

# 2022 Alexander L. Paskay Memorial Bankruptcy Seminar

# Consumer Session

# Consumer Practice Workshop, Part 1: Pre-Filing Issues

Hon. Grace E. Robson, Moderator

U.S. Bankruptcy Court (M.D. Fla.) | Orlando

Cynthia E. Lewis

Nardella & Nardella, PLLC | Orlando

Michael C. Markham

Johnson Pope Bokor Ruppel & Burns, LLP | Tampa

**Charles G. Moore** 

Charles G. Moore, PA | St. Petersburg

### ABI Paskay Seminar – March 29-31, 2022

Tampa Marriott Water Street, Tampa Wednesday, March 30, 2022

10:30 - 11:45 am ET

### Consumer Breakout: Consumer Practice Workshop, Part 1: Pre-Filing Issues

### Introduction of Panelists and Topics to be Discussed

- Cynthia Lewis
- Mike Markham
- Chuck Moore

### Topic 1: Due Diligence

- A. Bank Statements Both Personal and Business
  - Review a full year for potential fraudulent transfers if you have any 727 concerns
  - If business documents don't exist or have been destroyed, there can be a 727 issue
- B. Tax Returns Both Personal and Business
  - Look for Refunds/Owe considering timing of filing
  - Consider status of Business post filing
  - Any monies due from Business to Debtor
- C. Public Records
  - Official Records/Recorded Documents (Real Property Transfers as well as Judgments, Lis Pendens, Liens)
  - Judgments/Liens (including Tax Liens)
  - UCC Search
  - Court Records for Lawsuits
  - Property Appraiser(s)/Zillow
  - Corporations/Secretary of Sate
  - Vehicle Check (FL Dept. Hwy Safety & Motor Vehicle)
  - Trusts
- D. Credit Report
- E. Eligibility of Debtor [§ 109]
  - 11 U.S.C. § 109(e) Chapter 13 Debt Limits are \$1,395,875 secured, and \$465,275 unsecured (as of April 1, 2022)
  - Debt is calculated based on debt being Non-Contingent and Liquidated
  - See In re De La Hoz, 451 B.R. 192 (Bankr. M.D. Fla. 2011); In re Newman, 259 B.R. 914 (Bankr. M.D. Fla. 2001)

### Topic 2: Common Issues

- A. Exemptions
  - Two-year Jurisdiction Rule
  - § 522(o)
  - § 522(p) (1216 Day Rule)
- B. Avoidable Transfers
  - §547 Preferences
  - §548 Fraudulent Transfers
  - §549 Post-petition Transactions
  - Transfers to "insiders" including family members or friends, e.g., joint account with non-filing spouse
  - Pre-payment of rent or mortgage
- C. Discharge/Dischargeability [§§ 523 & 727]
  - § 707 Dismissal/Conversion vs. § 727 Denial of Discharge
  - Certain debts excepted from discharge under § 523 are dischargeable under § 1328
  - Collateral Estoppel of State Court Judgment (even a default judgment?)
  - Consequences of making false oath. <u>See Swicewood v. Ginn</u>, 924 F.2d 230 (11th Cir. 1991) (omission of watch, flatware, 2 shares of stock, golf clubs and 2 silver cups resulted in denial of discharge); <u>In re Phillips</u>, 476 Fed. Appx. 813 (11<sup>th</sup> Cir. 2012)

# Topic 3: Dischargeability

- A. Income Tax [§ 507(a)(8); § 523(a)(1)]
  - Six Factors to Determine Dischargeability of Income Tax
    - 1. A "Return" was filed.
    - 2. The 3-year Rule due date for filing the return is more than 3-years from petition date. §507(a)(8)(A)(i)
    - 3. The 2-Year Rule the tax return was filed more than 2 years before petition date. §523(a)(1)(B)
    - 4. The 240 Day Rule the liability was assessed more than 240 days prior to the petition date. §508(a)(8)(A)(ii)
    - 5. Non-Fraudulent Return
    - 6. No Willful Tax Evasion
    - Special Issues
      - 1. In re: McCoy, 666 F.3d 924 (5<sup>th</sup> Cir. 2012)
      - 2. In re: Justice, 817 F. 3d 738 (11th Cir. 2016)
      - 3. <u>In re: Shek</u>, 947 F.3d 770 (11<sup>th</sup> Cir. 2020)
- B. Student Loan [§ 523(a)(8)]
- C. Fines, Penalties [§ 523(a)(7)]
  - FTC litigation?
  - False Claims Act litigation?
- D. DSO/State Court Obligations [§ 523(a)(5), (a)(15)]
  - § 523(a)(15): Specified debt not excepted from discharge under §1328
  - Tip: File a Motion to Deem Current with Child Support at end of Plan since some require interest

### E. Bad Acts of Debtor

- § 523(a)(2) fraud;
- § 523(a)(4) fiduciary capacity;
- § 523(a)(6) willful and malicious injury

### Topic 4: CARES Act Considerations

- A. Provisions that Have/Will Sunset (See NCLC Chart)
  - December 27, 2021
  - March 27, 2022:
    - i. <u>Current Monthly Income</u>: COVID-related payments, including recovery tax rebates and child tax credit payments, are excluded from current monthly income (CARES Act § 1113(b)(1)(A); 11 U.S.C. § 101(10A)(B)(ii)(V))
    - ii. <u>Disposable Income</u>: COVID-related payments, including recovery tax rebates and child tax credit payments, are not disposable income (CARES Act § 1113(b)(1)(B); 11 U.S.C. § 1325(b)(2)).
    - iii. <u>Length of Plan</u>: Chapter 13 debtors may seek plan modification, if the plan was confirmed before March 27, 2021 and the debtor is experiencing a COVID-related hardship, that would extend plan payments for up to seven years after initial payment on original plan was due (CARES Act § 1113(b)(1)(C); 11 U.S.C. § 1329(d)(1)).

