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Consumer: Chapter 13 Stressors: Appreciation, Inflation, Budgets and Plan Length

Hon. Robert D. Berger
U.S. Bankruptcy Court (D. Kan.) | Kansas City

Gregory A. Burrell
Chapter 13 Trustee (D. Minn.) | Minneapolis

Kristina S. Crump
Coons and Crump, LLC | Lawrence, Kan.

CONCURRENT SESSION

2022

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KANSAS CITY, MISSOURI

OCTOBER 6-7, 2022

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- Chapter 13 Stressors: Appreciation, Inflation, Budgets, and Plan Length
- Listen to a Judge, Chapter 13 Trustee, and bankruptcy attorney discuss how to help Chapter 13 debtors succeed in Chapter 13 despite increasing asset values, increased loan balances, and increased expenses. Issues discussed will include creating feasible plans with debtors' tighter budgets, instilling flexibility in the bankruptcy system, and dealing with asset appreciation. The panel will also discuss options for cases that are running long in light of the *Kinney* decision and other issues that arise during the case.

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- Panelists
  - Honorable Robert D. Berger, Kansas
  - Gregory A. Burrell, Chapter 13 Trustee, Minnesota
  - Kristina Crump, Coons & Crump, LLC, Kansas & Missouri

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- Materials
  - Practice Points (Kinney, Valuation, Budget)
  - *In re Baker*, 620 B.R. 655 (Bankr. D. CO 2020)
  - *In re Kinney*, 5 F.4th 1136 (10th Cir. 2021)
  - Brief for Solicitor General Amicus Curiae, *In re Kinney*, 5 F.4th 1136 (10th Cir. 2021), *petition for cert. filed,* (U.S. August 2022)(No. 21-599)

KINNEY ISSUES – PRACTICE POINTS

- **Hardship Discharge**
  - 1328 (b)
    - Debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable
    - Liquidation test has been met (non-exempt equity)
    - Modification is not practicable
  - Discharges only unsecured debt
- **Conversion**
  - Eligibility (prior cases and income)
  - New debt
  - Secured debt paid through Chapter 13
  - Non-exempt assets
  - Good Faith and after acquired property
- **Dismiss/Refile**
  - New debt
  - Change in income/circumstances
- **Close without discharge**
  - Interest on secured debt will be recalculated

Points to consider

- **"Under the Plan"**
  - 5-year limitation
  - Confirmed vs. non-confirmed plan
  - Does the Plan begin at filing or at confirmation
  - Include language in the Plan that direct payments such as to a mortgage company or vehicle lender are not considered "payments under the plan" for 1328 purposes.
- **Material Default**
  - There is no definition in the code
  - Mere failure to make plan payments is not automatically a material default and a court must consider the totality of the circumstances.
    - From Solicitor General Brief: "*When determining if failure to make payments is a material default, a court may consider a variety of factors, including (1) "why such payments were not made," In re Howell, 76 B.R. 793, 795 (Bankr. D. Or. 1986); (2) whether the debtor "intentional[ly] fail[ed] to make payments at a time when the debtor was financially able to do so," ibid.; (3) "whether the failure of performance will result in creditors receiving less than they would have [otherwise] received," In re Jahanian, No. 08-10030, 2009 WL 3233161, at *3 (Bankr. E.D. Va. Sept. 28, 2009); and (4) whether the debtor "will be able to make up the*

*missing payments over the remaining term of the Plan," In re Wilson, No. 04- 29916, 2008 WL 4865587, at *1 (Bankr. D. Md. Nov. 7, 2008).*

- Define it yourself in the Plan?
  - If at the end of the five-year plan, regardless of ACP, the debtor has completed 95% or more of the required payments, the plan payment arrearage shall not be considered a material default until three additional months have passed and the payments remain incomplete.

- **Plan Language**
  - Can you put language in the Plan itself on when the payments are "under the plan" for Kinney purposes?
  - Can you identify what material default is?
- **Payments that are not part of the original Plan**
  - Voluntary payments to non-priority non-dischargeable creditors (e.g. IRS)
- **Abatements and plan length**
  - Language that would suspend the plan as opposed to the plan running at zero payment.

VALUATION ISSUES – PRACTICE POINTS

<u>How can I as debtor's counsel help my clients afford a Chapter 13 when plan payments increase due to rising values while available income decreases due to increase in living expenses</u>.

Vehicles

- **Exemptions**
  - $20,000 in KS
  - $3,000 in MO
  - $4,450 Federal
- **Online Tools**
  - KBB Private Party Value
    - https://www.kbb.com/whats-my-car-worth/
  - NADA
    - https://www.nada.com/
  - Facebook Market Place
  - Carvana, CarMax
    - Tools to get an instant purchase offer
- **Ask more questions about vehicle damage**
  - Mechanical damage
  - Ask for pictures/specifics/estimates
- **Appraisals**
  - Get a full copy
  - Body Damage/Insurance Appraisals/Mechanical work needed

Houses

- **Exemptions**
  - Unlimited exemption in KS
  - $15,000 in Missouri
- **Careful Valuation**
  - Work/repairs needed
  - Ask for pictures/estimates
- **Zillow**
  - https://www.zillow.com/how-much-is-my-home-worth/
- **BofA Valuation Tool**
  - https://homevaluerealestatecenter.bankofamerica.com/
- **County Appraisals**
  - Most counties in KS have an online tool
- **Real Estate Appraisals**
- **Do not assume your client knows what their house or their vehicle is worth.**

BUDGET ISSUES – PRACTICE POINTS

General Observations

- Anticipate yearly increases
- Some clients do not know what is "appropriate" in their situation
- Unlike regular budgets where you might look back to see what the clients were spending; you should look forward and help plan as many expenses have been suppressed (clients not buying medication, not buying new shoes, not getting vehicle repairs, etc).
- Many people think in terms of "weekly", "bi-weekly" spending – you have to help with monthly figures.

Fixed Expenses

- **Rent/mortgage**
  - Renter's insurance – might not have had money to pay before filing
- **Car insurance**
  - Always discuss car insurance especially if there is a lien.
- **Utilities**
  - Even payment plans are almost a must– especially if utilities are included in the case.

Variable Expenses

- **Food & Housekeeping supplies**
  - $250 - $350/per person for food
  - Dietary needs (medical needs, cultural/religious needs)
  - Food Deserts
  - Eating out

- School Lunches
- **Transportation Expenses**
  - Discuss commuting distance and plan for expenses
  - Ask how much it costs to fill up the car and how often they fill up.
  - Vehicle maintenance
  - Tires
  - Gas price fluctuations
  - Vehicle repairs
- **Clothing**
  - $150/per person/per month
  - Depends on career (construction workers, nurses, executives have unique needs)
  - Younger children
- **Personal Care**
  - $50-150/per person
  - Medical needs
- **Medical**
  - Prescriptions
  - Vitamins
  - Doctor visits
  - Are you meeting deductible every year?
  - Ask questions – do your clients have yearly scans or follow up work that needs to be pro-rated in the budget.
- **Student Loans**
  - Income Driven Repayment Programs
- **Emergencies**
  - Build in maintenance and miscellaneous expenses.
- **Entertainment**
  - What is appropriate?
  - Gambling is not entertainment
- **Retirement**
  - If there is money available, start or continue with retirement contributions

Bankruptcy Case No. 17-14041 EEB
United States Bankruptcy Court, D. Colorado.

In re Baker

620 B.R. 655 (Bankr. D. Colo. 2020)
Decided Sep 29, 2020

Bankruptcy Case No. 17-14041 EEB

2020-09-29

IN RE: Robert William BAKER, Debtor.

Stephen E. Berken, Sean Cloyes, Denver, CO, for Debtor. Chapter 13 Trustee-Goodman, Adam Goodman, Denver, CO, for Trustee Adam M. Goodman.

Elizabeth E. Brown, Bankruptcy Judge

656 *656

Stephen E. Berken, Sean Cloyes, Denver, CO, for Debtor.

Chapter 13 Trustee-Goodman, Adam Goodman, Denver, CO, for Trustee Adam M. Goodman.

ORDER ON REQUESTED PLAN MODIFICATIONS

Elizabeth E. Brown, Bankruptcy Judge

THIS MATTER is before the Court on two competing motions to modify the Debtor's chapter 13 plan, one filed by the Debtor and one by the chapter 13 trustee (the "Trustee"). Post-confirmation, the Debtor sold his residence and realized net sales proceeds in excess of Colorado's homestead exemption. The Debtor's request to modify seeks to eliminate any further payments to the mortgage holder, whose debt the Debtor repaid from the sales proceeds. The Trustee's request would require the Debtor to segregate the homestead proceeds and agree to restrict their use to only the purchase of a new home, as well as the immediate turnover of the non-exempt portion and the eventual turnover of the exempt proceeds in the event the Debtor does not purchase a new home within two years of the sale date.

To rule on the competing motions, the Court must decide whether the sale proceeds, or any portion of them, constitute post-confirmation property that vested in the Debtor (unfettered by any bankruptcy restrictions) or whether they remain
657 property *657 of the estate (subject to restricted use). While this might appear to be a narrow question, answering it requires the Court to interpret several foundational chapter 13 statutes. Some might argue that these statutes are vague and even contradictory. One thing is certain, court interpretations of them are widely divergent.

I. BACKGROUND

Before engaging in this legal discourse, there are two aspects of this matter that require some background, one involves the value of the Debtor's home and the other applicable state law. When the Debtor filed his chapter 13 case on May 3, 2017, he owned a home he valued at $230,000, encumbered by a first deed of trust in the amount of $196,131. He claimed an exemption for the $34,131 of equity under Colorado's $75,000 homestead exemption statute.[1] But when he sold his home post-confirmation, he realized $86,000 in net sales proceeds, only $75,000 of which is exempt. The Trustee has not disputed or requested an evidentiary hearing on whether the Debtor improperly scheduled the petition date value of his home or whether the increase reflects post-confirmation changes, such as reduction of the mortgage balance or changes in the residential marketplace. In the absence of any challenge to the Debtor's original valuation, the Court assumes the increase in value reflects a post-confirmation change.

[1] Colorado's homestead exemption statute is Colo. Rev. Stat. § 38-41-201. The Debtor has acknowledged that he incorrectly cited Colo. Rev. Stat. § 38-41-204 as the source of his homestead exemption. This statute governs the homestead exemption rights of surviving spouses or children of deceased homeowners. However, no party objected to the Debtor's homestead exemption within the time prescribed by Fed. R. Bankr. P. 4003(b) and as such the Debtor's claim of a $75,000 homestead exemption is not subject to challenge. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 643-44, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992).

Second, according to Colorado law, proceeds up to the amount of the applicable homestead exemption remain exempt:

> for a period of two years after such sale if the person entitled to such exemption keeps the exempted proceeds separate and apart from other moneys so that the same may be always identified. If the person receiving such proceeds uses said proceeds in the acquisition of other property for a home, there shall be carried over to the new property the same homestead exemption to which the owner was entitled on the property sold.

Colo. Rev. Stat. § 38-41-207. In this case, the Debtor's two-year reinvestment period will expire on May 17, 2021.

II. DISCUSSION

The Trustee's argument is straight forward. The Debtor can only exempt $75,000. Therefore, the additional $11,000 should be immediately contributed toward the repayment of creditors. The remaining $75,000 only retains its exempt character if the Debtor uses it to buy a new home within two years. Consequently, he should not be able to spend it on anything else. If he loses his exemption, then all the funds must go toward repaying creditors.

This argument requires the Court to interpret three pivotal statutes: 11 U.S.C. §§ 1306, 1327, and 1329.[2] Section 1306 delineates what is property of the estate in a chapter 13 case. In addition to the property specified in § 541, the chapter 13 estate
658 includes all property the debtor "acquires *658 after the commencement of the case but before the case is closed, dismissed, or converted...." 11 U.S.C. § 1306(a)(1). Section 1327 describes the legal effect of plan confirmation. In subsection (b), it provides that, unless the plan states otherwise, "confirmation ... vests all of the property of the estate in the debtor." *Id.* § 1327(b). These two statutes appear to be contradictory. Is property acquired post-confirmation property of the estate under § 1306(a)(1) that must be contributed toward plan obligations? Or is it property of the debtor following confirmation as provided by § 1327(b) and, therefore, it is no longer subject to the claims of his creditors, except as provided in the plan?

[2] Unless otherwise specified, all further references to "§" or "section" are to the Bankruptcy Code, Title 11, United States Code.

Finally, § 1329 sets forth the requirements for any post-confirmation modification of a plan. It allows for increases and decreases in plan payments but does not specify what constitutes cause for a change in payments. Is it limited to changes in income? Or does a sale of an asset provide grounds for an increase? It also specifies that any modification must satisfy certain confirmation standards, such as the best-interest-of-creditors test (the "BIC"). *Id.* § 1329(b) (incorporating § 1325(a)(4)). This test requires a showing that the creditors will receive under the modified plan at least as much as they would from a chapter 7 liquidation. *Id.* § 1325(a)(4). But § 1329(b) does not specify the measuring date on which the BIC test must be applied in a modification context. Should the court measure the hypothetical chapter 7 distribution on the date of the proposed modification or does it remain the date of the plan's effective date as specified in § 1325(a)(4)? The value of the debtor's assets, and even the existence of the assets themselves, may differ significantly on these two dates.

Congress may have left these statutes intentionally vague to allow courts greater flexibility in interpretation but, as a result, courts are sharply divided on how they have filled these gaps. When applicable bankruptcy statutes are subject to varying interpretations, this Court always begins by stepping back and looking at the Bankruptcy Code as a whole. It has provided two different methods by which individual debtors may restructure their finances and obtain a fresh start, one in chapter 7 and the other in chapter 13.[3] In chapter 7, the debtor parts with his non-exempt property but keeps his future income and, in exchange, he receives a discharge of his debts. In chapter 13, the debtor retains his property, but to achieve a discharge he agrees to contribute all his disposable income over the life of the plan, which payments must amount to at least as much as his creditors would receive in a chapter 7 liquidation. Thus, the two bargains struck are fundamentally different. David Gray Carlson, *Modified Plans of Reorganization and the Basic Chapter 13 Bargain* , 83 Am. Bankr. L.J. 585 (2009) ("Carlson"). Either the debtor trades his property or his income for his discharge, but not both. Any interpretation of these chapter 13 statutes must not attempt to blur this fundamental premise. It must recognize that, in chapter 13, the debtor's plan payments substitute for his property, leaving the debtor with the freedom "to treat his ... property as his ... own without court intervention at every turn." *Yoon v. Krick (In re Krick)* , 373 B.R. 593, 607 (Bankr.
659 N.D. Ind. 2007).*659 Another bedrock principle of chapter 13 is that a debtor must make his best efforts to repay creditors with his future income. However, often debtors' circumstances change over the three-to-five-year terms of their plans, whether for better or worse. The Bankruptcy Code anticipates this. In § 1329(a), the Code provides for modification of a confirmed plan to request four types of changes: (1) an increase or decrease in payments (§ 1329(a)(1)); (2) an extension or reduction in the time for payments (§ 1329(a)(2)), provided that any extension does not cause the plan to exceed five years in length (§ 1329(c)) or seven years in length if the debtor has experienced material financial hardship due to the COVID-19 pandemic (§ 1329(d)); (3) an alteration in a creditor's distribution rights under the plan to account for non-plan payments the creditor has received (§ 1329(a)(3)); and (4) a decrease in payments necessary to allow the debtor to acquire health insurance (§ 1329(a)(4)).

