must visit the office, we are on a no handshake basis. We are following guidelines for washing hands and using hand sanitizer. We invite you to use the hand sanitizer when you arrive so that we may all do our part to limit the spread of this infectious disease.

Below, we have provided simple options to help you easily communicate with our office:

**SCANNER APP**

1. Providing Documents – you may email your documents to our office. If you do not have a scanner, you may use the free PDF Scanner app on your iPhone or iPad. Here's the link to download the app:

   https://apps.apple.com/us/app/scanner-app-pdf-document-scan/id1040093707

   Do NOT send picture of your documents. For security reasons, our system blocks images as many images contain viruses. We need the documents in **PDF format only**.

2. You may also provide documents via Dropbox. Dropbox is free and easy to use. Just email us the link to share your documents. You may access Dropbox via the internet or by using the Dropbox app.

www.Dropbox.com

We do NOT use Google Drive, OneDrive, or iCloud.

**PAYMENTS**

3. Payments – You may continue to make payments on your account. We can accept debit card payments via phone. If someone else is paying for you and wishes to use a credit card they may also pay by phone. However, there's a much more convenient way to pay by using our encrypted and highly secure payment provider: LawPay. LawPay has been approved by nearly State Bar in the country. You may use a debit card, e-check, or credit card by clicking on the link below:

   https://secure.lawpay.com/pages/jdolinglawpc/trust

   We receive immediate notification of all payments.

**EMAIL INSTEAD OF U.S. MAIL**

4. We are temporarily suspending the use of U.S. Mail. Anything we normally send to you via U.S. Mail will now be sent via E-Mail. Please check your email frequently to stay informed of updates about your case. In addition, please limit use of U.S. Mail. We do not know when or if mail services may cease. We do not want to miss out on receiving items of importance from you.

**E-FILE**

5. We have been electronically filing bankruptcy cases since 2003. E-filing is nothing new to us or to our court. We will continue to e-file our cases, motions, and related pleadings. This option will not be affected by a quarantine unless there is intermittent internet service, which is unlikely.

**HEARINGS**

6. The U.S. Bankruptcy Court for the Central District of California, and the U.S. Trustee's Office for Region 16 (our Region), are considering telephonic appearances for all hearings. However, neither has taken a formal position. Your appearance at your hearing will remain mandatory unless we are informed otherwise. However, if you are ill or experiencing flu-like symptoms communicate that to our office so we can seek appropriate relief. Do NOT travel or appear at your hearing if you are feeling ill. We want to protect you and those around you. We do not want to take any actions that contribute to the spread of Covid-19.

**CREDIT COUNSELING**

7. All credit counseling requirements remain in effect. Credit counseling may be completed online and therefore, has not been affected by the Covid-19 pandemic. We will tell you when and where to take your credit counseling. Do NOT do the credit counseling in advance because the certificates expire. We do not want you paying for the courses twice or wasting time taking it more than once. In addition, it must be completed through a Department of Justice approved provider. Many scammers claim to be DOJ approved and are not. Please work with us to protect your personal data.

**HELPFUL RESOURCES**

8. Finally, if you have not visited our website, please take a moment to do so. We have many helpful links and information. Please click on the link to our resources page:

   https://www.jdl.law/resources/

9. If you need more information about Covid-19, please looks at these official links:

   Centers for Disease Control & Prevention (CDC):
   https://www.cdc.gov/coronavirus/2019-ncov/index.html

   World Health Organization (WHO):
   https://www.who.int/health-topics/coronavirus

   California Department of Public Health:
   https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/nCOV2019.aspx

   Government Response to Coronavirus, Covid-19:
   https://www.usa.gov/coronavirus

**CONCLUSION**

We will continue to monitor the situation and adhere to the latest guidance from the CDC and World Health Organization (WHO). We're here to assist you through the bankruptcy process. Please contact us if you have questions or if your financial circumstances have changed. We wish you and your family much health, happiness, and peace.

Best Regards,

**J. DOLING LAW, PC**

*/s/ Jenny L. Doling*

Jenny L. Doling, Esq.
Certified Bankruptcy Specialist

**SEC. 1113. BANKRUPTCY.**

(a) SMALL BUSINESS DEBTOR REORGANIZATION.—

(1) IN GENERAL.—Section 1182(1) of title 11, United States Code, is amended to read as follows:

"(1) DEBTOR.—The term 'debtor'—

"(A) subject to subparagraph (B), means a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning single asset real estate) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than $7,500,000 (excluding debts owed to 1 or more affiliates or insiders) not less than 50 percent of which arose from the commercial or business activities of the debtor; and

"(B) does not include—

"(i) any member of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than $7,500,000 (excluding debt owed to 1 or more affiliates or insiders);

"(ii) any debtor that is a corporation subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o(d)); or

"(iii) any debtor that is an affiliate of an issuer, as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c).".