### Topic 5: Creditor Fees

- A. Chapter 13 What is Presumptively Reasonable
  - Prevailing party attorneys' fees in discharge litigation
  - Rule 3002.1: Lender Guidelines vs. Lodestar Judge Jennemann ruling in In re Ezell, Case No. 20-3564-GER

# **Chapter 7 Review Checklist**

Prior Bankruptcy Filing	☐ Printout	
Two Years Residency		
↑ 1216		
<b>Property Appraiser Value for Real Estate</b>	□ Printout	
Kelly Blue Book for All Vehicles	□ Printout	
<b>Court Records Review</b>	□ Printout	
Official Records Review	□ Printout	
<b>Review PACER for Civil Cases</b>	□ Printout	
Reconcile "A" to "D"		
Reconcile "J" with "B" and SOFA		
Debtor's Work Address on "I"		
Verify Pay Stub Spreadsheets jive with:		
$\Box$ Schedule I $\Box$ YTD SOFA $\Box$	B-22	
<b>Document Amount of Non-Exempt Assets</b>		
<b>Check Tax Returns Against SOFA</b>		
SunBiz (Prior Corp. Info)	□ Printout	
SunBiz (UCC Filing)	□ Printout	
Date for Payment of Fees & Costs (SOFA)		
\$\$ in Budget for Re-Aff's		
Review Bank Statements		

# **Chapter 13 Review Checklist**

Prior Bankruptcy Filing	☐ Printout
Two Years Residency	
↑ <b>1216</b>	
Jurisdictional Limits	
<b>Property Appraiser Value for Real Estate</b>	□ Printout
Kelly Blue Book for All Vehicles	□ Printout
<b>Court Records Review</b>	□ Printout
Official Records Review	□ Printout
<b>Review PACER for Civil Cases</b>	□ Printout
Reconcile "A" to "D"	
Reconcile "J" with "B" and SOFA	
Debtor's Work Address on "I"	
Verify Pay Stub Spreadsheets jive with:	
$\square$ Schedule I $\square$ YTD SOFA $\square$	B-22
<b>Document Amount of Non-Exempt Assets</b>	
Liquidation	
<b>Check Tax Returns Against SOFA</b>	
SunBiz (Prior Corp. Info)	□ Printout
SunBiz (UCC Filing)	□ Printout
Date for Payment of Fees & Costs (SOFA)	
<b>Commitment Period</b>	
Feasibility	

# COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

OF THE

# JUDICIAL CONFERENCE OF THE UNITED STATES WASHINGTON, DC 20544

JOHN D. BATES Chair

#### CHAIRS OF ADVISORY COMMITTEES

**JAY S. BYBEE**APPELLATE RULES

**DENNIS R. DOW**BANKRUPTCY RULES

ROBERT M. DOW JR. CIVIL RULES

RAYMOND M. KETHLEDGE CRIMINAL RULES

> PATRICK J. SCHILTZ EVIDENCE RULES

### **MEMORANDUM**

TO: Scott S. Harris

Clerk, Supreme Court of the United States

FROM: Honorable John D. Bates Jac &

Chair, Committee on Rules of Practice and Procedure

DATE: October 18, 2021

RE: Summary of Proposed New and Amended Federal Rules of Procedure

This memorandum summarizes proposed amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure. All of the proposed rules amendments and the proposed new rules have been approved by the relevant advisory committee, the Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee), and the Judicial Conference of the United States at its March 16, 2021 and September 28, 2021 sessions. If adopted by the Court and transmitted to Congress by May 1, 2022 and absent congressional action, the amended and new rules will take effect on December 1, 2022.

### I. Federal Rules of Appellate Procedure 25 and 42

Appellate Rule 25 (Filing and Service). The proposed amendment to Rule 25(a)(5) would extend to petitions for review under the Railroad Retirement Act the same restrictions on remote electronic access to electronic files that Civil Rule 5.2(c) imposes in immigration cases and Social

0001

Summary of Proposed New and Amended Federal Rules of Procedure October 18, 2021

Page 2

Security review actions. Railroad Retirement Act review proceedings are similar to Social Security review actions, but are filed directly in the courts of appeals.

Appellate Rule 42 (Voluntary Dismissal). The proposed amendment to Rule 42 was published for public comment in August 2019. It would restore the requirement, in effect prior to the restyling of the Federal Rules of Appellate Procedure, that the circuit clerk dismiss an appeal if all parties so agree. At its June 2020 meeting, the Standing Committee queried how the proposed amendment might interact with local circuit rules that require evidence of a criminal defendant's consent to dismissal of an appeal. The Advisory Committee subsequently examined a number of local rules designed to ensure that a defendant has consented to dismissal, and added a new Rule 42(d) to the proposed amendment to explicitly authorize such local rules.