[3] Individuals may also file a chapter 11 petition, but few do so because of the greater cost and complexity of such a proceeding. Those who do usually do so because they are not eligible for chapter 13. *See* 11 U.S.C. § 109(e). In chapter 11, as in chapter 13, individual debtors are required to contribute their disposable income over the life of their plans. *Id.* §§ 1115(a)(2), 1129(a)(15).

This statute not only limits the types of permissible modifications, but also standing to request a modification. Requests for post-confirmation modification can be made only by the debtor, the chapter 13 trustee, or the holder of an allowed unsecured claim. *Id.* § 1329(a). And they must make their requests before the completion of payments under the confirmed plan. *Id.*

Before approval, the court must determine whether, with the proposed modification, the plan will continue to satisfy many of the original confirmation requirements. In § 1329(b), the Code lists several sections of chapter 13 that "apply to any modification." They are: §§ 1322(a), 1322(b), 1323(c) and "the requirements of section 1325(a)." *Id.* § 1329(b)(1). By failing to place restrictions on the use of the sale proceeds, the Trustee asserts that the Debtor's proposed modification does not meet two of the requirements of § 1325(a): (1) the BIC test of § 1325(a)(4) and (2) the good faith requirement of § 1325(a)(3).

A. What is the Measuring Date for the BIC Test under § 1329 ?

In the confirmation context, § 1325(a)(4) clearly specifies that the BIC test is to be applied "as of the effective date of the plan." However, § 1329(b) does not state its measuring date. Given its silence in this regard, many courts assume that they should reapply it as of the modification date. Keith M. Lundin, *Lundin on Chapter 13* , § 126.2, at ¶ 11 (September 27, 2020 update) ("Lundin"). The leading case for this view is *In re Barbosa* , 236 B.R. 540 (Bankr. D. Mass. 1999), *aff'd sub nom. Barbosa v. Solomon* , 243 B.R. 562 (D. Mass 2000), *aff'd*, 235 F.3d 31 (1st Cir. 2000). In that case, the debtors owned an investment property they valued at $63,000 at the time of confirmation of their original plan. A few months later, they sold the property for $137,500 and the chapter 13 trustee moved to modify the debtors' plan to increase the distribution to unsecured creditors. The bankruptcy court determined that the BIC test should be applied as of the date of modification, reflecting the higher asset value. *Barbosa* , 236
660 B.R. at 552.[4] *660 The legislative history of § 1329(b) can be read to support this view:

> In applying the standards of proposed 11 U.S.C. § 1325(a)(4) to the confirmation of a modified plan, 'the plan' as used in the section will be the plan as modified under this section, by virtue of the incorporation by reference into this section of proposed 11 U.S.C. § 1323(b). Thus, the application of the liquidation value test must be redetermined at the time of the confirmation of the modified plan.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 431 (1977), *as reprinted in* U.S.C.C.A.N. 5787, 6387. When a statute is susceptible to varying interpretations, legislative history is a relevant factor to consider. *Nat'l Credit Union Administration Board v. Nomura Home Equity Loan, Inc.* , 764 F.3d 1199, 1225-26 (10th Cir.

[4] For other cases following this view, see *In re Guenert* , 206 B.R. 958, 963 (Bankr. W.D. Mo. 1997) (observing that there is no specific Code provision so providing, but reasoning that the court must account for any property that has become property of the estate post-confirmation before any plan modification can be confirmed); *In re Roberts* , 514 B.R. 358, 365 (Bankr. E.D.N.Y. 2014) (concluding that the majority view maintains the purpose of the BIC test at modification, ensuring that creditors receive at least as much as they would under a chapter 7 liquidation); *In re Auernheimer* , 437 B.R. 405, 409 (Bankr. D. Kan. 2010) (applying the majority rule in a case that benefitted debtors because their property declined in value after confirmation of the original plan); and *In re Davenport* , 2011 WL 6098068, at *3-4 (Bankr. D. Kan. Dec. 7, 2011) (discounting practical problems inherent in majority view and anticipating that requests to modify would not occur absent significant unexpected changes in the value of estate property). As the Trustee notes in his brief, this Court has previously adopted the majority view in an unpublished decision, *In re Pettway-Wilson* , Case No. 13-13668 EEB (December 8, 2015), ECF No. 139. The court in *In re Villegas* , 573 B.R. 844 (Bankr. W.D. Wash. 2017) adopted a slight variation on the majority rule. It determined that the value of assets in existence on the petition date are fixed "once and for all" at the time of confirmation. *Id.* at 850. However, courts should value new assets coming into the estate after confirmation at the date of any modification for the purposes of § 1325(a)(4) and add the nonexempt value of such assets to the previously calculated BIC number. *Id.*

2014) ; 2A Norman Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction* § 48:1 (7th ed., October 2019 update) ("Sutherland") (citing *Train v. Colo. Public Interest Research Group, Inc.* , 426 U.S. 1, 10, 96 S.Ct. 1938, 48 L.Ed.2d 434 (1976)).

However, does this statement really answer the question? One possible interpretation is that the BIC test must be measured by valuing the assets as of the modification date, but it is also possible to interpret it as saying the test must be reapplied, but not necessarily with a change in the measuring date. If the debtor proposes a modification to decrease plan payments due to a decrease in his income, he still must pay his creditors at least as much as they would have received in chapter 7 on the effective date. If his confirmed plan required him to pay at least $25,000 to meet this test because he had $25,000 of non-exempt equity in his home on the effective date, he cannot later modify his confirmed plan to pay less than $25,000 to creditors. In this instance, the BIC test is reapplied to the proposed modification but with the same measuring date – to make sure creditors will still receive at least as much as they would have if the case had originally been filed as a chapter 7 proceeding.

Even if the legislative history is interpreted to mean a court should revalue the assets as of the modification date, legislative history is not the only factor to consider in interpreting this statute. When the overall context of a statutory scheme and the actual language of the statute suggest a different interpretation, the court need not be bound by legislative history. In fact, courts may disregard legislative history and rules of statutory construction and "expand a statute's literal meaning to accomplish beneficial results, or to serve an act's purpose, or to avoid thwarting a
661 legislative intent apparent *661 from an entire act ...." 2A Sutherland, *supra* , § 47:25 (footnotes omitted).

Before considering the overarching statutory framework of chapter 13, the language of § 1329(b) itself sheds some light on this interpretive question. First, § 1329(b) is a bit of an anomaly. Instead of stating in § 1329(b) itself the tests that apply to modifications, it merely incorporates other statutes by reference. The BIC test in § 1325(a)(4), which it incorporates, states that the test is to be applied "as of the effective date of the plan." Thus, in the absence of any other date specified in § 1329(b), it is logical to assume that the court should apply the same testing date. After all, § 1329(b) incorporated the totality of § 1325(a)(4), without making any changes to it.

The other statutes referenced in § 1329(b), and those omitted from it, provide further insight. While § 1329(b) incorporates § 1322(a) and (b), which list the required contents of a plan, it does not incorporate § 1322(c) – (f). Subsection (d), for example, specifies the permitted maximum length of the plan, which differs depending on whether the debtor is an above-median-income or below-median-income debtor. Section 1329 specifies its own term limit, *i.e.* that the plan, as modified, may not exceed five years in length. 11 U.S.C. § 1329(c). Thus, § 1329(b) did not need to incorporate § 1322(d). However, when § 1329 intended to incorporate a prior confirmation standard without making any changes, it did so merely by reference to it. From this standpoint, one can assume that Congress did not intend in § 1329(b) to change the BIC test measuring date from its original requirement in § 1325(a)(4), which specified the "effective date."

So, what is the effective date? Unfortunately, the Bankruptcy Code does not define its use of this phrase. Consequently, there are no less than three schools of thought as to what it means. One holds that it is the confirmation date. *See, e.g.* , *In re Gibson* , 415 B.R. 735, 738 (Bankr. D. Ariz. 2009). Another relies on § 1326(a)(1), which requires the debtor to begin making plan payments no later than thirty days from the filing of the plan. This "implies that the plan is effective against the debtor even before it is confirmed ...." Carlson, *supra* , at 601. "Judge Lundin, however, reports that most courts assume that the date of the bankruptcy petition is the date as of which the test must be performed." *Id.* (*citing* 3 Keith M. Lundin, *Chapter 13 Bankruptcy* § 160.1 (3d ed. 2000)); *see also In re Green* , 169 B.R. 480, 482 (Bankr. S.D. Ga. 1994). Whether it is the petition date, the first payment date, or the confirmation date, in most cases this date will be close in time to the petition date.

Some courts have adopted the view that the measuring date remains the confirmed plan's effective date when considering a modification request.[5] The leading case is *Forbes v. Forbes (In re Forbes)* , 215 B.R. 183, 189 (8th Cir. BAP 1997). In *Forbes* , the court determined that settlement proceeds from a cause of action that accrued post-petition would not be included in property of the estate under the BIC test and their existence was irrelevant to the court's approval of plan modification. The *Forbes* panel noted the impracticalities of applying the test at the date of plan modification. It might lead to the "absurd result that a Chapter 13 debtor could be required
662 *662 by consecutive motions from unsecured claim holders to continuously modify the confirmed plan if the debtor owns an asset that appreciates after confirmation of each modified plan." *Forbes* , 215 B.R. at 190. Ultimately, the *Forbes* court relied on the concept that the Code contemplates only one " 'plan' as a unitary constant and solitary construct." *Forbes* , 215 B.R. at 188. The court reasoned that

> there is but a single plan in effect at any given time during the pendency of a bankruptcy case [and] there is ordinarily but a single plan confirmation made during the entire course of a bankruptcy case. The Bankruptcy Code does not provide for the 'confirmation' of a modified plan; rather, the plan as modified becomes the plan if it is not disapproved.

Id.

Expanding on this reasoning, the court in *In re Gibson* relied on the language in § 1329(b)(2) that says, "the plan as modified becomes the plan." The court then concluded that:

> [t]he Code thus contemplates only one plan that is effective although its terms may be modified. It would be an anomaly for that one plan, as modified, to have two effective dates.... [O]nce the plan became binding on creditors, that event defined the plan's effective date. Modification of the terms of the plan makes no change to its effectiveness in binding creditors and cannot change the date on which it became effective.

In re Gibson , 415 B.R. 735, 739 (Bankr. D. Ariz. 2009). "There should be only one date as of which the determination is made as to what creditors would have received upon liquidation, so the 'effective date of the plan' must remain that of the original plan." *Id.*

This interpretation maintains the fundamental bargain of chapter 13 where a debtor trades his future income, not his property, to obtain a discharge. Any interpretation that would require a debtor to trade both his income and his property should be eschewed. The Collier treatise sums up the flaws inherent in the *Barbosa* view. It argues that the court should not recalculate the BIC test based on property values at the time of modification because:

[5] For cases adopting this view, see *Hollytex Carpet Mills v. Tedford* , 691 F.2d 392, 393 (8th Cir. 1982) ; *In re Stinmore* , 22 B.R. 37, 38 (Bankr. D. Neb. 1982). *See also In re Easley* , 240 B.R. 563, 566 (Bankr. W.D. Mo. 1999) (making determination in context of hardship discharge).

[t]he best-interests test turns on what would have happened had the debtor filed a chapter 7 case instead of a chapter 13 case. If a chapter 7 case had been filed, only property of the estate under section 541 would have been available to creditors and not the additional property that became property of the estate under section 1306(a). Therefore, property acquired after the petition, other than the limited types that become property of the estate under section 541, is not relevant to application of section 1325(a)(4) to a proposed plan modification. To hold otherwise, a court would have to find the best-interests test to be a constantly fluctuating standard, subject not only to property coming into the estate and leaving the estate but also to changes in the value of estate property. Indeed, if a case is converted from chapter 13 to chapter 7, property of the estate ordinarily is based on the property the debtor had on the date of the petition, and not the date of conversion. [§ 348(f)(1)] The policy behind this provision, that a debtor should not be discouraged from filing a chapter 13 case by the possibility that property acquired during the case could be lost to creditors who would have no right to it had the debtor initially filed a chapter 7 case, is equally applicable. For similar reasons, the acquisition or liquidation of assets should not be grounds for modification, at least if those assets do not produce additional ongoing income for the debtor.

663 *663

8 *Collier on Bankruptcy* ¶ 1329.05[3] (Richard Levin & Henry J. Sommer eds., 16th ed. 2019).

Demanding an increase in plan payments because of a post-confirmation sale of property or its appreciation in value would threaten the very fabric of the chapter 13 bargain.

Suppose a debtor owns a house. The § 1325(a)(4) test is conducted at the time of the confirmation hearing and the court finds that, given the appraised value of the house, all creditors would receive more from the plan than they would have received in a chapter 7 liquidation. Two years later, however, the house has increased in value. If an unsecured creditor moves to modify, and if the § 1325(a)(4) test is redone, the payments, previously high enough to justify confirmation, no longer suffice. To make the plan work as modified, the debtor would have to liquidate principal, not income. This would be a violation of the basic chapter 13 bargain.

Carlson, *supra* , at 599-600.

B. Are the Homestead Proceeds Property of the Chapter 13 Estate Under § 1306(a) ?

The Trustee's second argument for taking the sales proceeds into account when determining an increase or decrease in plan payments is based on his reading of § 1306(a). Section 1306(a)(1) provides that property of the estate includes "all property of the kind specified in [§ 541] that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 ...." In his view, this language is broad enough to include the increase in value that has occurred since confirmation. Many courts agree with him and this Court acknowledges that, if this statute is read in isolation, it would. But § 1327(b) provides that, "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." And § 1327(c) says that, "[e]xcept as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan." These latter two sections suggest that the chapter 13 estate terminates at confirmation. At that point property of the estate becomes property of the debtor, no longer subject to bankruptcy court oversight.

The apparent contradiction between § 1306(a) and § 1327 have led courts to adopt no less than five different approaches to reconciliation:

> Estate-termination approach – At confirmation the estate ceases to exist and all property of the estate, whether acquired before or after confirmation, becomes property of the debtor.
>
> Estate-transformation approach – At confirmation, all property of the estate becomes property of the debtor except property essential to the debtor's performance of the plan; the Chapter 13 estate continues to exist, but it contains only property necessary to performance of the plan, whether acquired before or after confirmation.
>
> Estate-replenishment approach – At confirmation, all property of the estate becomes property of the debtor; the Chapter 13 estate continues to exist and "refills" with property defined in § 1306 that is acquired by the debtor after confirmation, without regard to whether that property is necessary to performance of the plan.
>
> Estate-preservation approach – The vesting of property in the debtor under § 1327(b) does not remove any property

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> from the chapter 13 estate, whether acquired before or after confirmation; property remains in the estate until the case is closed, dismissed or converted. The debtor's rights and responsibilities with respect to property of the estate may change somewhat at confirmation, but the existence and composition of the estate are not disturbed by § 1327(b).
>
> Conditional-vesting approach – At confirmation, vesting gives the debtor an immediate and fixed right to use estate property, but that right is not final until the debtor completes the plan and obtains a discharge.