(2) APPLICABILITY OF CHAPTERS.—Section 103(i) of title 11, United States Code, is amended by striking "small business debtor" and inserting "debtor (as defined in section 1182)".

(3) APPLICATION OF AMENDMENT.—The amendment made by paragraph (1) shall apply only with respect to cases commenced under title 11, United States Code, on or after the date of enactment of this Act.

(4) TECHNICAL CORRECTIONS.—

(A) DEFINITION OF SMALL BUSINESS DEBTOR.—Section 101(51D)(B)(iii) of title 11, United States Code, is amended to read as follows:

"(iii) any debtor that is an affiliate of an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)).".

(B) UNCLAIMED PROPERTY.—Section 347(b) of title 11, United States Code, is amended by striking "1194" and inserting "1191".

(5) SUNSET.—On the date that is 1 year after the date of enactment of this Act, section 1182(1) of title 11, United States Code, is amended to read as follows:

"(1) DEBTOR.—The term 'debtor' means a small business debtor.".

(b) BANKRUPTCY RELIEF.—

(1) IN GENERAL.—

(A) EXCLUSION FROM CURRENT MONTHLY INCOME.—Section 101(10A)(B)(ii) of title 11, United States Code, is amended—

(i) in subclause (III), by striking "; and" and inserting a semicolon;

(ii) in subclause (IV), by striking the period at the end and inserting "; and"; and

(iii) by adding at the end the following:

"(V) Payments made under Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID–19).".

(B) CONFIRMATION OF PLAN.—Section 1325(b)(2) of title 11, United States Code, is amended by inserting "payments made under Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID–19)," after "other than".

(C) MODIFICATION OF PLAN AFTER CONFIRMATION.—Section 1329 of title 11, United States Code, is amended by adding at end the following:

"(d) (1) Subject to paragraph (3), for a plan confirmed prior to the date of enactment of this subsection, the plan may be modified upon the request of the debtor if—

"(A) the debtor is experiencing or has experienced a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID–19) pandemic; and

"(B) the modification is approved after notice and a hearing.

"(2) A plan modified under paragraph (1) may not provide for payments over a period that expires more than 7 years after the time that the first payment under the original confirmed plan was due.

"(3) Sections 1322(a), 1322(b), 1323(c), and the requirements of section 1325(a) shall apply to any modification under paragraph (1).".

(D) APPLICABILITY.—

(i) The amendments made by subparagraphs (A) and (B) shall apply to any case commenced before, on, or after the date of enactment of this Act.

(ii) The amendment made by subparagraph (C) shall apply to any case for which a plan has been confirmed under section 1325 of title 11, United States Code, before the date of enactment of this Act.

(2) SUNSET.—

(A) IN GENERAL.—

(i) EXCLUSION FROM CURRENT MONTHLY INCOME.—Section 101(10A)(B)(ii) of title 11, United States Code, is amended—

(I) in subclause (III), by striking the semicolon at the end and inserting "; and";

(II) in subclause (IV), by striking "; and" and inserting a period; and

(III) by striking subclause (V).

(ii) CONFIRMATION OF PLAN.—Section 1325(b)(2) of title 11, United States Code, is amended by striking "payments made under Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID–19),".

(iii) MODIFICATION OF PLAN AFTER CONFIRMATION.—Section 1329 of title 11, United States Code, is amended by striking subsection (d).

(B) EFFECTIVE DATE.—The amendments made by subparagraph (A) shall take effect on the date that is 1 year after the date of enactment of this Act.

The economic harm caused by the COVID-19 pandemic will soon translate into pervasive credit reporting harm, as millions of consumers become unable to pay their credit obligations, and creditors, debt collectors, and others furnish negative information about them to the nationwide consumer reporting agencies (CRAs). This article explains how consumers can protect their credit reports by enforcing the very modest protections offered by the CARES Act.

## Application of the CARES Act Credit Reporting Provision

The Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136 (Mar. 27, 2020), at **section 4021** [1], amends the Fair Credit Reporting Act (FCRA). A new subparagraph (F) is added to 15 U.S.C. § 1681s-2(a)(1).

This new FCRA subparagraph provides protections only if a creditor approves a consumer for an "accommodation." An accommodation is an agreement for a forbearance, a payment deferral, a partial payment agreement, a loan modification, or "any other assistance or relief granted to a consumer who is affected by the coronavirus disease 2019 (COVID-19) pandemic during the covered period." 15 U.S.C. § 1681s-2(a)(1(F)(i)(I). The covered period extends to 120 days after the termination of the national emergency declared by the President over COVID-19. 15 U.S.C. § 1681s-2(a)(1(F)(i)(II).