# II. Federal Rules of Bankruptcy Procedure 1007, 1020, 2009, 2012, 2015, 3002, 3010, 3011, 3014, 3016, 3017.1, new Rule 3017.2, 3018, 3019, 5005, 7004, and 8023

SBRA-related Rules. On August 23, 2019, the President signed into law the Small Business Reorganization Act of 2019 (SBRA), which created a new subchapter V of chapter 11 for the reorganization of small business debtors, an alternative procedure that small business debtors can elect to use. Upon recommendation of the Standing Committee, on December 16, 2019, the Executive Committee, acting on an expedited basis on behalf of the Judicial Conference, authorized the distribution of interim rules and forms to the courts so they could be adopted locally prior to the February 19, 2020 effective date of the SBRA. The purpose of the interim rules and forms was to facilitate uniformity of practice until the Bankruptcy Rules and Official Forms could be revised in accordance with the Rules Enabling Act. The interim rules formed the basis for the proposed amendments and new rule that have been published, and are now forwarded for final approval, through the Rules Enabling Act process. The proposed amendments and proposed new rule that relate to the SBRA are:

- Rule 1007 (Lists, Schedules, Statements, and Other Documents; Time Limits);
- Rule 1020 (Chapter 11 Reorganization Case for Small Business Debtors);
- Rule 2009 (Trustees for Estates When Joint Administration Ordered);
- Rule 2012 (Substitution of Trustee or Successor Trustee; Accounting);
- Rule 2015 (Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status);
- Rule 3010 (Small Dividends and Payments in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13);
- Rule 3011 (Unclaimed Funds in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13);
- Rule 3014 (Election Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or Chapter 11 Reorganization Case);
- Rule 3016 (Filing of Plan and Disclosure Statement in a Chapter 9 Municipality or Chapter 11 Reorganization Case);
- Rule 3017.1 (Court Consideration of Disclosure Statement in a Small Business Case or in a Case Under Subchapter V of Chapter 11);

Summary of Proposed New and Amended Federal Rules of Procedure October 18, 2021

Page 3

- New Rule 3017.2 (Fixing of Dates by the Court in Subchapter V Cases in Which There Is No Disclosure Statement);
- Rule 3018 (Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case); and
- Rule 3019 (Modification of Accepted Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case).

Rule 3002(c)(6) (Filing Proof of Claim or Interest). The rule currently requires a court to apply different standards to a creditor request to extend the deadline to file a claim depending on whether the creditor's address is foreign or domestic. The proposed amendment creates a uniform standard for granting extensions that applies to all creditors.

Rule 5005 (Filing and Transmittal of Papers). The proposed amendment: (1) allows papers required to be transmitted to the United States trustee to be sent by filing with the court's electronic filing system; (2) eliminates the requirement of proof of transmittal when the transmittal is made by that means; and (3) eliminates the need to verify the proof of transmittal if papers are sent to the United States trustee in any other manner.

Rule 7004 (Process; Service of Summons, Complaint). The proposed amendment adds a new subdivision (i) to make clear that service under Rules 7004(b)(3) or (h) may be made on an officer, managing or general agent, or other agent by use of their title rather than their name.

Rule 8023 (Voluntary Dismissal). The proposed amendment would conform Rule 8023 to the pending proposed amendment to Appellate Rule 42(b) (discussed *supra*). The proposed amendment would clarify, inter alia, that a court order is required for any action other than a simple voluntary dismissal of an appeal.

# III. Federal Rule of Civil Procedure 7.1 and New Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)

Civil Rule 7.1 (Disclosure Statement). The proposed amendment to Rule 7.1(a)(1) is meant to conform the rule to the recent amendments to Appellate Rule 26.1 (effective December 1, 2019) and Bankruptcy Rule 8012 (effective December 1, 2020). It would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene. The proposed new Rule 7.1(a)(2) would create a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity because that citizenship is attributed to a party. The proposed amendment to subdivision (b) is a technical and conforming amendment that adds a reference to intervenors and proposed intervenors in light of the amendment to Rule 7.1(a)(1).

Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g). The proposed supplemental rules are the result of four years of study by the Civil Rules Committee at the suggestion of the Administrative Conference of the United States. Section 405(g) provides that an individual may obtain review of a final decision of the Commissioner of Social Security "by a civil action." A nationwide study commissioned by the Administrative Conference revealed widely differing district court procedures for these actions.

17

#### FEDERAL RULES OF BANKRUPTCY PROCEDURE

### Rule 3002. Filing Proof of Claim or Interest

\* \* \* \* \*

case, chapter 12 case, or chapter 13 case, a proof of claim is timely filed if it is filed not later than 70 days after the order for relief under that chapter or the date of the order of conversion to a case under chapter 12 or chapter 13. In an involuntary chapter 7 case, a proof of claim is timely filed if it is filed not later than 90 days after the order for relief under that chapter is entered. But in all these cases, the following exceptions apply:

\* \* \* \* \*

(6) On motion filed by a creditor before or after the expiration of the time to file a proof of claim, the court may extend the time by not more than 60 days from the date of the order granting the motion. The motion may be granted if the court finds that the notice was insufficient under the

### 18 FEDERAL RULES OF BANKRUPTCY PROCEDURE

circumstances to give the creditor a reasonable time to file a proof of claim.