Lundin, *supra* , at § 120.3, ¶ [9] (citations omitted).

Under the "estate termination" view, all property that vested in the debtor at confirmation and any post-confirmation income or property he acquires is no longer property of the estate. There is no chapter 13 estate once the court confirms a chapter 13 plan. *See, e.g.* , *Calif. Franchise Tax Bd. v. Jones (In re Jones)* , 420 B.R. 506, 514 (9th Cir. BAP 2009). The vested property is no longer subject to administration by the bankruptcy court. Under this view, neither the Debtor's home nor the proceeds of the home sale are estate property and the Debtor is free to do with the proceeds whatever he wants.

The "estate transformation" view also would not obligate the Debtor to contribute the homestead proceeds to his plan. Under this view, the post-confirmation chapter 13 estate includes only post-petition income and property necessary to consummate the plan. *See, e.g.* , *Telfair v. First Union Mortg. Corp.* , 216 F.3d 1333, 1340 (11th Cir. 2000) (concluding that the plan returns so much of that property to the debtor's control as is not necessary to the fulfillment of the plan); *Black v. U.S. Postal Serv. (In re Heath)* , 115 F.3d 521, 524 (7th Cir. 1997) (stating that post-confirmation income that is not necessary to fulfillment of plan is not estate property). The Debtor's confirmed plan does not require him to use the homestead proceeds to pay creditors, so it is not property of his estate under this view.

The "estate preservation" and "conditional vesting" views both deem all property, whether acquired pre- or post-confirmation, to be estate property. Thus, the Debtor would have to account for the non-exempt proceeds in a BIC calculation if the Court performs the BIC test as of the date of modification. *See, e.g.* , *In re Brensing* , 337 B.R. 376, 383 (Bankr. D. Kan. 2006) ; *In re Fisher* , 198 B.R. 721, 732-34 (Bankr. N.D. Ill. 1996), *rev'd* , 203 B.R. 958 (N.D. Ill. 1997) ; *W. Va. State Tax Dep't v. Mullins (In re Mullins)* , 2009 WL 3160361, at *3-4 (S.D. W. Va. Sep. 30, 2009) (describing but disagreeing with lower court's conditional vesting analysis).

The "estate replenishment" view, sometimes called the "modified estate transformation" approach, is the most difficult to apply in the present context. Under this view, all pre-confirmation property, including his former home, vested in the Debtor on confirmation of his plan, but if one views the homestead proceeds as "new" property, they would become estate property under § 1306(a). Conversely, if one interprets the vesting provision of § 1327(b) as permanently removing the home from the jurisdiction of the Court, or if one views the homestead proceeds as a "substitute" for the home rather than an entirely new property interest, then the proceeds would not become estate property under § 1306(a). *See, e.g.* , *Waldron v. Brown (In re Waldron)* , 536 F.3d 1239, 1242-43 (11th Cir. 2008) (determining that "entirely new" property interests acquired post-confirmation are estate property under § 1306(a), whether "necessary" to the completion of the plan or not);
665 *665 *City of Chicago v. Fisher (In re Fisher)* , 203 B.R. 958 (N.D. Ill. 1997) ; *In re Gonzales* , 587 B.R. 363, 370 (Bankr. D. N.M. 2018) (adopting estate replenishment view but explaining that pre-confirmation wages are no longer estate property after confirmation). Some courts do not make the distinction between the sale of pre-bankruptcy property and the acquisition of additional property post-confirmation. *See* , *e.g.* , *Garcia v. Bassel* , 507 B.R. 907 (N.D. Tex. 2014).

1. No Binding Precedent

There is no binding precedent in the Tenth Circuit on this question. There is, however, language in *United States v. Richman (In re Talbot)* , 124 F.3d 1201 (10th Cir. 1997) consistent with either the "estate termination" or "estate preservation" approach. In *Talbot* , the debtors proposed a plan that bifurcated the I.R.S.' claim into a secured claim with a lien against their home to the extent of $18,000 and an unsecured claim in the amount of $19,000. The I.R.S. did not object to this treatment and the court confirmed the plan. However, when the debtors sold their home post-confirmation, the I.R.S. refused to release its lien at closing unless it was paid $37,000 on its combined claim. The debtors capitulated to this demand. Then they moved to modify their plan to eliminate any remaining payment of secured debts against the home and any further payment to the I.R.S. The chapter 13 trustee requested an order requiring the I.R.S. to disgorge the sales proceeds. The bankruptcy court, and the district court on appeal, ordered disgorgement. Before the Tenth Circuit, the trustee argued that the disgorgement order was proper because the bankruptcy court retained jurisdiction over the sale proceeds as property of the estate under § 1306(a). The Tenth Circuit rejected this notion, applying § 1327. Under § 1327(b), the house vested in the debtors at confirmation. Therefore, it was no longer property of the estate under § 1306(a). Under § 1327(c), the Debtor's title to the home was free and clear of any claim or interest provided for by the plan, except as expressly provided otherwise. This plan only retained an $18,000 lien of the I.R.S. Finally, under § 1327(a), the I.R.S. was bound by the confirmed plan. Its action in extracting full payment at the closing violated the plan. Therefore, on remand, the bankruptcy court could order disgorgement, but only of the excess payment amount.

This reasoning and its ruling are consistent with the estate termination approach. However, the Tenth Circuit was careful to note that it did not have to decide whether the "vesting provisions in § 1327(b) operate to grant absolute 'ownership' of estate property to the debtor upon confirmation of a Chapter 13 plan," because the trustee had conceded this point. *Talbot* , 124 F.3d at 1207 n.5. So, this case provides no precedent on this issue, but we are left with several indications of the court's leanings. It clearly acknowledged that "vesting" under § 1327 is an important consequence of plan confirmation. It relied on *Black v. U.S. Postal Serv. (In re Heath)* , 115 F.3d 521, 524 (7th Cir. 1997), which held that a bankruptcy court lacks jurisdiction to control disposition of a chapter 13 debtor's property that is no longer property of the estate. *Talbot* , 124 F.3d at 1206-07. However, in a parenthetical, the Tenth Circuit described the *Heath* case as "holding that post-confirmation income *that is not necessary to the fulfillment of the plan* of reorganization does not become part of bankruptcy estate." *Id.* at 1208 n.9 (emphasis added). This language echoes the estate transformation approach, in which all property vests in the debtor on confirmation, except property essential to the fulfillment of the plan. Thus, it is not possible from this case alone
666 to decipher what position *666 the Tenth Circuit would take on this thorny issue.

Nor is there is a Tenth Circuit Bankruptcy Appellate Panel ("BAP") decision on this issue. Twice, the BAP has recognized the issue and the split in authority. *See Rael v. Wells Fargo Bank, N.A. (In re Rael)* , 527 B.R. 799, 2015 WL 847432 (10th Cir. BAP Feb. 27, 2015) (unpublished opinion); *Vannordstrand v. Hamilton (In re Vannordstrand)* , 356 B.R. 788, 2007 WL 283076 (10th Cir. BAP Jan. 31, 2007) (unpublished opinion). Yet it has not yet reached this issue.

In a recent decision, *In re Gonzales* , 587 B.R. 363 (Bankr. D.N.M. 2018), the New Mexico bankruptcy court adopted the estate transformation view, in part based on language in *Harris v. Viegelahn* , 575 U.S. 510, 135 S. Ct. 1829, 191 L.Ed.2d 783 (2015). In *Harris v. Viegelahn* , the Supreme Court said that "the Chapter 13 estate ... includes both the debtor's property at the time of his bankruptcy petition, and any wages and property acquired after filing." *Id.* at 1835. However, the Supreme Court addressed only whether, after conversion of a chapter 13 case to chapter 7, a chapter 13 trustee could distribute to creditors funds derived from the debtor's post-petition wages remaining in the trustee's possession on the conversion date. The Court was not required to, and did not consider, the effect of § 1327(b) on property of the estate on the date of confirmation. The Supreme Court's general statements regarding property of the estate under § 1306(a) were only made to highlight the differences between chapter 7 and chapter 13 cases. Moreover, the debtor's plan in *Harris v. Viegelahn* specifically provided that "[u]pon confirmation of the plan, all property of the estate shall not vest in the Debto[r], but shall remain as property *of the estate* ." *Id.* at 1839 (emphasis in original). Therefore, *Harris v. Viegelahn* does not directly speak to the issue at hand.

2. Estate Termination View is the Better Interpretation

This Court has previously addressed the interplay between § 1327 and § 1306(a) in *In re Dagen* , 386 B.R. 777, 782 (Bankr. D. Colo. 2008), a case alleging a stay violation under a prior version of § 362(b). There, the issue was whether a child support creditor had violated the automatic stay when she collected her pre- and post-petition debts from the debtor's post-confirmation income. The Court had to determine whether post-confirmation income was property of the estate because § 362(b)(2)(B) only allows a child support creditor to collect its debt from "property that is not property of the estate." 11 U.S.C. § 362(b)(2)(B).

The Court adopted the "estate termination" approach because it is the only construction that "gives effect to the literal terms of § 1327(b), which expressly states that confirmation vests all property in the debtor." *Id.* at 782. Accordingly, the Court held that the debtor's post-confirmation disability income, even though necessary to fund the plan, was no longer property of the estate under § 1306(a). *Id.* at 785.

Another division of this court, faced with facts similar to the present case, held that proceeds from a post-confirmation sale of the homestead were no longer property of the estate under § 1306(a)(1). *Sender v. Golden (In re Golden)* , 528 B.R. 803 (Bankr. D. Colo. 2015). In *Golden* , the chapter 13 debtor sold his home after confirmation, transferred the proceeds from the sale to his ex-wife, and then converted his case to chapter 7. His chapter 7 trustee sued the ex-wife under § 549 to recover the sale proceeds transferred without court authorization. Because § 549 applies only to an unauthorized transfer of "estate property," the
667 court had to address whether *667 the proceeds were in fact property of the estate. 11 U.S.C. § 549(a).

Reasoning that the most common meaning of "vest" refers to a transfer of ownership, the *Golden* court determined that § 1327(b) meant that, upon confirmation, "ownership of the property left the estate and vested in the Debtor." *In re Golden* , 528 B.R. at 806. The court discussed the various theories regarding the extent of the post-confirmation chapter 13 estate and concluded that only the "estate preservation" approach would consider the proceeds to be estate property. Under any other approach, because the home sale proceeds were not necessary to consummate the plan, they would not become estate property under § 1306(a)(1). The court further noted that, in *Talbot* , the Tenth Circuit did not adopt the estate preservation view and neither had prior bankruptcy court decisions from Colorado. *Id.* at 807-08 (citing *In re Segura* , 2009 WL 416847 at *6 (Bankr. D. Colo. Jan. 9, 2009) (adopting "estate termination" approach) and *Providian Nat'l Bank v. Vitt (In re Vitt)* , 250 B.R. 711, 718-19 (Bankr. D. Colo. 2000) (adopting "estate transformation" approach)). Viewing its decision as consistent with the reasoning in *Talbot* , the court said "the home was no longer property of the Chapter 13 estate upon confirmation of the Debtor's plan. The Debtor, therefore, enjoyed full ownership and control over the property after the date of confirmation." *Golden* , 528 B.R. at 808.

This Court believes the estate termination approach is the only interpretation that respects the plain meaning of the language of § 1327(b). As the *Golden* court noted, in § 1306(b), the Code already provides that a chapter 13 debtor has the right to possess all property of the estate from and after the date of filing. Therefore, unless the concept of "vesting" in § 1327(b) refers to a transfer of ownership, § 1327(b) is rendered meaningless. *Golden* , 528 B.R. at 806-07 (citing *In re Clouse* , 446 B.R. 690, 699 (Bankr. E.D.Pa. 2010)); *see also Yoon v. Krick (In re Krick)* , 373 B.R. at 601 (to give meaning to § 1327(b), the words "estate" and "debtor" must define separate concepts and, therefore, "vesting" must mean a change in ownership from the estate to the debtor).

While the estate termination approach gives meaning to § 1327(b)'s vesting provision, it is admittedly at odds with the general language of § 1306(a). In the face of this apparent conflict, resort to traditional canons of statutory construction are called for. First, "where one statute deals with a subject in general terms and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible. But if two statutes conflict, the general statute must yield to the specific statute involving the same subject." 2B Sutherland, *supra* , § 51:5; *see also In re Petruccelli* , 113 B.R. 5, 15 (Bankr. S.D. Cal. 1990). Section 1306(a) is a more general statute defining what property comes into the chapter 13 estate. Section 1327(b) is the more specific statute describing its status following confirmation.

The estate termination view gives meaning to both statutes. Consider a debtor's home and his wages. On the filing of his chapter 13 petition, both become property of his estate under § 1306(a), protected by the automatic stay from creditor attempts to collect prepetition debts. On confirmation, his home and his wages become property of the debtor once again, but despite this change in status, they continue to be protected by the automatic stay, (with only very narrow exceptions set out in § 362(b) such as the domestic support creditor), until the case is closed, dismissed, or the debtor receives or is denied his
668 discharge, *668 whichever comes first. 11 U.S.C. §§ 362(a)(5)-(7), (c)(2). The plan provides creditors with substitute rights in regard to their prepetition debts. *Id.* § 1327(a).

Section 1306(a) still plays an important role in many respects, including bringing those assets under the umbrella of the automatic stay and in determining what assets must be considered in the BIC test analysis at confirmation. Section 1327(b), on the other hand, terminates the estate's rights to that property. The debtor is then free to spend his wages and deal with his assets however he wishes, so long as he fulfills his plan obligations. Post-confirmation, he does not need to run into the bankruptcy court for approval to trade his car in for a new one or to obtain a home-equity line of credit to repair his plumbing. The plan is the only contract between the debtor and his prepetition creditors. They have no further rights in the debtor's property except those specifically preserved in the plan. § 1327(c). Therefore, the bankruptcy court has no further authority over this property, except to rule on a motion for stay relief or a dismissal motion if the debtor defaults on his plan obligations. And, of course, it continues to have jurisdiction over post-confirmation modification motions until the plan has been completed.

A modification request may alter the contract between the debtor and his prepetition creditors by requiring an increase in plan payments, but not because § 1306(a) causes his post-petition wages to remain property of the estate. It is because Congress has expressly provided for the adjustment of the contract to reflect changes in the debtor's financial circumstances. It does so not by changing title to the property once again but only by increasing his payment obligation. In that sense, modification grants his unsecured creditors an *impersonam*, not an *in rem* remedy.

This interpretation is also consistent with another well-known canon of statutory construction, which advises that identical words used in different parts of the same or a similar statute should be interpreted to have the same meaning absent some contrary indication. 2A Sutherland, *supra* , § 46.6. Thus, the term "vest" in § 1327(b) should be construed similarly to how it is used in other Code provisions. Section § 1141(b) mirrors § 1327(b) insofar as it "vests" property of the estate in the debtor on confirmation. Courts construing § 1141(b) have interpreted it to mean that the property is no longer property of the estate. *Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n* , 997 F.2d 581, 587 (9th Cir. 1993) ; *Still v. Rossville Bank (In re Chattanooga Wholesale Antiques)* , 930 F.2d 458, 462 (6th Cir. 1991) ; *Penthouse Media Group v. Guccione (In re General Media, Inc.)* , 335 B.R. 66, 74 (Bankr. S.D.N.Y. 2005).