Significantly, any accommodation qualifies. It need not be one required under other CARES Act provisions. An accommodation should include one required by state legislation or a state emergency order. An accommodation also includes an agreement provided by a creditor voluntarily. An accommodation can relate to a mortgage loan, credit card account, a car loan, or any other agreement altering payment obligations.

On the other hand, the CARES Act offers no protections for the millions of Americans who become delinquent on credit obligations and do not obtain an accommodation from their creditor. Government-mandated accommodations are generally limited to certain home mortgage and student loans and rental agreements, thus leaving accommodations for credit card and auto loans to the discretion of the lender. Even with mortgages forbearances, consumers typically must apply for them, yet consumers are having difficulty reaching their creditors or servicers that are overwhelmed with massive numbers of calls.

Nor do the protections provide practical relief to debt collection accounts, where a loan has already been turned over to a debt collection agency and thus considered inherently negative. For further discussion of the limits of the CARES Act credit reporting provision, see NCLC's Policy Brief: ***Protecting Credit Reports During the Covid-19 Crisis*** [2] (April 2020).

## New Credit Reporting Rights Under the CARES Act

If a consumer is able to obtain a covered accommodation, the CARES Act offers the following protections:

- If the consumer was current on an obligation at the time of an accommodation approval, the account must be reported to CRAs as current if the consumer is complying with the accommodation agreement. 15 U.S.C. § 1681s-2(a)(1(F)(ii)(I).
- If the consumer was already delinquent when the consumer received the accommodation, but complies with the accommodation agreement, the creditor or other furnisher must report the same delinquency status during the accommodation period. 15 U.S.C. § 1681s-2(a)(1(F)(ii)(II)(aa).
- If a delinquent consumer manages to catch up during the accommodation period, the creditor or other furnisher must then report the consumer as current. 15 U.S.C. § 1681s-2(a)(1(F)(ii)(II)(bb).

CARES Act credit reporting protections do not apply to accounts that have been charged off. 15 U.S.C. § 1681s-2(a)(1(F)(iii). An account is charged off when it is moved from profit to loss, occurring at 120 days past due for closed-end loans and 180 days past due for credit cards. *See* **NCLC *Fair Credit Reporting* § 5.2.3.4.2** [3].

These basic CARES Act rights translate into the following technical implementation, as guided by the standardized Metro 2 format developed by the Consumer Data Industry Association. This Metro 2 format is explained at **NCLC's *Fair Credit Reporting* § 6.3.2** [4].

When a creditor reports accounts as "current," the Metro 2 reporting format includes both a payment history field and an account status field. If the CARES Act requires the account to be reported as current, one would assume that both fields should be reported as current, i.e., the payment history field should be reported as not being past due while the account status field

should be reported as "current." *See* **NCLC's *Fair Credit Reporting* § 6.3.3.3.4** [5].

In addition, the Metro 2 format considers any payment that is less than 30 days late to be "current." The same should be true for purposes of the CARES Act credit reporting provision. *See* **NCLC's *Fair Credit Reporting* § 6.3.3.7** [6].

For delinquent accounts, the CARES Act credit reporting provision requires that the furnisher "maintain the delinquent status." This should be the same delinquency status that was reported immediately before the accommodation, e.g., if an account was 30 days delinquent when a borrower is approved for a forbearance, the account should continue to be reported as 30 days delinquent.

## Even the Credit Reporting Industry Expects Problems with Implementation of These New Rights

One can expect a significant number of errors and creditor noncompliance with these new credit reporting rights, given the large volume of accommodations that creditors are processing. In addition, creditors may be onboarding large numbers of new customer service staff who may be inexperienced in dealing with credit reporting issues. Even the nationwide CRAs expect problems, as an Equifax representative **openly admitted** [7] "It will take a moment to figure out how to execute against what's been stipulated [by the CARES Act], so something's bound to slip through the cracks."

## Consumer Enforcement of the CARES Act Credit Reporting Provision

It is now free to check frequently a consumer's credit report for violations of the CARES Act credit reporting provision. The major three credit reporting agencies, Equifax, TransUnion, and Experian, are offering **free weekly credit reports** [8] through April 2021.

Once a violation is spotted, private enforcement is a two-step process. The CARES Act credit reporting provision is codified in the FCRA at 15 U.S.C. § 1681s-2(a). Consumers cannot privately enforce that FCRA provision because 15 U.S.C. § 1681s-2(c) excludes § 1681s-2(a) from the FCRA's private liability provisions. *See* **NCLC's *Fair Credit Reporting* § 6.1.2** [9].