\* \* \* \* \*

### **Committee Note**

Rule 3002(c)(6) is amended to provide a single standard for granting motions for an extension of time to file a proof of claim, whether the creditor has a domestic address or a foreign address. If the notice to such creditor was "insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim," the court may grant an extension.



# Summary of COVID Bankruptcy Relief Provisions

March 31, 2021

This chart provides a summary of the bankruptcy provisions in the CARES Act and Consolidated Appropriations Act. To help attorneys deal with the different dates when these temporary provisions expire, the chart lists the provisions by sunset date. Each provision is accompanied by the Public Law and United States Code cites, and links for more detail in National Consumer Law Center (NCLC) articles (open to the public) and to NCLC's Consumer Bankruptcy Law and Practice (subscribers only).

The sunset provisions in the CARES Act were extended for an additional year by the COVID-19 Bankruptcy Relief Extension Act of 2021, Pub. L. No. 117-5 (Mar. 27, 2021)

CAA = Consolidated Appropriations Act of 2021, Pub. L. No. 116-260 (Dec. 27, 2020) CARES Act = Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136 (Mar. 27, 2020)

Provision and Additional Information	Bill Section	Bankruptcy Code Section	Sunset
COVID stimulus payments (recovery tax rebates) are not property of the estate –  NCLC articles: Jan. 7, 2021 and Mar. 15, 2021;  NCLC's Consumer Bankruptcy Law and Practice §  2.5.6	CAA, div. FF, tit. 10, § 1001(a)	11 U.S.C. § 541(b)(11)	Dec. 27, 2021
COVID-related payments, including recovery tax rebates and child tax credit payments, are excluded from current monthly income –  NCLC article: <u>Jan. 7, 2021;</u> NCLC's Consumer Bankruptcy Law and Practice § 13.4.3.2.7	CARES Act, § 1113(b)(1)(A)	11 U.S.C. § 101(10A)(B)(ii)(V)	Mar. 27, 2022
COVID-related payments, including recovery tax rebates and child tax credit payments, are not disposable income –  NCLC article: Jan. 7, 2021	CARES Act, § 1113(b)(1)(B)	11 U.S.C. § 1325(b)(2)	Mar. 27, 2022
COVID stimulus payments (recovery tax rebates) are not subject to the "operation of any bankruptcy or insolvency law" –  NCLC article: Jan. 7, 2021; NCLC's Consumer Bankruptcy Law and Practice § 2.5.6	CAA, div. N, § 272(d), [amends Internal Revenue Code, adding new 26 U.S.C. § 6428A]	N/A	Dec. 27, 2021
Chapter 13 debtor may seek plan modification, if the plan was confirmed before Mar. 27, 2021 and the debtor is experiencing a COVID-related hardship, that would extend plan payments for up to seven years after initial payment on original plan was due – NCLC article: Aug. 13, 2020; NCLC's Consumer Bankruptcy Law and Practice § 8.7.4 and 12.6.3	CARES Act, § 1113(b)(1)(C)	11 U.S.C. § 1329(d)(1)	Mar. 27, 2022

Provision and Additional Information	Bill Section	Bankruptcy Code Section	Sunset
Chapter 13 debtor may seek an early discharge if the debtor has missed three or fewer mortgage payments due to a COVID-related hardship or has entered into a loan forbearance or modification –  NCLC article: Jan. 7, 2021;  NCLC's Consumer Bankruptcy Law and Practice § 8.8.1 and 15.1	CAA, div. FF, tit. 10, § 1001(b)	11 U.S.C. § 1328(i)(1)	Dec. 27, 2021
Debtor who is in a pending bankruptcy or has received a discharge cannot be denied a mortgage forbearance, protection under the foreclosure and eviction moratorium, and related relief provided under the CARES Act –  NCLC article: Jan. 7, 2021; NCLC's Consumer Bankruptcy Law and Practice § 11.6.1.5.a	CAA, div. FF, tit. 10, § 1001(c)	11 U.S.C. § 525(d)	Dec. 27, 2021
Mortgage servicer may file a "CARES forbearance claim," which is a supplemental proof of claim for the amount forborne under a loan forbearance granted to a debtor under the CARES Act –  NCLC article: Jan. 7, 2021; NCLC's Consumer Bankruptcy Law and Practice § 11.6.1.5.a	CAA in div. FF, tit. 10, § 1001(d)	11 U.S.C. § 501(f) and § 502(b)(9) (claim must be filed no later than 120 days after expiration of forbearance)	Dec. 27, 2021
Debtor and any party, including a mortgage creditor, may move to modify the debtor's plan to provide for a CARES forbearance claim –  NCLC article: Jan. 7, 2021;  NCLC's Consumer Bankruptcy Law and Practice § 11.6.1.5.a	CAA div. FF, tit. 10, § 1001(e)	11 U.S.C. § 1329(e)	Dec. 27, 2021
Debtor may have utility service maintained or restored after filing bankruptcy without paying a deposit, as long as the debtor pays for postpetition service –  NCLC article: Jan. 7, 2021; NCLC's Consumer Bankruptcy Law and Practice § 9.8.2	CAA div. FF, tit. 10, §1001(h)	11 U.S.C. § 366(d)	Dec. 27, 2021

In re Dukes, 909 F.3d 1306 (2018)

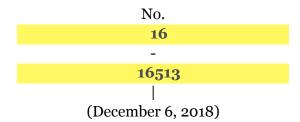
Bankr. L. Rep. P 83,334, 27 Fla. L. Weekly Fed. C 1559

KeyCite Yellow Flag - Negative Treatment

Disagreed With by In re Mrdutt, 9th Cir.BAP (Cal.), May 6, 2019

909 F.3d 1306 United States Court of Appeals, Eleventh Circuit.

IN RE: Mildred M. DUKES, Debtor.
Mildred M. Dukes, Plaintiff-Appellant,
v.
Suncoast Credit Union,
Defendant-Appellee.