Section § 349(b)(3) uses the term "revest" to describe the change in title that occurs with dismissal of a bankruptcy case. Dismissal "revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case…" 11 U.S.C. § 349(b)(3). In most instances, this means the property will revert to its status as property of the debtor but, if for example, the trustee avoided a preferential transfer or fraudulent conveyance during the case, dismissal will return title to the transferee. *Sender v. Golden (In re Golden)* , 528 B.R. 803, 807 (Bankr. D. Colo. 2015) ; *In re Van Stelle* , 354 B.R. 157, 167-68 (Bankr. W.D. Mich. 2006) ; *In re Beaird* , 578 B.R. 643, 646-49 (Bankr. D. Kan.

2017) ; *In re Sadler* , 935 F.2d 918 (7th Cir. 1991). In both §§ 1141(b) and 349(b)(3), "vesting" connotes a transfer of title and the termination
669 *669 of an estate. *In re Petruccelli* , 113 B.R. 5, 16-17 (Bankr. S.D. Cal. 1990).

The Court rejects the estate preservation view and the conditional vesting view because they give no effect to the term "vest," essentially reading § 1327(b) out of the Code. They also strip this term of its commonly accepted meaning, which signifies a transfer of ownership. *See Vest, Black's Law Dictionary* (11th ed. 2019) (defining "vest" as "[t]o confer ownership (of property) on a person," "[t]o invest (a person) with the full title to property," or "[t]o give (a person) an immediate, fixed right of present or future enjoyment.").

The estate transformation view reads nonexistent language into the statute by distinguishing between property necessary to consummation of the plan from that which is not. Decisions in which the courts employ this approach often seem result driven, with the courts endeavoring to protect the debtor's post-confirmation assets from the collection efforts of post-petition creditors. *See, e.g.* , *In re Ziegler* , 136 B.R. 497, 502 (Bankr. N.D. Ill. 1992) (ruling that debtor's post-petition earnings were property of the estate and protected by the automatic stay from post-petition creditors to the extent the earnings were necessary to fund plan payments); *see also McGlockling v. Chrysler Fin. Co. (In re McGlockling)* , 296 B.R. 884, 887 (Bankr. S.D. Ga. 2003) (determining that debtor's car was property of the estate because he needed reliable transportation to complete plan and compelling lender to permit debtor to take car overseas). However, nothing in chapter 13, or the Code as a whole, promises protection against the collection of *post-* petition debts.

Finally, the Court disagrees with the estate replenishment view because it reads § 1306(a) too broadly and gives insufficient weight to § 1327(b). The Court has considered but respectfully disagrees with the decisions of the Fifth Circuit and the lower courts in Texas that have viewed proceeds from the post-confirmation sale of exempt property as "new" property interests that enter a chapter 13 estate through § 1306(a). *See* , *e.g.* , *Hawk v. Engelhart (In re Hawk)* , 871 F.3d 287 (5th Cir. 2017) ; *Garcia v. Bassel* , 507 B.R. 907 (N.D. Tex. 2014). The Trustee relies heavily on these decisions, but the Court finds them unpersuasive.

In *Black v. Leavitt (In re Black)* , 609 B.R. 518 (9th Cir. BAP 2019), the court analyzed the interplay between §§ 1306(a) and 1327(b) in the context of property appreciating in value post-confirmation. Its interpretation gave full effect to the chapter 13 bargain a debtor makes when trading his future income for his assets. In *Black* , the debtor owned a rental property that he valued at $44,000. In his plan, he provided that he would sell the rental property at some point during the plan and contribute $45,000 from the sale to his creditors. Near the end of his three-year plan, the debtor sold the property for $107,000. The chapter 13 trustee moved to modify to require the debtor to contribute all the sales proceeds to his creditors. The bankruptcy court approved the trustee's modification request, but the appellate court reversed. Recognizing a split of authority, the court rejected *Barbosa's* estate preservation approach and reaffirmed its prior adoption of the estate termination view. *Black* , 609 B.R. at 529 (*citing Cal. Franchise Tax Bd. v. Jones (In re Jones)* , 420 B.R. 506, 515 (9th Cir. BAP 2009)). It held that when the bankruptcy court confirmed the debtor's plan, the property vested in him. It was no longer property of the estate, so the appreciation in the property's value did not belong to the estate.

C. Good Faith

The Trustee also objects to the Debtor's proposed
670 modification on the basis of "bad *670 faith." The only evidence of bad faith that he asserts is the Debtor's failure to commit the proceeds from the sale of his home to repay creditors.[6] The fact that

the Debtor seeks to remain in chapter 13 but refuses to modify his plan in accordance with his present ability to pay, says the Trustee, contravenes the purpose and intent of chapter 13. "[T]he spectacle of [a debtor] profiting while in bankruptcy is disconcerting and may be indicative of a bad faith manipulation of the Code." *In re Barbosa* , 236 B.R. 540, 552 (Bankr. D. Mass. 1999), *aff'd sub nom. Barbosa v. Solomon* , 243 B.R. 562 (D. Mass 2000), *aff'd*, 235 F.3d 31 (1st Cir. 2000).

6 The Court offered the parties an opportunity to present evidence on the good faith objection but they agreed to submit the matter to the Court on this basis only.

Section 1325(a)(3) requires that a plan be "proposed in good faith" and § 1329(b) applies this same test to post-confirmation modifications. The Tenth Circuit has directed bankruptcy courts to make the good faith determination on a case-by-case basis, considering the totality of the circumstances. *Flygare v. Boulden* , 709 F.2d 1344, 1347 (10th Cir. 1983). One of the factors to consider in evaluating good faith is "whether [the debtor] has unfairly manipulated the Bankruptcy Code." *Robinson v. Tenantry (In re Robinson)* , 987 F.2d 665, 668 n. 7 (10th Cir. 1993).

In this case, the Debtor clearly intends to keep all the sales proceeds while paying his unsecured creditors almost nothing. Is this an unfair manipulation of the Bankruptcy Code to the detriment of his creditors? Or is the Debtor merely taking advantage of what the Bankruptcy Code permits? If, as this Court has determined, the Code itself does not compel the Debtor to use these proceeds to pay creditors, can the Court nevertheless find he has acted in bad faith solely because he refuses to do so? In a different context, the Tenth Circuit has answered this question in the negative, saying that it is "not bad faith for [a debtor] to adhere to the provisions of the Bankruptcy Code and, in doing so, obtain a benefit provided by it." *Anderson v. Cranmer (In re Cranmer)* , 697 F.3d 1314, 1319 (10th Cir. 2012).

The *Cranmer* case is instructive. The debtor was an above-median-income debtor who, in addition to his other sources of income, received $1,940 each month in social security income. Over the life of his plan, this would amount to an additional $87,000 in income. The chapter 13 trustee opposed confirmation because he did not include his social security income in his calculation of "projected disposable income." The trustee argued that his refusal to commit any of these funds to the payment of creditors meant he had not proposed his plan in good faith.

While the definition of "current monthly income," which is used to calculate a debtor's disposable income, expressly excludes social security income, the trustee argued social security income should nevertheless be considered part of the debtor's projected disposable income under the Supreme Court's decision in *Hamilton v. Lanning* , 560 U.S. 505, 130 S.Ct. 2464, 177 L.Ed.2d 23 (2010). In that case, the Supreme Court held that known and virtually certain changes to the debtor's income should be taken into account when calculating projected disposable income. *Lanning* , 560 U.S. at 524, 130 S.Ct. 2464. It was virtually certain the *Cranmer* debtor would receive $87,000 in additional income during his plan. Nevertheless, the Tenth Circuit rejected this argument because the Bankruptcy Code authorized the debtor's exclusion of social security income and, therefore, the exclusion was not "one
671 of the *671 unusual cases contemplated by *Lanning* ." *Cranmer* , 697 F.3d at 1318. Accordingly, when a debtor calculates his plan payments "exactly as the Bankruptcy Code and Social Security Act allow him to," the exclusion of social security income from his plan payments "cannot constitute a lack of good faith." *Cranmer* , 697 F.3d at 1319 ; *see also Beaulieu v. Ragos (In re Ragos)* , 700 F.3d 220, 227 (5th Cir. 2012) ("Having already concluded that Debtors' plan

fully complied with the Bankruptcy Code, it is apparent that [d]ebtors are not in bad faith merely for doing what the Code permits them to do.").

In *In re Boisjoli* , 591 B.R. 468 (Bankr. D. Colo. 2018), the debtors proposed a sixty-month plan to pay one hundred percent of their debts, but the trustee objected because they had the financial ability to repay their creditors much sooner. The court rejected the trustee's argument that stringing out payments over a five-year period amounted to bad faith. It concluded the debtors' plan met all the Code's requirements and the debtors had done everything the Bankruptcy Code required of them.

The same reasoning applies here. Courts may disagree on whether the BIC test should be recalculated as of the date of modification and whether the estate terminates at confirmation. However, this Court has determined both issues in the Debtor's favor and ruled that he is permitted to retain the sale proceeds. As a result, it cannot find that in doing so he is acting in bad faith or unfairly manipulating the Code.

III. CONCLUSION

For the reasons set forth above, the Court hereby:

1. OVERRULES the Trustee's objection to the Debtor's proposed modification;

2. DENIES the Trustee's proposed modification; and

3. APPROVES the Debtor's modification of his plan, dated May 7, 2019, finding that it satisfies the requirements of § 1329.

5 F.4th 1136

IN RE: Margaret L. KINNEY, Debtor.

Margaret L. Kinney, Appellant,
v.
HSBC Bank USA, N.A., Appellee.

Douglas B. Kiel, Chapter 13 Trustee, Amicus Curiae.

No. 20-1122

United States Court of Appeals, Tenth Circuit.

FILED July 23, 2021

Stephen E. Berken, Berken Cloyes, Denver, Colorado, for the Appellant.

Jamie G. Siler, Murr Siler & Accomazzo, Denver, Colorado, for the Appellee.

Matthew W. Hoelscher, Greenwood Village, Colorado, for Chapter 13 Trustee, Douglas B. Kiel, Amicus Curiae

Before BACHARACH, EBEL, and EID, Circuit Judges.

BACHARACH, Circuit Judge.

[5 F.4th 1139]

The bankruptcy code provides a five-year limit on payment plans under Chapter 13. 11 U.S.C. § 1322(d). Once a debtor completes payments under the plan, the bankruptcy court must grant a discharge. 11 U.S.C. § 1328(a).

This appeal arises because Ms. Margaret L. Kinney failed to make some of the required mortgage payments within her plan's five-year period. Shortly after the five-year period ended, however, she made the back payments and requested a discharge. The bankruptcy court denied the request and dismissed the case.

The issue on appeal is whether the bankruptcy court could grant a discharge, and the answer turns on how we characterize Ms. Kinney's late payments. She characterizes them as a cure for her earlier default; HSBC Bank characterizes them as an impermissible effort to modify the plan. We agree with the bank and affirm.

1. Chapter 13 plans are limited to five years.

Chapter 13 of the bankruptcy code allows qualifying debtors to cover claims through "plans" that pledge future earnings. 11 U.S.C. §§ 1321, 1322(a) – (c). Upon confirmation, the plans bind the debtors and creditors. 11 U.S.C. § 1327.

But the code also allows modification of the plan. Through modification, a bankruptcy court can

- "extend or reduce the time for ... payments" (11 U.S.C. § 1329(a)(2)) and

- permit the debtor to cure a default on a mortgage payment (*In re Hoggle* , 12 F.3d 1008, 1011 (11th Cir. 1994)).

But modifications cannot provide for payments more than five years after the deadline for the first payment. 11 U.S.C. § 1329(c).

A Chapter 13 bankruptcy case ends in discharge, conversion to Chapter 7, or dismissal. *See* Part 5(B)(1), below. Dismissals and conversions are governed by 11 U.S.C. § 1307 ; discharges are governed by 11 U.S.C. § 1328.

2. After suffering a car accident, Ms. Kinney missed two mortgage payments to the bank in the final months of her Chapter 13 plan.

Ms. Kinney filed bankruptcy under Chapter 13. Her plan, ultimately confirmed, required monthly mortgage payments to the bank.[1]

Ms. Kinney was current with her mortgage payments when she filed bankruptcy, and she made her first post-petition payment in November 2013.[2] Under the plan,

[5 F.4th 1140]

she needed to keep making timely mortgage payments through November 2018.

But misfortune struck: In March 2018, Ms. Kinney suffered a car accident. The accident triggered substantial expenses, and Ms. Kinney missed two mortgage payments in the final months of the five-year plan. (After the plan ended, Ms. Kinney missed two more mortgage payments.)

3. Because Ms. Kinney had not completed her payments within five years, the bankruptcy court concluded that it lacked discretion to grant a discharge.

The missed mortgage payments constituted a material default; so after the five-year plan had ended, the bank moved to dismiss the bankruptcy case. Ms. Kinney objected and tendered the back payments; but the bankruptcy court granted the motion to dismiss, reasoning that a discharge was no longer possible. Ms. Kinney unsuccessfully moved for reconsideration and now appeals.

4. We conduct de novo review of the bankruptcy court's interpretation of the code provision.

The bankruptcy code states that the court "may" dismiss a Chapter 13 case. 11 U.S.C. § 1307(c). Given the word "may," we would ordinarily review the dismissal for an abuse of discretion. *See Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 995–96 (10th Cir. 1999) (applying the abuse-of-discretion standard based on the statutory term "may").

But the issue here is a legal one, and a bankruptcy court abuses its discretion by making a legal error. *See Cooter & Gell v. Hartmarx Corp.* , 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). To determine whether the bankruptcy court legally erred in construing the code provisions, we conduct de novo review. *In re Scrivner* , 535 F.3d 1258, 1262 (10th Cir. 2008).

5. Though the bankruptcy code is ambiguous, its language suggests that discharge is allowable only if the debtor had no ongoing material default when the plan ended.

Conducting de novo review, we consider whether the bankruptcy code permits the court to treat Ms. Kinney's late payments as a "cure" rather than an impermissible "modification" of the plan. On this question, the code itself is ambiguous; but its language suggests that the late payments do not constitute a cure of the default. The statutory language thus supports the bank's position that the court couldn't grant Ms. Kinney a discharge.

A. We consider the code's language.

We start with the language of the code, giving undefined terms their "ordinary meaning." *Ransom v. FIA Card Servs., N.A.* , 562 U.S. 61, 69, 131 S.Ct. 716, 178 L.Ed.2d 603 (2011) ; *Hamilton v. Lanning* , 560 U.S. 505, 513, 130 S.Ct. 2464, 177 L.Ed.2d 23 (2010) (quoting *Asgrow Seed Co. v. Winterboer* , 513 U.S. 179, 187, 115 S.Ct. 788, 130 L.Ed.2d 682 (1995)). To avoid interpretations incompatible with the rest of the code, we read the provisions in the context of each other. *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs ., Ltd.*, 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988).