Nevertheless, violations of the CARES Act protections will be privately enforceable under the FCRA once a consumer lodges a dispute with a CRA, thus triggering a furnisher's reinvestigation duties under 15 U.S.C. § 1681s-2(b). Section 1681s-2(b) as opposed to 1681s-2(a) is privately enforceable. *See* **NCLC's *Fair Credit Reporting* § 6.10** [9].

The CARES Act provision is considered *in pari materia* with the standard for accuracy under the reinvestigation requirements of CRA-referred disputes under section 1681s-2(b). Therefore, the CARES Act provision informs those reinvestigation duties.

Indeed, several courts note the interplay between furnisher duties found in subsections 1681s-2(a) and 1681s-2(b). *See* **NCLC's *Fair Credit Reporting* § 6.10.5** [10]. Most notably is the Fourth Circuit in ***Saunders v. Branch Banking & Trust Co. of Virginia*** [11], 526 F.3d 142, 150 (4th Cir. 2008):

> The first subsection, § 1681s-2(a), provides that furnishers have a general duty to provide accurate and complete information; the next subsection, § 1681s-2(b), imposes an obligation to review the previously disclosed information and report whether it was "incomplete or inaccurate" upon receipt of a notice of dispute from a CRA. The second subsection thus requires furnishers to review their prior report for accuracy and completeness; it does not set forth specific requirements as to what information must be reported, because these requirements have already been set forth in the first subsection.

As stated by one court summarizing the *Saunders* jurisprudence, "If a furnisher has a duty to report information under the subsection (a) standard, that information must also be covered by the subsection (b) duty to investigate and correct 'incomplete or inaccurate' information." ***Shames-Yeakel v. Citizens Fin. Bank*** [12], 677 F. Supp. 2d 994, 1005 (N.D. Ill. 2009).

## Special Enforcement Rights for California Consumers

California residents have the option to enforce the CARES Act credit reporting provisions *before* raising a dispute. Unlike other states (with the exception of Massachusetts), the FCRA does not preempt the California credit reporting statute's furnisher accuracy requirement. *See* **NCLC's *Fair Credit Reporting* § 10.7.3.2.2** [13]. The California statute does not require a consumer to dispute a report before suing a furnisher for inaccuracy.

A number of California decisions hold that courts should look to the federal FCRA when interpreting California's furnisher accuracy requirements. *See, e.g.*, ***Carvalho v. Equifax Info. Servs., L.L.C.*** [14], 629 F.3d 876, 889 (9th Cir. 2010) (because the California FCRA "is substantially based on the Federal Fair Credit Reporting Act, judicial interpretation of the federal provisions is persuasive authority and entitled to substantial weight when interpreting the California provisions").

## For more information

Description of the Metro 2 format: See **NCLC's *Fair Credit Reporting* § 6.3.2** [4].

Litigation against furnishers in reinvestigation cases: **NCLC's *Fair Credit Reporting* § 6.10** [15].

NCLC's Policy Brief: ***Protecting Credit Reports During the Covid-19 Crisis*** [2] (April 2020).

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**About Author:**
**Chi Chi Wu** has been a staff attorney at NCLC for over a decade. Chi Chi focuses on consumer credit issues at NCLC, including legislative, administrative, and other advocacy. Chi Chi's specialties include fair credit reporting, credit cards, refund anticipation loans, and medical debt. Before joining NCLC, Chi Chi worked in the Consumer Protection Division at the Massachusetts Attorney General's office and the Asian Outreach Unit of Greater Boston Legal Services. Chi Chi is a graduate of Harvard Law School and The Johns Hopkins University.

Chi Chi is co-author of the legal manuals ***Fair Credit Reporting*** [16] and ***Collection Actions*** [17], and a contributing author to ***Consumer Credit Regulation*** [18] and ***Truth in Lending*** [19].



**Links**
[1] https://library.nclc.org/sec-4021-credit-protection-during-covid–19
[2] https://bit.ly/protect-covid-credit-rpt

[3] https://library.nclc.org/nclc/link/FCR.05.02.03.04.02
[4] https://library.nclc.org/nclc/link/FCR.06.03.02
[5] https://library.nclc.org/nclc/link/FCR.06.03.03.03.04
[6] https://library.nclc.org/nclc/link/FCR.06.03.03.07
[7] https://www.businessinsider.com/personal-finance/check-credit-report-free-weekly-coronavirus-2020-4
[8] https://www.annualcreditreport.com/index.action
[9] https://library.nclc.org/nclc/link/FCR.06.01.02
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