### **Synopsis**

Background: Residential mortgagee brought adversary proceeding in reopened Chapter 13 case for determination that debtor-mortgagor's debts to it on two separate mortgages were not discharged upon completion of debtor's payments under plan. The United States Bankruptcy Court for the Middle District of Florida, No. 9:09-bkc-02778, Caryl E. Delano, J., 2015 WL 3856335, granted mortgagee's motion for summary judgment, and debtor appealed. The District Court, No. 2:15-cv-00420, Sheri Polster Chappell, J., 2016 WL 5390948, affirmed. Debtor appealed.

**Holdings:** The Court of Appeals, Julie Carnes, Circuit Judge, held that:

- [1] as matter of first impression, mere reference to mortgage debts in plan, when plan specified that mortgage debts would be paid outside plan, was not "providing for" these mortgage debts, as required for the debts to be discharged upon completion of debtor's plan payments;
- [2] discharge of long-term mortgage debts, which were secured only by an interest in real property used by debtor as principal residence, would violate antimodification provision; and
- [3] issue not raised in bankruptcy court was waived as issued on appeal.

Affirmed.

Jill Pryor, Circuit Judge, filed opinion concurring in part and concurring in judgment.

**Procedural Posture(s):** On Appeal; Motion for Summary Judgment.

West Headnotes (28)

# [1] **Bankruptcy** Scope of review in general

On appeal in bankruptcy case, the Court of Appeals functions as second reviewer of bankruptcy court's rulings and applies same standards as district court.

[2] Bankruptcy ← Conclusions of law; de novo review

Bankruptcy ← Clear error

In re Dukes, 909 F.3d 1306 (2018)

Bankr. L. Rep. P 83,334, 27 Fla. L. Weekly Fed. C 1559

Bankruptcy court's conclusions of law are reviewed de novo, while its findings of fact are reviewed for clear error. Fed. R. Bankr. P. 8013.

# [3] Bankruptcy • Debts provided for in plan; unfiled claims

Mere reference to mortgage debts in debtor-mortgagor's confirmed Chapter 13 plan, when plan specified that mortgage debts would be paid outside plan, was not "providing for" these mortgage debts, as required for the debts to be discharged upon completion of debtor's payments under plan, where plan did not set repayment terms for credit union's mortgages, identify a repayment schedule, or otherwise mention the mortgages. 11 U.S.C.A. § 1328(a).

### 1 Cases that cite this headnote

### [4] Statutes • Language

When construing language of statute, courts begin with the language of statute itself.

- 1 Cases that cite this headnote
- [5] Statutes Plain Language; Plain, Ordinary, or Common Meaning

Courts give effect to the plain terms of statute.

[6] Statutes Statute as a Whole;
Relation of Parts to Whole and to
One Another

**Statutes** — Context

Courts read statute to give full effect to each of its provisions and look to the entire statutory context.

# [7] Statutes - Similarity or difference

Word or phrase in legislative enactment is presumed to bear the same meaning throughout.

# [8] Bankruptcy • Debts provided for in plan; unfiled claims

In order for debt to be "provided for by the plan," so as to be discharged upon Chapter 13 debtor's completion of payments under plan, the plan must make provision for, or stipulate to, the debt. 11 U.S.C.A. § 1328(a).

9 Cases that cite this headnote

# [9] Bankruptcy Construction and Operation

Adequate protection payments have nothing to do with repayment of debt.

# [10] Bankruptcy Adequate protection; insurance

Adequate protection payments are required by the Bankruptcy Code

In re Dukes, 909 F.3d 1306 (2018)

Bankr. L. Rep. P 83,334, 27 Fla. L. Weekly Fed. C 1559

in order to protect value of secured creditors' collateral while creditor is unable to enforce lien on debtor's property during the bankruptcy case. 11 U.S.C.A. § 1326(a)(1)(C).

# [11] **Bankruptcy** — Construction and Operation

Adequate protection payments are wholly different from maintenance payments due under original loan agreements or payments made under a bankruptcy plan.

# [12] Bankruptcy Adequate protection; insurance

Chapter 13 debtor may be required to provide adequate protection payments to any secured creditor unable to enforce its lien, even if creditor's debt is not treated or repaid under plan.

# [13] Bankruptcy Debts provided for in plan; unfiled claims

Claims wholly governed by the original loan instruments, rather than by terms of Chapter 13 plan, are not "provided for by the plan," and thus are not discharged upon completion of debtor's payments under plan.

11 U.S.C.A. § 1328(a).

1 Cases that cite this headnote

# [14] Bankruptcy • Debts provided for in plan; unfiled claims

Debt is "provided for by the plan," so as to be discharged upon successful completion of debtor's payments under plan, where the plan supplies terms that will govern repayment of debt. 11 U.S.C.A. § 1328(a).