The code is ambiguous if it can be "understood by reasonably well-informed persons in two or more different senses." *In re Geneva Steel Co* ., 281 F.3d 1173, 1178 (10th Cir. 2002) (internal quotation marks omitted). Ambiguity depends on "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."

[5 F.4th 1141]

Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc ., 965 F.3d 792, 804 (10th Cir. 2020) (quoting *Ceco Concrete Const., LLC v. Centennial State Carpenters Pension Tr* ., 821 F.3d 1250, 1258 (10th Cir. 2016)). If the code is ambiguous, we can consider congressional intent. *In re Geneva Steel Co* ., 281 F.3d at 1178.

B. The code's language is ambiguous.

A discharge is necessary upon the debtor's "completion ... of all payments under the plan." 11 U.S.C. § 1328(a). But the code doesn't define this phrase, so we must decide whether payments could contribute to a "completion ... of all payments under the plan" when the payments come after expiration of the plan's five-year term.

On this question, other courts differ based on how they interpret the statutory phrase "completion ... of all payments under the plan."[3] These differences are understandable in light of the ambiguity inherent in the combination of §§ 1307(c), 1322, 1325, 1328(a), and 1329.

(1) Sections 1307(c) and 1328(a) don't definitively resolve the extent of discretion over dismissal and discharge, but suggest that discharge is unavailable when the plan ends with an ongoing material default.

The code gives the bankruptcy courts three options:

1. grant a discharge (11 U.S.C. § 1328(a))
2. dismiss the case (11 U.S.C. § 1307(c)(6))
3. convert the case to a Chapter 7 bankruptcy (11 U.S.C. § 1307(c)(6))

The options differ in the extent of discretion that they provide.

Section 1307(c)(6) says that a bankruptcy court "may" order dismissal or conversion if debtors have materially defaulted. 11 U.S.C. § 1307(c)(6). "May" usually implies some discretion. *Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co* ., 529 U.S. 193, 198–99, 120 S.Ct. 1331, 146 L.Ed.2d 171 (2000) ; *see* Part 4, above.

But under § 1328(a), a district court "shall" grant discharges to debtors who have completed payments under the plans. 11 U.S.C. § 1328(a).[4] The term

[5 F.4th 1142]

"shall" means that discharges are mandatory if debtors complete the payments under their plans. *Forest Guardians v. Babbitt* , 174 F.3d 1178, 1187 (10th Cir. 1999) ; *see* 11 U.S.C. § 1328(a). So § 1328(a) supports a discharge only if the late payments were considered "under the plan."

Ms. Kinney argues that discharge was permissible because the court could regard her payments as "under the plan." She did make the payments, but were they completed "under the plan" if they came after its expiration?

To answer we start with the term "under." The term "under" is a "chameleon," bearing ambiguity in light of its multiple meanings. *See Pereira v. Sessions* , ––– U.S. ––––, 138 S. Ct. 2105, 2117, 201 L.Ed.2d 433 (2018) ("chameleon"); *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.* , 554 U.S. 33, 40–41, 128 S.Ct. 2326, 171 L.Ed.2d 203 (2008) (recognizing that "under" bears multiple meanings and "both sides present credible interpretations").[5] To ascertain the better interpretation of this ambiguous term, we must focus on the context. *See Pereira* , 138 S. Ct. at 2117 (stating that the Court must draw the meaning of "under" from its context). The context here suggests that the payments are "under the plan" only if they are subject to or under the authority of the plan.

"Under" connects two nouns: "payments" and "plan." 11 U.S.C. § 1128(a). Though "under" bears multiple meanings, a payment "under" a bankruptcy plan is "more natural[ly]" read as something "subject to ... or under the authority of" the plan. *Piccadilly Cafeterias* , 554 U.S. at 39–41, 128 S.Ct. 2326.

An earlier version of the code used a similar term in a different provision, referring to a transfer "under a plan confirmed." 11 U.S.C. § 1146(c) (2000). To apply this provision, the Supreme Court considered whether a transfer could be "under" a confirmed plan if the transfer had preceded confirmation of the plan. *Piccadilly Cafeterias* , 554 U.S. at 35, 128 S.Ct. 2326. The Court answered "no," reasoning that

> • the "more natural" reading of "under" suggests that the transfer must be "subject to" or "under the authority of" the plan (*id.* at 39, 128 S.Ct. 2326) and
>
> • the transfer could not be subject to or under the authority of the plan if the plan had not yet been confirmed (*id.* at 41, 128 S.Ct. 2326).

The Supreme Court cited a Third Circuit opinion, *In re Hechinger Investment Co. of Delaware, Inc.* , 335 F.3d 243 (3d Cir. 2003). *E.g.* , *id.* at 38, 40, 128 S.Ct. 2326. *Hechinger* had drawn the same conclusion:

> After considering all of these definitions [of the term "under"], we believe that the most natural reading of the phrase "under a plan confirmed" in 11 U.S.C. § 1146(c) is "authorized" by such a plan. [*See Random House Dictionary of the English Language* 1543 (unabridged ed. 1967)]. When an action is said to be taken "under" a provision at law or a document having legal effect, what is generally meant is that the action is "authorized" by the provision of law or legal document. Thus, if a claim is asserted "under" 42 U.S.C. § 1983, Section 1983 provides the authority for the

[5 F.4th 1143]

> claim. If a motion is made "under" Fed. R. Civ. P. 12(b)(6), that rule provides the authority for the motion. If benefits are paid "under" a pension or welfare plan, the payments are authorized by the plan.
>
> On this reading, if an instrument of transfer is made or delivered "under" a plan, the plan must provide the authority for the transaction.

335 F.3d at 252 ; *see also In re NVR, LP* , 189 F.3d 442, 457–58 (4th Cir. 1999) (concluding that the plain meaning of "under" forecloses characterization of preconfirmation transfers as "under a plan confirmed" for purposes of 11 U.S.C. § 1146(c)).

Likewise, the more natural reading here is that the payments could fall "under" a plan only if the plan remained in existence. The Supreme Court concluded that a transfer likely hadn't fallen "under" a plan if it hadn't been confirmed yet. *See* pp. 1142–43, above. There is no reason for a different result when a plan has expired.

Ms. Kinney insists that even though the plan had ended, she could informally cure her default by making the late payments. But if those payments came after the plan had ended, they wouldn't have been "subject to" or "authorized by" the plan. So the statutory term "under" suggests that the payments would permit a discharge only if they had been made during the existence of the plan.

(2) Section 1307(c) does not control.

Ms. Kinney argues that § 1307(c) controls because it is specific to dismissals. But § 1307(c) is no more specific than § 1328(a) ; these sections simply authorize the three possible outcomes (dismissal, conversion to a Chapter 7 bankruptcy, or discharge). *See* Part 5(B)(1), above.

Ms. Kinney also argues that § 1307(c) 's permissive language creates discretion to order dismissal. The bank disagrees, arguing that the court lacks discretion under § 1328(a) because the five-year plan ended with an ongoing material default.

According to Ms. Kinney, the bank's interpretation erases § 1307 's use of the word "may." We disagree, for the code still gives discretion to the court in various situations involving material defaults. For example, the court has discretion to avoid dismissal of a Chapter 13 case by

- permitting modification of the plan before it has ended and

- granting a hardship discharge.

See, e.g. , *In re Hoggle* , 12 F.3d 1008, 1011 (11th Cir. 1994) (allowing a debtor to cure a default on mortgage payments through modification of the plan); 11 U.S.C. § 1328(b) – (c) (permitting a court to grant a discharge based on partial hardship despite the failure to complete the plan payments). So even if the bankruptcy court lacked discretion to regard Ms. Kinney's late payments as "under the plan," the bank's interpretation would still give effect to § 1307(c) 's permissive "may."

* * *

The bankruptcy code suggests that material defaults cannot be cured after the plan has ended. But § 1307(c) does not say whether payments can be "under the plan" when they're made after the plan has ended. So we must consider whether other sections clarify the meaning of the phrase "under the plan."

(3) The other statutory provisions are ambiguous on whether payments after the five-year period are "under the plan."

The parties point to four other sections (§§ 1322, 1325, 1328, and 1329) in debating whether "payments under the plan" include payments following expiration of the plan. These sections are not conclusive, but the better interpretation is that the late

[5 F.4th 1144]

payments are not "under the plan" if it has already expired.

a. Sections 1322 and 1329 suggest that payments after the plan's expiration are not "under the plan."

The bank argues that under §§ 1322 and 1329, a debtor doesn't complete payments "under the plan" if the payments come after the plan has expired. As Ms. Kinney argues, these sections don't remove the ambiguity. But they do suggest that the late payments are not "under the plan."

Under § 1322, a Chapter 13 debtor cannot commit to a plan lasting more than five years. 11 U.S.C. § 1322(d). And § 1329 permits some types of plan modifications, including those extending or shortening "the time for ... payments [under the plan]." 11 U.S.C. § 1329(a)(2). But modified plans are also subject to the five-year time limit. 11 U.S.C. § 1329(c). Together, §§ 1322 and 1329(a)(2) suggest that a late payment is simply an effort to modify the plan by extending the time for payment.

Suppose that after the accident, Ms. Kinney had moved for an extension of time, asking the bankruptcy court to allow her to make the back payments soon after the five-year period had ended. As Ms. Kinney conceded in oral argument, the court would have needed to deny the motion. Oral Argument at 2:36–2:50.

Ms. Kinney nonetheless urges consideration of her late payments as an informal cure rather than an improper modification. But this approach would nullify the code's restrictions on modifications. *See In re Scrivner* , 535 F.3d 1258, 1263 (10th Cir. 2008) ("[T]o allow the bankruptcy court, through principles of equity, to grant any more or less than what the clear language of [the code] mandates would be tantamount to judicial legislation and is something that should be left to Congress, not the courts.") (quoting *In re Alderete* , 412 F.3d 1200, 1207 (10th Cir. 2005)). How could a bankruptcy court forgive a late payment as an informal cure if the court couldn't approve the payment through a properly filed motion? So §§ 1322 and 1329(a)(2) suggest that a debtor completes payments "under the plan" only when the payments come during the plan's five-year period.

b. Sections 1325 and 1328 do not require us to characterize payments after the five-year period as payments under the plan.

Section 1325. Ms. Kinney relies partly on § 1325(a)(6), which requires confirmation of a plan if "the debtor will be able to make all payments under the plan and to comply with the plan." 11 U.S.C. § 1325(a)(6). The Third Circuit interpreted this language to imply that a debtor can make payments under the plan without complying with the plan's terms. *In re Klaas* , 858 F.3d 820, 829–30 (3d Cir. 2017).

But this language doesn't show that post-plan payments are "under the plan." For instance, a debtor may make a late payment while the plan remains in effect. The late payment would not "comply with" the plan, but could still be "under the plan." So the Third Circuit's distinction sheds no light on whether payments after the five-year period are payments "under the plan."

Section 1328. Ms. Kinney also argues that because § 1328(a) does not require timeliness for "payments under the plan," debtors need not complete the plan payments within five years. We disagree.

As Ms. Kinney points out, § 1307 elsewhere requires "timely" actions. 11 U.S.C. § 1307(c)(3)–(4). In those places, however, the code otherwise gives no guidance on timing. For example, § 1307(c)(3) allows dismissal for "failure to file a plan *timely* under section 1321 of this title." 11 U.S.C. § 1307(c)(3) (emphasis added). Because

[5 F.4th 1145]

§ 1321 does not itself specify a time requirement, the term "timely" is needed to prevent overeager creditors from moving to dismiss when the debtor still has time to file a plan.

But the term is unnecessary in § 1328(a) ; here the phrase "under the plan" is naturally read to require that a plan remain in effect when the payments are made. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc* ., 554 U.S. 33, 45, 128 S.Ct. 2326, 171 L.Ed.2d 203 (2008). And it's not clear whether "timely" here would mean that the payments came

- within the five-year period or
- by the due-date for each monthly payment.

Either interpretation is reasonable.

* * *

The parties present competing arguments from the statutory language, but none is conclusive. In the end, there's no code provision that expressly allows or prohibits a discharge when the debtor has not completed the plan payments by the end of the five-year period. So the text is ambiguous.

Because the text is ambiguous, we "seek guidance from Congress's intent, a task aided by reviewing the legislative history." *In re Geneva Steel Co* ., 281 F.3d 1173, 1178 (10th Cir. 2002). Along with the legislative history, we consider which interpretation best fits the statutory language. *Circuit City Stores, Inc. v. Adams* , 532 U.S. 105, 119, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001).

In our view, the statutory language suggests that Ms. Kinney's late payments are not "under the plan" because they came after the plan had already ended. This suggestion is supported by the legislative history of Chapter 13.

6. Congress intended to limit payments under Chapter 13 plans to five years.

The legislative history is also ambiguous, but likewise supports the bank's interpretation of the code.

"The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.' " *Marrama v. Citizens Bank of Mass.* , 549 U.S. 365, 367, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007) (quoting *Grogan v. Garner* , 498 U.S. 279, 286–87, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991)). Concern for this purpose led the 1977 House Judiciary Committee to criticize the frequency of court-supervised repayment plans lasting seven to ten years:

> [I]nadequate supervision of debtors attempting to perform under wage earner plans have made them a way of life for certain debtors. Extensions on plans, new cases, and newly incurred debts put some debtors under court supervised repayment plans for seven to ten years. This has become the closest thing there is to indentured servitude; it lasts for an identifiable period, and does not provide the relief and fresh start for the debtor that is the essence of modern bankruptcy law.

House Judiciary Committee Report for the Reform Act, H.R. Rep. No. 95–595, at 117 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6078 (footnotes omitted).

On the other hand, the 1977 House Judiciary Committee regarded Chapter 13's predecessor as "overly stringent and formalized." *Id.* The Committee observed that Chapter 13 had "simplifie[d], expand[ed], and ma[de] more flexible wage earner plans." *Id.* at 117–18.

The bank argues that allowing debtors to informally cure their plans would lead to a "slippery slope" that extends the duration of plans, the evil that Congress tried

[5 F.4th 1146]

to prevent. This concern is not entirely hypothetical. In *In re Henry* , 368 B.R. 696 (N.D. Ill. 2007), the district court applied a flexible test to allow a debtor to take an "extra 30 months" beyond the 5-year plan. *Id.* at 701–02.

Despite the potential for lengthy plans, recognition of informal cures could permit fresh starts by injecting flexibility into administration of the plan.[6] Given the benefit of flexibility, the Third Circuit views the five-year limit on plans as a "shield" for debtors rather than as a "sword" for creditors. *In re Klaas* , 858 F.3d 820, 830 (3d Cir. 2017). This approach makes sense because dismissal or conversion to a Chapter 7 bankruptcy could hurt both the debtor and creditor.[7]

But the 1977 House Judiciary Committee Report reflects Congress's concern as to "inadequate supervision" and indefinite extensions of payment plans. House Judiciary Committee Report for the Reform Act, H.R. Rep. No. 95–595, at 117 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6077. The Committee apparently reasoned that

- what is best for an individual debtor might not be what is best for debtors as a whole and
- strict deadlines are best for debtors as a whole.