4 Cases that cite this headnote

# [15] Bankruptcy • Individual Debt Adjustment

Goal of Chapter 13 bankruptcy is to aggregate debtor's outstanding debts, create a repayment plan for those debts, and prescribe the order, manner, and terms of repayment.

# [16] Bankruptcy Acceptance or rejection by creditors

Chapter 13 plan may not give a secured creditor less than the value of its secured claim, or otherwise require it to accept a modification of the debt obligation, such as a change in interest rate or maturity date, unless creditor specifically consents.

11 U.S.C.A. § 1325(a)(5)(A-C).

# [17] Bankruptcy • Security interests in principal residences

"Rights" protected by antimodification provision, which provides even greater safeguards

In re Dukes, 909 F.3d 1306 (2018)

Bankr. L. Rep. P 83,334, 27 Fla. L. Weekly Fed. C 1559

to secured creditors whose claims are collateralized solely by security interest in real property used by Chapter 13 debtor as principal residence, are those reflected in the relevant mortgage instruments and are governed by state law. 11 U.S.C.A. § 1322(b)(2).

# [18] Bankruptcy • Liens and encumbrances; secured creditors

Mortgagee's failure to object to confirmation of proposed Chapter 13 plan that simply provided that its mortgages would be paid outside the plan was not consent to having its mortgage cut short and discharged upon completion of debtor's payments under plan, where there was no indication in plan that this would be the result of completion of debtor's payments under plan.

### 4 Cases that cite this headnote

## [19] Bankruptcy - Effect

It is Chapter 13 debtor's obligation to specify as accurately as possible in plan the amounts which he intends to pay creditors, and thus debtor must pay the price if there is any ambiguity in plan's terms.

# [20] Bankruptcy • Security interests in principal residences

assuming debtor's Even that confirmed Chapter 13 plan, merely by specifying that credit union's residential mortgage loans would be paid outside the plan, thereby provided for these mortgage debts, discharge of these longterm mortgage debts, which were secured only by an interest in real property used by debtor as principal residence, would violate antimodification provision, even though credit union would retain its lien interests, as depriving credit union of right to pursue debtor personally for any deficiency. 11 U.S.C.A. § 1322(b)(2).

# [21] Mortgages and Deeds of

**Trust** ← Right to Deficiency and Grounds Therefor

Under Florida law, foreclosing mortgagee has right to seek a deficiency judgment against mortgagor if foreclosure on its security interest in mortgage property is insufficient to satisfy balance owing on mortgage loan. Fla. Stat. Ann. § 702.06.

# [22] Bankruptcy • Necessity of Filing; Effect of Failure

**Bankruptcy** ← Particular Debts or Liabilities

If no proof of claim is filed at outset of bankruptcy case, creditor typically will lose its right to repayment,

In re Dukes, 909 F.3d 1306 (2018)

Bankr. L. Rep. P 83,334, 27 Fla. L. Weekly Fed. C 1559

and debt will be discharged as disallowed.

# [23] Bankruptcy • Presentation of grounds for review

Any argument that Chapter 13 debtor's secured debts to residential mortgagee were discharged as result of mortgagee's failure to file proof of claim was waived as issued on appeal, due to debtor's failure to raise argument in bankruptcy court.

# [24] Federal Courts ← In general; necessity

As general rule, an issue raised for the first time on appeal will not be considered

1 Cases that cite this headnote

# [25] Federal Courts ← In general; necessity

While appellate court may consider pure questions of law despite a party's failure to raise such issues below, it may do so only if its refusal to consider the issue will result in miscarriage of justice.

# [26] Bankruptcy • Presentation of grounds for review

No miscarriage of justice would result from the Court of Appeals' failure to consider an issue that debtor failed to raise in bankruptcy court, and that she belatedly sought to raise for first time on appeal, where debtor had every opportunity to raise issue in bankruptcy court, but simply failed to do so.

### [27] Bankruptcy Secured claims

Secured creditor need not file proof of claim in order for its lien interest to survive a discharge of debtor's personal obligations in bankruptcy.

### [28] Bankruptcy Secured claims

For secured creditors whose claims are secured only by an interest in real property that is Chapter 13 debtor's principal residence, and which are thus protected by antimodification provision, such creditors' failure to file proof of claim will not effect either their lien interests or their ability to hold debtor personally liable on debts to such creditors. 11 U.S.C.A. § 1322(b)(2).

### **Attorneys and Law Firms**

\*1309 Richard J. Hollander, Melissa H. Jeda, Edward R. Miller, Miller Hollander & Jeda, Naples, FL, for Plaintiff—Appellant.

Marie Tomassi, Trenam Kemker, Saint Petersburg, FL, Larry M. Foyle, Kass Shuler,

In re Dukes, 909 F.3d 1306 (2018)

Bankr. L. Rep. P 83,334, 27 Fla. L. Weekly Fed. C 1559

PA, Rhys Phillips Leonard, Trenam Law, Tampa, FL, for Defendant–Appellee.

Appeal from the United States District Court for the Middle District of Florida, D.C. Docket Nos. 2:15-cv-00420-SPC; 9:09-bkc-02778-FMD

Before JILL PRYOR and JULIE CARNES, Circuit Judges, and CONWAY,\* District Judge.