Second, the bankruptcy court points out that without informal extensions, most Chapter 13 debtors would lack meaningful breathing room. Appellant's App'x at 175. After 2005, Chapter 13 plans for above-median debtors must last exactly five years (unless the debtors are fully paying all unsecured claims). *See* 11 U.S.C. § 1325(b)(4).[8]

Strict enforcement of the five-year period would inevitably limit the court's flexibility when debtors experience unexpected calamities in the final stages of their plans. But Congress presumably recognized the problem when requiring plans to last five years and prohibiting plan extensions. Indeed, Congress labelled the section "Chapter 13 plans to have 5-year duration in certain cases." Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,

[5 F.4th 1147]

Pub. L. 109–8, Title III, § 318, Apr. 20, 2005, 119 Stat. 23.

Recent legislation suggests congressional recognition that the bankruptcy code prohibited informal cures after expiration of the five-year period. In December 2020, Congress inserted a new subsection "i" in 11 U.S.C. § 1328. The new subsection allows discharges for debtors, like Ms. Kinney, who have "not completed payments to ... a creditor holding a security interest in the principal residence of the debtor" if

> (2)(A) the plan provides for the curing of a default and maintenance of payments on a residential mortgage under § 1322(b)(5) ; and
>
> (B) the debtor has entered into a forbearance agreement or loan modification with the holder or servicer ....

11 U.S.C. § 1328(i)(2) ; Consolidated Appropriations Act, 2021, Pub. L. 116-260, Div. FF, Title X, § 1001(b)(1)–(2), Dec. 27, 2020, 134 Stat. 3217. This provision, which was effective upon enactment, expires in December 2021. *Id.*

This enactment suggests that (1) Congress realizes that unexpected calamities prevent many Chapter 13 debtors, like Ms. Kinney, from timely paying their mortgages and (2) Congress tried to soften the blow without disturbing the code's other limitations.

* * *

So in our view, Congress intended to strictly limit the time for payments under Chapter 13 plans.

7. Conclusion

We affirm the dismissal of Ms. Kinney's Chapter 13 case. Although the Code's language and legislative history are ambiguous, both suggest that Congress intended to limit Chapter 13 plan payments to five years.

If Ms. Kinney wanted to avoid a material default, she needed a plan modification. But the court couldn't permit Ms. Kinney to cure her default once the plan's five-year period ended.

Given Ms. Kinney's material default, the plan's expiration left the bankruptcy court without authority to grant a discharge. We thus affirm dismissal of the Chapter 13 bankruptcy case.

EID, J., concurring in the judgment.

Although I agree with the majority's conclusion that payments made after the five-year payment period cannot cure a default and permit discharge, I write separately because I would not find the statutory scheme to be ambiguous on this point. *Contra* Maj. Op. at 1140–41, 1145.

Under the statutory scheme, a plan can only last five years. 11 U.S.C. § 1322(d)(1) ("the plan may not provide for payments over a period that is longer than 5 years"). As the majority points out, a discharge can occur only when the debtor "complet[es] ... all payments under the plan." Maj. Op. at 1141 (citing 11 U.S.C. § 1328(a)). While the majority suggests that the term "under" is automatically ambiguous, *id.* at 1142, the statutory language and context in this case show that the plain meaning of "under" is "subject to." *See Pereira v. Sessions* , --- U.S. ----, 138 S. Ct. 2105, 2113, 2117, 201 L.Ed.2d 433 (2018) (explaining that while the word "under" is a "chameleon," the "plain language and context" in the case before it showed that "Congress ha[d] supplied a clear and unambiguous answer to the interpretive case at hand"). As the majority concludes, properly in my view, a payment cannot be made subject to a plan if the plan no longer exists—that is, if the five-year period has passed. Maj. Op. at 1143, 1145. Given that Kinney did not "complet[e] ... all payments under the plan," as required by § 1328(a), within five years, as required by § 1322, the bankruptcy court was without

[5 F.4th 1148]

jurisdiction to grant a discharge and properly dismissed the case. There is no ambiguity here. *See* A. Scalia & B. Garner, Reading Law 167 (2012) ("The text must be construed as a whole"); *Pereira* , 138 S. Ct. at 2116 (rejecting "strain[ed]" efforts "to inject ambiguity into the statute").[1]

The majority concludes that the language is ambiguous because "[i]n the end, there's no code provision that expressly allows or prohibits a discharge when the debtor has not completed the plan payments by the end of the five-year period." Maj. Op at 1145. The majority then proceeds to consider the legislative history of the statute, concluding that it too is ambiguous. *Id* . at 1145.

It was not necessary for Congress to have added an express provision regarding payments made after the five-year period because the language already provides for such a result: a plan expires after five years, and payments cannot be "under" a plan that has come to an end. Because the majority's definition of ambiguity places an untenable burden on Congress to expressly spell out a result even where the result is plain under application of existing statutory provisions, I respectfully concur only in the judgment it reaches.

Notes:

[1] The parties agree that Ms. Kinney's mortgage payments during the plan were payments "under the plan."

[2] Ms. Kinney notes that courts are divided on whether the five-year period begins with the first post-petition payment or after confirmation of the plan. Appellant's Opening Br. at 4 n.1. But she does not argue that the five-year period begins after confirmation of the plan or contest the bank's assertion that the five-year period began on the due-date of the first payment. So Ms. Kinney has waived any argument that the term started after confirmation of the plan. *See United States v. Harman* , 297 F.3d 1116, 1131 (10th Cir. 2002) (en banc) ("Arguments raised in a perfunctory manner, such as in a footnote, are waived."). Given this waiver, we assume without deciding that the five-year period began with the due-date of the first post-petition payment.

[3] In *In re Klaas* , the Third Circuit held that such payments after five years are "under the plan." 858 F.3d 820, 827–33 (3d Cir. 2017). Before that opinion, bankruptcy courts had divided on the issue.

Many bankruptcy courts had concluded that untimely payments are allowable under the plan. *In re Hill* , 374 B.R. 745, 749–50 (Bankr. S.D. Cal. 2007) ; *In re Henry* , 343 B.R. 190, 192–93 (Bankr. N.D. Ill. 2006) ; *In re Aubain* , 296 B.R. 624, 634 (Bankr. E.D.N.Y. 2003) ; *In re Brown* , 296 B.R. 20, 22 (Bankr. N.D. Cal. 2003) ; *In re Harter* , 279 B.R. 284, 287–88 (Bankr. S.D. Cal. 2002) ; *In re Black* , 78 B.R. 840, 842–43 (Bankr. S.D. Ohio 1987).

But many other bankruptcy courts had disagreed, concluding that untimely payments are not "under the plan." *In re Hanley* , 575 B.R. 207, 217–19 (Bankr. E.D.N.Y. 2017) ; *In re Ramsey* , 507 B.R. 736, 739 (Bankr. D. Kan. 2014) ; *In re Grant* , 428 B.R. 504, 507–08 (Bankr. N.D. Ill. 2010) ; *In re Goude* , 201 B.R. 275, 277 (Bankr. D. Or. 1996) ; *In re Jackson* , 189 B.R. 213, 214 (Bankr. M.D. Ala. 1995) ; *In re Woodall,* 81 B.R. 17, 18 (Bankr. E.D. Ark. 1987).

[4] Ms. Kinney points out that "nothing in the Code mandates dismissal of a case with a confirmed plan which ends up needing some extra time to complete." Appellant's Opening Br. at 16 (quoting *In re Klaas* , 858 F.3d 820, 829 (3d Cir. 2017)). But this omission in the bankruptcy code does not necessarily imply discretion to grant a discharge when the plan ends with a material default. To the contrary, the existence of discretion may stem from flexibility built elsewhere into the bankruptcy code. Such flexibility exists, for example, when a debtor seeks a partial discharge

based on a hardship after committing a material default. 11 U.S.C. § 1328(b).

5 Though the Supreme Court regarded the competing interpretations of the statutory term "under" as "credible," the Court ultimately declined to decide whether the term was ambiguous facially or within the statutory context. *Piccadilly Cafeterias* , 554 U.S. at 41, 47, 128 S.Ct. 2326. Irrespective of the term's ambiguity, the Court interpreted the term "under" based not only on the statutory text but also on legislative intent. *Id.* at 47–52, 128 S.Ct. 2326. We've likewise considered legislative intent, though the concurrence does not. *See* Part 6, below.

6 As an amicus, Ms. Kinney's Trustee contends that attorney fees would skyrocket if every late payment requires modification. Here, though, we are addressing only the inability to cure a default after the five-year period has ended. At that point, the parties agree that the court cannot modify the plan to permit future payments. In any event, we must interpret the bankruptcy code as Congress drafted it even if this interpretation would increase legal expenses.

7 The alternatives to discharge may be harsh for debtors, like Ms. Kinney, suffering unanticipated setbacks late in a five-year payment period. To soften the blow, Congress has added a temporary provision allowing discharges for debtors defaulting on mortgage payments. 11 U.S.C. § 1329(i) (2021).

But the permanent alternatives—hardship discharge, dismissal, and conversion—are tough. The hardship discharge is not always available and even when it is, the relief is limited to unsecured debts. 11 U.S.C. § 1328(b), (c). And after a dismissal, the debtor does not get a fresh start and might need to re-enter bankruptcy or continue in debt. 11 U.S.C. § 349. Conversion also has downsides. For some Chapter 13 debtors, conversion to Chapter 7 may not be available. *See* 11 U.S.C. § 707(b). And even if conversion to Chapter 7 were available, it could jeopardize debtors' ability to remain in their homes. *See* 11 U.S.C. § 726.

8 Some exceptions may exist. *See In re Lanning* , 545 F.3d 1269, 1274 n.4 (10th Cir. 2008) ("The ruling on the relevant duration of the commitment period is not at issue in this appeal."); *see also* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109–8 (titling the relevant section of the bill "Chapter 13 plans to have 5-year duration in certain cases"); *In re Sisk*, 962 F.3d 1133, 1146 (9th Cir. 2020) (concluding that 11 U.S.C. § 1325(b)(4) requires the plan to last a minimum of five years "only if the plan triggered an objection" by a trustee or creditor).

1 In addition to *Pereira* , the majority cites to *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc* ., 554 U.S. 33, 39–41, 128 S.Ct. 2326, 171 L.Ed.2d 203 (2008). That decision provides no support for its finding of ambiguity, however, as it assumed for the sake of argument that the language in that case was ambiguous. *Id.* at 41, 128 S.Ct. 2326.

No. 21-599

In the Supreme Court of the United States

MARGARET L. KINNEY, PETITIONER

v.

HSBC BANK USA, N.A.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
CURTIS E. GANNON
Deputy Solicitor General
NICOLE FRAZER REAVES
Assistant to the Solicitor General
MARK B. STERN
BENJAMIN M. SHULTZ
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a bankruptcy court may grant a completion discharge under 11 U.S.C. 1328(a) when a debtor misses payments near the end of her Chapter 13 plan's five-year commitment period but completes those payments shortly after the end of that period.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

(III)

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. The Bankruptcy Code provides various ways for debtors in financial distress to discharge their financial obligations and obtain a "fresh start." *Grogan* v. *Garner*, 498 U.S. 279, 286 (1991). Most individual debtors pursue relief under either Chapter 7 or Chapter 13 of the Bankruptcy Code. In Chapter 7, the debtor's existing assets (subject to various exemptions) are liquidated to pay off creditors, and the debtor may promptly obtain a discharge. *Harris* v. *Viegelahn*, 575 U.S. 510, 512-514 (2015); see 11 U.S.C. 701 *et seq.* Alternatively, Chapter 13 permits a debtor with regular income to re-

tain some existing assets, but the debtor must make monthly payments from her disposable income under a plan that typically lasts between three and five years. See 11 U.S.C. 1301 *et seq.*; *Harris*, 575 U.S. at 514. A Chapter 13 discharge ordinarily can be achieved only after the debtor completes "all payments under the plan." 11 U.S.C. 1328(a).

A debtor seeking Chapter 13 relief is required to propose a repayment plan, which must (among other things) set out how the debtor's disposable income will be used to repay creditors. See 11 U.S.C. 1321, 1322(a). If the debtor's income is below her State's median, the plan generally must include a commitment period of 3 years, "unless the [bankruptcy] court, for cause, approves a longer period, but the court may not approve a period that is longer than 5 years," 11 U.S.C. 1322(d)(1); see 11 U.S.C. 1322(d)(2), 1325(b)(4). If the debtor's income is at or above the state median, the standard commitment period is 5 years, 11 U.S.C. 1325(b)(4)(ii), and "the plan may not provide for payments over a period that is longer than 5 years," 11 U.S.C. 1322(d)(1).[1] A debtor must commence plan payments within 30 days of filing a plan if the court has not yet confirmed the plan. 11 U.S.C. 1326(a)(1).

b. Once the bankruptcy court confirms a Chapter 13 plan, the plan binds the debtor and all creditors. 11 U.S.C. 1327(a). Two types of post-confirmation events that occur in some cases are relevant here. First, "upon request of the debtor, the trustee, or the holder of an allowed unsecured claim," a confirmed plan may be modified in a number of specific ways. 11 U.S.C.

[1] A shorter commitment period is permitted "only if the plan provides for payment in full of all allowed unsecured claims over a shorter period." 11 U.S.C. 1325(b)(4)(B).

1329(a). A modified plan "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 period that expires after five years after such time." 11 U.S.C. 1329(c). Second, at the request of the U.S. Trustee or an interested party, the court "may convert" the case to a Chapter 7 proceeding "or may dismiss" the case, "whichever is in the best interests of creditors and the estate, for cause." 11 U.S.C. 1307(c). One form of "cause" is a "material default by the debtor with respect to a term of a confirmed plan." 11 U.S.C. 1307(c)(6).

In some cases, conversion to Chapter 7 will have the same effect as dismissal. The Bankruptcy Code presumes that it would be an "abuse" for certain debtors—including many with incomes above the state median—to receive Chapter 7 relief, and if such a debtor cannot rebut the presumption of abuse, her Chapter 7 case may be dismissed. See 11 U.S.C. 707(b)(1), (2)(A)(i), and (2)(B)(i).

Subject to certain exceptions, "as soon as practicable after completion by the debtor of all payments under the plan," the bankruptcy court "shall grant the debtor a discharge of all debts provided for by the plan." 11 U.S.C. 1328(a). That type of discharge is known as a completion discharge. If the debtor "has not completed payments under the plan," she may still be eligible for what is known as a hardship discharge, 11 U.S.C. 1328(b)(1), which is generally narrower in scope than a completion discharge because certain categories of debts usually covered by a completion discharge are not covered by a hardship discharge. Compare 11 U.S.C. 1328(a)(1) and (2), with 11 U.S.C. 1328(c). To obtain a hardship discharge, the debtor must establish that her "failure to complete * * * payments is due to circumstances for which the debtor should not justly be held accountable" and that she meets additional requirements. 11 U.S.C. 1128(c); see 11 U.S.C. 1328(b)(2) and (3). If a debtor is not eligible for a completion or hardship discharge, the case will be dismissed or converted to a Chapter 7 proceeding. See 11 U.S.C. 1307(a), (b), and (c).

2. a. Petitioner is an individual debtor who filed a petition for Chapter 13 relief in the Bankruptcy Court for the District of Colorado in 2013. Pet. App. 26. At the time of that filing, petitioner had an outstanding balance on the mortgage for her principal residence, which she owed to respondent. See *id.* at 3. When petitioner filed for bankruptcy, she was current on her mortgage payments. *Ibid.*

The bankruptcy court confirmed petitioner's plan in May 2014. C.A. App. 118. The plan required petitioner to pay her disposable income to the Chapter 13 Trustee, who then distributed those funds to unsecured creditors. See *id.* at 111. Petitioner's monthly income was above her State's median, so the plan specified that she was required to make those payments for five years starting on November 25, 2013. *Id.* at 110-111. The plan also required petitioner to make direct payments to certain secured creditors, including respondent. Pet. App. 25; C.A. App. 112, 115. Those were treated as payments under petitioner's bankruptcy plan. Pet. App. 3; see 8 *Collier on Bankruptcy* ¶ 1328.02, at 1328-8 to 1328-8.1 (Richard Levin & Henry J. Sommer eds., 16th ed. 2021) (*Collier*).

The five-year commitment under petitioner's plan was scheduled to end in November 2018. Pet. App. 26. In July 2018, respondent filed a document with the bankruptcy court confirming that petitioner was current on her mortgage payments. *Ibid.*; see Fed. R. Bankr. P. 3002.1(f). But petitioner failed to make mortgage payments due on September 1, October 1, and November 1, 2018, resulting in an arrearage of $2,978.18. Pet. App. 26-27; C.A. App. 147. According to petitioner, she missed those payments because her injuries from a March 2018 car accident resulted in multiple surgeries and substantial medical expenses. Pet. App. 4, 46.

In December 2018, respondent moved to dismiss petitioner's bankruptcy case under Section 1307(c)(6), arguing that petitioner's failure to make the three mortgage payments was a material default with regard to her confirmed plan. Pet. App. 27; C.A. App. 125-127. In February 2019, while respondent's motion to dismiss was pending, petitioner made the three missing payments in full. Pet. App. 27.

b. The bankruptcy court entered an order dismissing the case, but delayed finalizing the order to permit petitioner to instead convert the case to Chapter 7. Pet. App. 25-34; see *id.* at 37. The court held "that the Bankruptcy Code does not permit the Debtor additional time to cure plan arrearages after the plan has ended." *Id.* at 25-26. And the court found that petitioner's "failure to timely pay her mortgage payments during the five-year applicable commitment period constitutes a material default" and "is cause for dismissal" under Section 1307(c)(6). *Id.* at 32.

Petitioner did not move to convert the case to Chapter 7; she instead moved for reconsideration of the dismissal, which was denied. Pet. App. 37-50. The bankruptcy court then entered a final order of dismissal. *Id.* at 35.

3. On direct appeal from the bankruptcy court to the court of appeals under 28 U.S.C. 158(d)(2), the court of appeals affirmed. Pet. App. 1-24.

a. The court of appeals identified "ambiguity inherent in the combination of" relevant provisions of the Bankruptcy Code about whether a debtor's payments after the expiration of a plan's five-year term can cure a default and permit a discharge. Pet. App. 7. The court observed that Section 1328(a) requires discharge "as soon as practicable after completion by the debtor of all payments under the plan," 11 U.S.C. 1328(a), but does not address whether to count payments made after the plan ends. Pet. App. 7a. The court further observed that Section 1307(c)(6), which permits but does not require dismissal for material default, "implies some discretion." *Id.* at 8. Although those provisions "don't definitively resolve the extent of discretion over dismissal and discharge," the court concluded that they "suggest that discharge is unavailable when the plan ends with an ongoing material default." *Id.* at 7 (emphasis omitted). In the court's view, "the more natural reading" of Section 1328(a) is that payments can "fall 'under' a plan only if the plan remained in existence" at the time the payments were made. *Id.* at 11. The court also stated that treating "late payments as an informal cure * * * would nullify" Section 1329(c), which prohibits plan modifications that would provide for payments over a period longer than five years. *Id.* at 14.

To resolve the perceived ambiguity in the Bankruptcy Code, the court of appeals turned to legislative history. Pet. App. 17-22. The court noted that, when Congress adopted the five-year limit on commitment periods, the House Judiciary Committee expressed concern about "indefinite extensions of payment plans." *Id.*

at 19 (citing H.R. Rep. No. 595, 95th Cong., 1st Sess. (1977) (House Report)). The court therefore concluded that "Congress intended to strictly limit the time for payments under Chapter 13 plans." *Id.* at 22. In reaching that conclusion, the court indicated that it disagreed with the Third Circuit's decision in *In re Klaas*, 858 F.3d 820 (2017). Pet. App. 7, 15, 19.

Applying its rule to petitioner, the court of appeals held that, "[g]iven [her] material default, the plan's expiration left the bankruptcy court without authority to grant a discharge." Pet. App. 22.[2]

b. Judge Eid concurred in the judgment. Pet. App. 22-24. In her view, there was no need to consult legislative history because the statutory scheme unambiguously provides that "a plan expires after five years, and payments cannot be 'under' a plan that has come to an end." *Id.* at 24.

DISCUSSION

A bankruptcy court generally cannot dismiss or convert a Chapter 13 case over a debtor's objection without first finding "cause"—such as a material default by the debtor. 11 U.S.C. 1307(c). And a mere failure to make a plan payment is not automatically a material default. Rather, a court must consider the totality of the circumstances before dismissing or converting a Chapter 13 case on that basis.

The court of appeals erred to the extent it declined to apply that principle to payments missed near the end of a five-year commitment period and instead held that

[2] The court of appeals also found that petitioner forfeited any argument that her five-year commitment period commenced when the plan was confirmed in May 2014, rather than when the first payment was due in November 2013. Pet. App. 3.

a completion discharge is categorically unavailable whenever a payment is made after that period. None of the Bankruptcy Code provisions governing the approval, modification, or dismissal of Chapter 13 plans requires the Tenth Circuit's approach. If Congress had wanted to adopt that rigid and unforgiving rule for any payment outstanding at the moment the five-year period ends, it could have made that clear. The court's rule undermines the Bankruptcy Code's goals for both debtors and creditors and produces absurd and inequitable results, especially for debtors who unknowingly have a small outstanding balance at the end of five years.

Despite the disagreement between the Third and Tenth Circuits, the question presented does not warrant this Court's review at this time. No other court of appeals has addressed the question presented, and it does not appear to have been frequently litigated in the lower courts. Moreover, the full scope of the Tenth Circuit's decision is unclear. This Court should therefore, at a minimum, defer consideration of the question presented until the Tenth Circuit clarifies the reach of its rule.

A. The Court Of Appeals Erred To The Extent It Held That A Bankruptcy Court Must Deny A Debtor A Completion Discharge If She Fails To Make All Payments Within The Five-Year Commitment Period

1. If all goes as intended in a Chapter 13 bankruptcy, the case proceeds as follows: the debtor proposes a plan; the bankruptcy court approves the plan; the debtor may seek and the court may grant plan modifications; and, once the debtor has completed the plan payments, the court grants the debtor a completion discharge. See pp. 2-4, *supra*. One way that process can

be derailed is by a conversion or dismissal "for cause." 11 U.S.C. 1307(c). Enumerated forms of "cause" include "unreasonable delay by the debtor that is prejudicial to creditors" and "material default by the debtor with respect to a term of a confirmed plan." 11 U.S.C. 1307(c)(1) and (6). But in the absence of cause, a debtor who makes all her payments is entitled to a completion discharge.

The court of appeals erred to the extent that it held that a bankruptcy court must automatically deny a debtor a completion discharge if she fails to make all payments within the five-year commitment period. As lower courts have repeatedly found in Chapter 13 cases, whether missed payments are a material default depends on the "totality of circumstances": sometimes they are, but sometimes debtors are permitted to make up for missed payments. *In re Brown*, 70 B.R. 10, 12 (Bankr. S.D. Ohio 1986); see 8 *Collier* ¶ 1307.04, at 1307-20.[3] When determining whether the failure to make

[3] For decisions finding material default when debtors failed to make payments, see, *e.g.*, *In re Silva*, No. 21-55873, 2022 WL 2340802, at *1 (9th Cir. June 29, 2022); *In re Roberts*, 279 B.R. 396, 399-400 (B.A.P. 1st Cir. 2000), aff'd, 279 F.3d 91 (1st Cir. 2002); *Evans* v. *Stackhouse*, 564 B.R. 513, 530-533 (E.D. Va. 2017); *In re Formaneck*, 534 B.R. 29, 32-35 (Bankr. D. Colo. 2015); *In re Heinzle*, 511 B.R. 69, 81-83 (Bankr. W.D. Tex. 2014); *In re King*, 217 B.R. 623, 626 (Bankr. S.D. Cal. 1998). For decisions finding no material default when debtors failed to make payments, see, *e.g.*, *Sievers* v. *Green*, 64 B.R. 530, 530-531 (B.A.P. 9th Cir. 1986); *In re Durben*, 70 B.R. 14, 15-16 (Bankr. S.D. Ohio 1986); *In re Brown*, 70 B.R. at 11-12; *In re Pizzullo*, 33 B.R. 740, 742 (Bankr. E.D. Pa. 1983); *In re Jarvis*, 24 B.R. 46, 47-48 (Bankr. D. Vt. 1982). For decisions recognizing that debtors may be permitted to make up missed plan payments in some situations, see, *e.g.*, *Ferrell* v. *Countryman*, 398 B.R. 857, 860-861, 865-866, 868 (E.D. Tex. 2009); *In re Nicksion*, 631 B.R. 475, 480-481 (Bankr. D. Kan. 2021); *In re Wilson*, No. 04-29916, 2008

payments is a material default, a court may consider a variety of factors, including (1) "why such payments were not made," *In re Howell*, 76 B.R. 793, 795 (Bankr. D. Or. 1986); (2) whether the debtor "intentional[ly] fail[ed] to make payments at a time when the debtor was financially able to do so," *ibid.*; (3) "whether the failure of performance will result in creditors receiving less than they would have [otherwise] received," *In re Jahanian*, No. 08-10030, 2009 WL 3233161, at *3 (Bankr. E.D. Va. Sept. 28, 2009); and (4) whether the debtor "will be able to make up the missing payments over the remaining term of the Plan," *In re Wilson*, No. 04-29916, 2008 WL 4865587, at *1 (Bankr. D. Md. Nov. 7, 2008).

Thus, as relevant here, when a creditor seeks dismissal because a debtor is late on a payment, a bankruptcy court cannot simply dismiss or convert the case on that basis. Rather, the court must first determine that the late payment constituted a material default under Section 1307(c)(6). The court of appeals appears to have rejected that approach when it comes to a late payment that occurs after the end of the five-year commitment period. But, for the reasons discussed below, nothing in the Bankruptcy Code requires that late payments at the end of the five-year period be treated differently from late payments during the five-year period. If Congress had wanted to impose differential treatment with such harsh results, it would have been clear. There is therefore no basis for a strict rule barring a completion discharge whenever a debtor has an outstanding payment at the conclusion of year five, but later makes that payment.

WL 4865587, at *1 (Bankr. D. Md. Nov. 7, 2008); *In re Howell*, 76 B.R. 793, 793-795 (Bankr. D. Or. 1986).

2. None of the Bankruptcy Code provisions governing Chapter 13 plans, their modification, or discharges under them prohibits a completion discharge just because the debtor fails to make a payment before the conclusion of the five-year commitment period.

a. To be confirmed, a Chapter 13 "plan may not provide for payments over a period that is longer than 5 years." 11 U.S.C. 1322(d)(1); see 11 U.S.C. 1322(d)(2) (barring a bankruptcy court from "approv[ing] a period that is longer than 5 years"). By placing limits on the "*commitment* period," 11 U.S.C. 1325(b)(4) (emphasis added), and barring plans that "*provide* for payments" beyond five years, 11 U.S.C. 1322(d)(1) (emphasis added), Congress addressed only the length of the payment schedule—not what happens when a payment is untimely. See 8 *Collier* ¶ 1322.18, at 1322-62.6 ("[T]he fact that a debtor does not actually conclude the payments within the stated period does not constitute a violation of section 1322(d)."). Had Congress wanted to adopt a more stringent rule, it could have used language that referred to more than the plan's approved length—such as stating that "no payment shall be accepted or payable after five years."

The limits on commitment periods in Chapter 13 repayment plans therefore do not speak to whether or when a late payment is permitted. That is confirmed by the Bankruptcy Code's overarching distinction between the prerequisites for confirmation and the conditions for discharge, dismissal, and conversion. For example, at confirmation, a bankruptcy court must determine that "the debtor will be able to make all payments under the plan and to comply with the plan." 11 U.S.C. 1325(a)(6). But if it turns out, after confirmation, that a debtor is unable to make all payments or comply with the plan, the confirmation provisions do not control. Rather, the court must consider whether post-confirmation modification is appropriate under 11 U.S.C. 1329 or whether the case should be dismissed or converted for cause under Section 1307(c). Similarly, if a debtor fails to complete all payments by the conclusion of a confirmed plan, the confirmation provisions do not control—much less compel automatic dismissal or conversion. Nor do the provisions governing plan modifications. Although a bankruptcy court "may not approve" a modification that would permit a plan's commitment period to "expire[] after five years," 11 U.S.C. 1329(c), that limitation does not dictate whether dismissal or conversion is required if an outstanding payment is made after that period expires.

b. The Bankruptcy Code's discharge provisions likewise do not bar a completion discharge in all cases in which a debtor was missing a payment at the end of the five-year period but subsequently made the payment. Section 1328(a) provides that "as soon as practicable after completion by the debtor of all payments under the plan" the bankruptcy court "shall grant the debtor a discharge." 11 U.S.C. 1328(a). The timing of the discharge depends on what is "practicable" after the completion of "payments under the plan," not after the expiration of the commitment period. *Ibid.* But a late payment—whether it occurs during or after the commitment period—may still be a payment "under the plan."

The preposition "under" "can have many different meanings in different contexts." *In re Hechinger Inv. Co.*, 335 F.3d 243, 252 (3d Cir. 2003) (Alito, J.). In the context of Section 1328(a), the most applicable definition is "[s]ubject to the restraint or obligation of." *The*

American Heritage Dictionary of the English Language 1395 (1975) (*American Heritage*); see *Webster's Third New International Dictionary of the English Language* 2487 (1976) (*Webster's*) (def. 8a: "required by : in accordance with : bound by"); 18 *The Oxford English Dictionary* 949 (2d ed. 1989) (*OED*) (def. 14b: "With words denoting an obligation, compact, or formal engagement: Subject to, bound or constrained (legally or morally) by."). The dictionaries' examples of that meaning include "under contract," "[under] contract to deliver," and "rights [under] the law." *American Heritage* 1395 (italics omitted); *Webster's* 2487.