### **Opinion**

### JULIE CARNES, Circuit Judge:

Mildred M. Dukes ("Debtor") filed for Chapter 13 bankruptcy in 2009, and the bankruptcy court confirmed her bankruptcy plan in 2010. At the time her plan was confirmed, Debtor had two outstanding mortgages with Suncoast Credit Union ("the Credit Union"). Debtor's plan did not address the Credit Union's mortgages aside from stating that Debtor would make payments directly to the Credit Union, not through the bankruptcy trustee. The plan did not specify repayment terms for the mortgages, did not set a schedule for repayments, and did not make any changes to the mortgages' terms. When her plan was confirmed, Debtor was current on her payments to the Credit Union.

Debtor made the required payments under her bankruptcy plan, and, in 2012, Debtor made her last payment for her bankruptcy. Accordingly, the bankruptcy court discharged "all debts provided for by the plan." 11 U.S.C. § 1328(a).

Debtor, however, had defaulted on her mortgage payments to the Credit Union in 2011. In 2013, the Credit Union foreclosed on Debtor's home under the second mortgage and sought a judgment against Debtor for the remainder on the first mortgage. In 2014, the Credit Union moved to reopen the bankruptcy proceeding and begin an adversary proceeding to declare that Debtor's personal liability on the first mortgage had not been discharged.

\*1310 The bankruptcy court and the district court, hearing the initial appeal, both concluded that the first mortgage was not discharged because it was not "provided for" by Debtor's bankruptcy plan. Both also found that, even if the mortgage was "provided for," the discharge did not include the debt for other reasons, including because discharge would violate 11 U.S.C. § 1322(b)(2), which prohibits a plan from "modify[ing] the rights of holders of ... a claim secured only by a security interest in real property that is the debtor's principal residence."

On appeal, Debtor contends that both the bankruptcy court and the district court erred in holding that the plan did not "provide for" the Credit Union's mortgage and that discharge was prohibited by § 1322(b)(2). Debtor also asserts that the mortgage was discharged because the Credit Union failed to file a proof of claim for it.

Bankr. L. Rep. P 83,334, 27 Fla. L. Weekly Fed. C 1559

to the debt in the plan. Because Debtor's plan did nothing more than state that the Credit Union's mortgage would be paid outside the plan, it was not "provided for" and was not discharged. Even if it was provided for, we hold that discharge of the Credit Union's debt would violate § 1322(b)(2) by modifying the Credit Union's right under the original loan documents to obtain a deficiency judgment against Debtor. We also hold that the issue of whether the Credit Union's failure to file a proof of claim for its first mortgage resulted in the mortgage's discharge was not preserved for appeal because Debtor did not raise it before the bankruptcy court, and, alternatively, that failure to file a proof of claim did not discharge the Credit Union's mortgage because, again, discharge would violate § 1322(b)(2).

#### I. BACKGROUND

### A. Factual Background

Debtor's first mortgage with the Credit Union was taken out in 1989 and her second mortgage was taken out in 2007. Together, the mortgages total roughly \$150,000 and mature in 2022. On February 18, 2009, Debtor filed for Chapter 13 bankruptcy. In her bankruptcy schedules, Debtor listed the Credit Union—then Suncoast Schools Federal Credit Union—as the holder of both the first and second mortgages on her primary residence. At the time Debtor filed for bankruptcy, she was current on her payments for both mortgages. During the bankruptcy proceeding, the Credit Union filed a proof of claim only for the second mortgage (with a balance of approximately \$77,000), not the first.

Debtor's plan includes a number of sections potentially relevant to the Credit Union's mortgages. Specifically, the plan lists the amount for the adequate protection payments required under the Bankruptcy Code. *See* 11 U.S.C. § 1326(a)(1)(C). The plan and its implementing orders further state that no money would be paid through the plan to the Credit Union, meaning that any payments made on the Credit Union's mortgages will be made directly to the Credit Union, not through the bankruptcy trustee. The plan does not set repayment terms for the Credit Union's mortgages, identify a repayment schedule, or otherwise mention the mortgages.

First, the plan states that "All secured creditors, except as provided otherwise herein, including mortgage creditors, must be paid through the plan as part of the \*1311 plan payment to the Chapter 13 Trustee." Next, the part of the plan titled "Secured Claims," addresses adequate protection payments:

(A) **Pre-Confirmation** Protection Adequate Payments: No later than 30 days after the date of the filing of this Plan or the Order for Relief, whichever is earlier, the Debtor(s) shall make the following adequate protection payments creditors pursuant to 1326(a)(1)(C).... If Debtor(s) elects to make such adequate protection payments directly to the creditor, and such creditor is not otherwise

In re Dukes, 909 F.3d 1306 (2018)

Bankr. L. Rep. P 83,334, 27 Fla. L. Weekly Fed. C 1559

paid through the Plan, such payments shall constitute adequate protection.

Following this and under the heading "Paid directly to the Creditor," the plan includes the following entries:

 Creditor
 Total Est. Claim
 Direct Ad. Prot. Pay.

 Suncoast Schools FCU
 \$79000.00
 \$611.00

 Suncoast Schools FCU
 \$77671.00
 \$1,040.00

Part (B) of the same section addresses "Claims Secured by Real Property Which Debtor(s) Intends to Retain / Mortgage Payments Paid Through the Plan." The Credit Union's mortgages presumptively fit into this category. But, in the section where Debtor could have elected to have the Trustee "pay the post-petition mortgage payments" on Debtor's behalf, Debtor wrote "N/A."