A payment is therefore made "under the plan," 11 U.S.C. 1328(a), if it is one that the plan "oblig[ed]," *American Heritage* 1395, or "required," *Webster's* 2487, the debtor to make. That means that a debtor has "complet[ed] * * * all payments under the plan," 11 U.S.C. 1328(a), when she has made all payments required by the plan. That remains true even if a required payment was late. Neither the definition of "under" nor the statutory context forbids a late payment or imposes an absolute timeliness requirement.[4] Although Section 1328(a) requires all payments to be made before a completion discharge, it does not reference the timing of payments. And, while various provisions state that a bankruptcy court may not impose a commitment period of more than five years, those provisions do not suggest that a confirmed plan automatically "is no longer in

[4] The only non-obsolete definition of "under" that refers to a time period, encompassing the reign of an individual ruler, is inapposite. See 18 *OED* 951 (def. 11a: "With names or designations of rulers, passing into the sense of 'during the reign or administration of', 'in the time or period of'."); *Webster's* 2487 (def. 10b: "during the reign or administration of").

force" or that late payments are barred after five years. Br. in Opp. 13.

That reading accords with common parlance. For example, consumers routinely enter into cell-phone contracts that include a term of service and require monthly payments. When a consumer is late in making a monthly payment in the beginning or middle of the contract period, nobody thinks that the late payment is not made "under" the plan. Similarly, if a payment is outstanding at the end of the contract, but is made shortly thereafter, it still satisfies an obligation "under" the contract. By the same token, payments required by a Chapter 13 plan that are made after the plan's five-year commitment period are payments under that plan—though in some cases their lateness may make dismissal or conversion for material default or prejudicial delay appropriate.

Contrary to respondent's assertion (Br. in Opp. 13), this Court's decision in *Florida Department of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U.S. 33 (2008), does not suggest that the phrase "under the plan" in Section 1328(a) bars a completion discharge if a payment is made after five years. In *Piccadilly* the Court held that 11 U.S.C. 1146(a), which provides that the transfer of a security "under a plan confirmed under section 1129 or 1191 of this title[] may not be taxed under any law imposing a stamp tax," does not apply to transfers that occur before a plan is confirmed. 554 U.S. at 52-53. Adopting a definition of "under" similar to the applicable one here, the Court found that "under a plan confirmed," 11 U.S.C. 1146(a), was best "read to mean 'with the authorization of' or 'inferior or subordinate' to its referent, here the confirmed plan." *Piccadilly*, 554 U.S. at 39. The Court observed that "a transfer made prior to the date of plan confirmation cannot be subject to, or under the authority of, something that did not exist at the time of the transfer—a confirmed plan." *Id.* at 40. *Piccadilly*'s textual analysis therefore hinged on what it means to be a "plan *confirmed*." 11 U.S.C. 1146(a) (emphasis added). Here, there is no question that the plan was confirmed well before petitioner's late payment.

And *Piccadilly* does not stand for the broad proposition that a payment is only "under the plan" if it occurs within the commitment period. *Piccadilly* analyzed plan confirmation—which occurs on a certain date pursuant to a specific court order. See 554 U.S. at 37. But no order terminating the plan is entered precisely at the end of the commitment period. Rather, at some time thereafter, the debtor will seek a discharge under Section 1328(a) or, if the debtor has failed to comply with the plan, a party or the U.S. Trustee will seek dismissal or conversion under Section 1307(c).

c. Neither the court of appeals nor respondent has identified a Bankruptcy Code provision that automatically bars a bankruptcy court from granting a completion discharge if a Chapter 13 debtor fails to make all payments within five years. If a debtor fails to make all plan payments by the end of that period, a court, on a proper motion, should consider whether the failure to make timely payments is a material default or otherwise constitutes cause to convert or dismiss the case. See 11 U.S.C. 1307(c). In such situations, courts should be guided by the general considerations for determining whether a default is material. See pp. 9-10, *supra*. Of course, if a default is immaterial, the debtor still must "complet[e]" any missing payments before receiving a completion discharge. 11 U.S.C. 1328(a).

3. The broader statutory context supports an approach that permits some debtors who complete their plan payments after five years to obtain completion discharges. As an initial matter, debtors who fall behind on payments *during* the five-year period may be permitted to make up those payments in some cases. See pp. 9-10, *supra*. And nothing in the Bankruptcy Code justifies "denying that opportunity to debtors after a lengthy track record of good faith payments" and thereby "'impos[ing] a standard of perfection at the conclusion of the plan term that does not exist at any other point in the case.'" *In re Klaas*, 858 F.3d 820, 831 (3d Cir. 2017) (citation omitted). Indeed, the rule in the decision below undermines "a central purpose of the Code": to "provide a procedure by which certain * * * debtors can reorder their affairs, make peace with their creditors," and be "'unhampered by the pressure and discouragement of preexisting debt.'" *Grogan* v. *Garner*, 498 U.S. 279, 286 (1991) (citation omitted). In many situations, permitting a brief period for the debtor to complete payments will best serve both the debtor's interest in obtaining a completion discharge and the creditor's interest in receiving its payments. The facts of this case illustrate the point: Once petitioner made up the missed mortgage payments, respondent repeatedly disavowed any interest in the dismissal of petitioner's case. See C.A. Doc. 10110366727 (June 25, 2020); Br. in Opp. 11-12.

The court of appeals' approach could also create results bordering on the absurd. For example, a plan may require payment of a fee that the debtor is not notified about until after the five-year commitment period ends. See *In re Klaas*, 858 F.3d at 824, 833 & n.1. And U.S. Trustees have informed this Office that they are aware of situations in which a debtor, because of a calculation error or mistake, owes less than $100 after the applicable commitment period has ended. Under a strict reading of the Tenth Circuit's rule, such a debtor would be automatically barred from obtaining a completion discharge—even if the debtor believed she had timely made all plan payments, the calculation error was not her fault, and she paid promptly after learning of the outstanding amount.

4. Because the statutory text and context resolve the meaning of the relevant statutory provisions, there is no need to consult legislative history. See *Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). In any event, the legislative history invoked by the court of appeals does not support its approach. The House Judiciary Committee's Report stated that the predecessor to the Bankruptcy Code permitted too many "[e]xtensions on plans" that "put some debtors under court supervised repayment plans for seven to ten years." House Report 117. The Committee criticized such plans as "the closest thing there is to indentured servitude," in that they "last[] for an [unidentifiable] period, and do[] not provide the relief and fresh start for the debtor that is the essence of modern bankruptcy law." *Ibid.*

That criticism does not suggest that the Committee drafted a rule that completely disallows payments after the five-year commitment period—and thereby prevents a completion discharge. Such a strict rule would frustrate the Committee's desire to provide "relief and [a] fresh start for the debtor." House Report 117. And the Committee did not indicate that the five-year cap on Chapter 13 plans—which was meant to shield debtors from indefinitely long repayment periods—would also be a sword preventing debtors from obtaining relief for minor payment anomalies that happen to arise at the end, rather than the beginning or middle, of their plans. See *In re Klaas*, 858 F.3d at 830.

5. Respondent's and the court of appeals' remaining substantive arguments lack merit. Permitting late payments in appropriate cases does not "nullify" Section 1329(c)'s requirement that a plan may not be modified to extend beyond five years. Pet. App. 14; see Br. in Opp. 13-14. A debtor who fails to make all payments by the end of five years must be prepared to rebut any claim of material default and complete the payments in order to obtain a completion discharge. See p. 15, *supra*. That approach best accounts for both Section 1329(c)'s limits on modification and Section 1307(c)'s proviso that a case may not be dismissed or converted over a debtor's objection absent cause (such as a material default). And, just as an immaterial late payment *during* the five-year period does not "nullify" the Bankruptcy Code's general timeliness requirements, permitting a debtor to rectify an immaterial payment failure *at the end of* five years does not "nullify" Section 1329(c).

Respondent suggests (Pet. 17-18) that conversion to Chapter 7 will provide relief to Chapter 13 debtors who miss payments at the end of their repayment plans. But conversion to Chapter 7 will have the same effect as dismissal in some cases. See *Hamilton* v. *Lanning*, 560 U.S. 505, 523 (2010); see also p. 3, *supra*. Similarly, contrary to respondent's suggestion (Br. in Opp. 4), a hardship discharge under Section 1328(b)(1) is unlikely to provide relief to many debtors. To obtain a hardship discharge, a debtor must establish, among other things, that she "fail[ed] to complete" plan payments. 11 U.S.C.

1328(b)(1). A hardship discharge therefore appears to be unavailable to debtors like petitioner, who made up her missed plan payments before the bankruptcy court determined whether dismissal or discharge was appropriate. At the same time, encouraging debtors "to withhold the remainder of the plan funding that they have at their disposal" in order to be eligible for the more limited discharge associated with non-completion does not "make sense," as it "deprive[s] creditors of those distributions," which disserves a basic purpose of Chapter 13. *In re Klaas*, 858 F.3d at 831. Thus, in *Hamilton* v. *Lanning*, this Court declined to adopt a "mechanical approach" to Chapter 13 in part because it would "produce senseless results" by "deny[ing] creditors payments that the debtor could easily make." 560 U.S. at 520.

B. The Question Presented Does Not Warrant This Court's Review At This Time

Although the court of appeals' decision is erroneous, and although it conflicts with a decision from the Third Circuit, further review of the question presented is unwarranted at this time. This issue appears to have been litigated infrequently. And the Tenth Circuit should have the opportunity to clarify the reach that its decision will have.

1. As respondent appears to acknowledge (Br. in Opp. 6-10), the court of appeals' decision conflicts with the Third Circuit's decision in *In re Klaas, supra*. Although the facts here differ from those in *In re Klaas*—which involved debtors who were unaware of an end-of-plan shortfall resulting from unpaid fees for the Chapter 13 Trustee, 858 F.3d at 824 & n.1, 833—the Third Circuit's rule is incompatible with the rule that the court of appeals appears to have adopted in this case.

Instead of imposing a bright-line rule barring a completion discharge whenever a debtor has not completed all payments within five years, the Third Circuit held that "bankruptcy courts have discretion to grant a brief grace period and discharge debtors who cure an arrearage in their payment plan shortly after the expiration of the plan term." *Id.* at 823. And the Third Circuit instructed bankruptcy courts contemplating payments after the five-year period to examine the sort of factors that they normally consider when determining whether a debtor has materially defaulted. *Id.* at 831-833.

But as the shallowness of the split suggests, the question presented appears to have been litigated infrequently and therefore does not currently warrant this Court's review. Petitioner and the court of appeals identify (Pet. 10-12; Pet. App. 7) only 16 other cases in the past 35 years in which bankruptcy courts have confronted the question of how to treat missing payments at the end of five years. It is therefore not clear that this case presents a sufficiently "important matter" for this Court's review. Sup. Ct. R. 10(a).

2. The question presented also does not warrant this Court's review at this time because the breadth of the court of appeals' decision is unclear. The decision below could be understood to adopt a sweeping rule that bars a bankruptcy court from granting a debtor a completion discharge whenever any payment comes after the five-year window closes. But the decision alternatively could be read more narrowly, as holding that if a late payment after the end of the five-year period constitutes a material default, only then is a court prohibited from granting a completion discharge.

That reading is possible because the issue of materiality was not briefed by petitioner in the court of appeals; she did not contest the bankruptcy court's determination that her three untimely mortgage payments constituted a material default under Section 1307(c)(6). See Pet. C.A. Br. 8-11, 16; see also Resp. C.A. Br. 25 n.5 (noting that petitioner "does not argue in her brief that the three missed mortgage payments were immaterial"). The court of appeals therefore may not have independently considered whether the default in this particular case was material, see Pet. App. 5, 7, 8, 12-13, 22, and instead may have taken the materiality of the default as a "[g]iven," *id.* at 22. It is therefore possible that, in the future, the Tenth Circuit will limit the decision below by directly considering the materiality question. The court could hold that some missed payments at the end of a five-year plan are immaterial—perhaps depending on their amounts and the degree of lateness in ultimate payment—*and* that the rule in this case does not bar a completion discharge when the default is immaterial. Such an interpretation would limit the effects of the court's decision in this case and reduce any need to resolve the shallow circuit split.

This Court should therefore, at a minimum, defer review of the question presented until the court of appeals has an opportunity to clarify the scope of the decision below. That approach is particularly appropriate because petitioner did not seek en banc rehearing, and, to the government's knowledge, neither a court of appeals panel nor the en banc court has had an opportunity to interpret the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
CURTIS E. GANNON
Deputy Solicitor General
NICOLE FRAZER REAVES
Assistant to the Solicitor General
MARK B. STERN
BENJAMIN M. SHULTZ
Attorneys

AUGUST 2022

Faculty

Hon. Robert D. Berger was appointed as a U.S. Bankruptcy Judge for the District of Kansas in Kansas City on Oct. 16, 2003, and was reappointed on Oct. 16, 2017. Prior to his appointment, Judge Berger practiced law as a bankruptcy and insolvency specialist representing debtors and creditors, and was among the first group of attorneys in Kansas and Missouri to be certified by the American Board of Certification in both consumer and business bankruptcy law. Judge Berger is a member of ABI and the National Conference of Bankruptcy Judges, and a founding member of the Kansas Chapter of the Federal Bar Association. He also is a chapter author for *Collier on Bankruptcy*, *Collier Bankruptcy Practice Guide*, *Kansas Bankruptcy Handbook* and *Practitioner's Guide to Kansas Family Law*. Judge Berger is a frequent lecturer and he has authored articles for various publications, including *The Washburn Law Journal*, *ABI Journal* and the *Journal of the Kansas Bar Association*. He received his B.A. in history and political science from the University of Kansas in 1983 and his J.D. from Washburn University School of Law in 1986.

Gregory A. Burrell is a chapter 13 trustee in Minneapolis, appointed in 2013, and is a licensed attorney in Louisiana and Minnesota. He started his legal career with Murray & Murray Law firm as a consumer attorney representing debtors in chapter 7 and 13 bankruptcies, businesses in chapter 7 bankruptcies and the chapter 7 trustee in various litigation. Mr. Burrell founded a bankruptcy law clinic at Southern University Law Center, where he led student attorneys, who filed chapter 7 bankruptcies free of charge on behalf of individuals living below the poverty line. He also served as staff attorney to the chapter 13 trustee in the Western District of Louisiana. Mr. Burrell is a permanent member of the Bankruptcy Practice Committee in the District of Minnesota, a current NACTT board member and treasurer-elect for NACTT. He is very involved in the topic of equal justice under the law for marginalized communities and what can be done to correct such concerns within the bankruptcy system. Mr. Burrell received his Bachelor's degree in political science from Xavier University with a minor in business administration, and his J.D. from Southern University Law Center.

Kristina S. Crump is a partner at Coons and Crump LLC in Lawrence, Kan., and has been practicing bankruptcy law exclusively since 2013. She focuses her practice on representing individuals and small business owners in chapter 7 and 13 cases throughout Kansas and Western District of Missouri. Prior to working in the legal field, Ms. Crump worked for a local Community Action Agency in Kansas, dedicated to helping people living in poverty. After leaving her nonprofit job, she continued to be involved in the community by serving on Head Start Policy Council and later the East Central Kansas Economic Opportunity Corporation board of directors. Ms. Crump received her B.A. from Our Lady of the Lake University in San Antonio, her M.B.A. from Baker University in Kansas and her J.D. from the University of Kansas.