The plan concludes with a calculation of the total debt burden under the plan's payment schedule. This calculation includes a dividend of \$3,600 to unsecured creditors, attorneys' fees totaling \$1,500, and a trustee's fee of \$566.60, for a total of \$5,666.66 to be paid off in thirty-six installments over an estimated three years. <sup>1</sup> None of this money goes to pay off the roughly \$150,000 Debtor owed on the Credit Union's mortgages.

When Debtor filed her Chapter 13 petition, an automatic stay went into effect that prevented any creditor, including the Credit Union, from foreclosing on Debtor's property. See 11 U.S.C. § 362(a). Shortly after she filed the plan, Debtor moved for authorization to make her mortgage payments directly to the Credit Union. The bankruptcy court granted her

request and issued two orders authorizing direct payments to the Credit Union for both the first and second mortgages. The orders accordingly terminated the automatic stay against the Credit Union for its mortgages, permitting it "to seek *in rem* relief against the property securing [the Credit Union's] claim[s]."

The Credit Union did not object to the plan, and the bankruptcy court confirmed it in May 2010. Shortly thereafter, the court issued a follow-up order identifying the claims that would be allowed and ordering disbursement pursuant to the plan. The Credit Union's first mortgage was omitted from this order, as no proof of claim had been filed. The order listed the second mortgage (for which a proof of claim was properly filed) in "Exhibit D" as "hereby allowed," but noted that "the Trustee shall not make distribution upon such claims" under the confirmed plan.

Thus, at each point in the bankruptcy proceeding, Debtor intended—and was granted the right—to make payments on \*1312 the first and second mortgages directly to the Credit Union "rather than through the Chapter 13 Trustee." In fact, the implementing order specifically stated that the Credit Union "SHALL NOT RECEIVE ANY PAYMENT FROM THE CHAPTER 13 TRUSTEE UNDER THE CONFIRMED PLAN." Thus, Debtor's performance of her monthly installment obligations under the plan would do nothing to pay down her mortgage debt owed to the Credit Union.

Once the plan was confirmed, Debtor began making payments to the trustee. She timely made her thirty-six payment obligations

In re Dukes, 909 F.3d 1306 (2018)

Bankr. L. Rep. P 83,334, 27 Fla. L. Weekly Fed. C 1559

and, upon completion, the bankruptcy court discharged "all debts provided for by the plan" in March 2012, under 11 U.S.C. § 1328(a).

During this same time period, Debtor made a few of the scheduled payments to the Credit Union on her mortgages but stopped paying altogether in 2011. Both mortgages entered default. In 2013, the Credit Union foreclosed on Debtor's home under the second mortgage and sought a personal judgment against Debtor on the first.

### **B.** Procedural History

In 2014, the Credit Union moved to reopen the bankruptcy case and commenced an adversary proceeding seeking a determination that Debtor's personal liability on the first mortgage had not been discharged. Both parties moved for summary judgment. The bankruptcy court granted summary judgment to the Credit Union and concluded that the Credit Union's mortgage had not been discharged because it was not "provided for" by the plan, as it was paid outside the plan and unaffected by the plan itself. The bankruptcy court also held that, even if the mortgage was provided for, the antimodification provision in § 1322(b)(2) prohibited the discharge from modifying the Credit Union's right to a deficiency judgment and the claim constituted "long-term debt" exempted from discharge under § 1322(b)(5). See 11 U.S.C. § 1328(a)(1). Debtor appealed to the district court under 28 U.S.C. § 158(a). Debtor contended that the bankruptcy court erred in ruling for the Credit Union, and, for the first time, asserted that the Credit Union's failure to file a proof of claim for the first mortgage meant that it had been discharged —regardless of whether it was "provided for" by the plan. The district court rejected Debtor's proof of claim argument as waived and affirmed the bankruptcy court on all grounds. Debtor filed this appeal.

### II. STANDARD OF REVIEW

[1] [2] In a bankruptcy appeal, this Court functions as a second reviewer of the bankruptcy court's rulings and applies the same standards as the district court. Brown v. Gore (In re Brown), 742 F.3d 1309, 1315 (11th Cir. 2014). Conclusions of law are reviewed de novo, and findings of fact are reviewed for clear error. Id.

### III. DISCUSSION

Debtor asserts that the bankruptcy court's discharge under 11 U.S.C. § 1328(a) of "all debts provided for by the plan" included the Credit Union's first mortgage because the plan mentioned that the mortgage would be paid outside the plan "rather than through the Chapter 13 Trustee." In essence, Debtor contends that mere reference to the Credit Union's debt is sufficient for it to be "provided for" by the plan. We disagree. Supreme Court precedent defines "provided for" more narrowly to require that the plan either stipulate to or make a provision for the debt. In other words, the plan's terms must, in some way, affect or govern the debt's repayment. By stating only that Debtor \*1313 would make any payments to the Credit Union directly, Debtor chose not to handle the Credit Union's debt through her bankruptcy. Notably, other courts addressing this issue have reached the same conclusion: a plan's mere statement that

Bankr. L. Rep. P 83,334, 27 Fla. L. Weekly Fed. C 1559

payments on a debt will be made outside the plan does not mean that debt is "provided for" by the plan. Even if the Credit Union's debt was provided for by the plan, we also hold that, because the Credit Union's claim was secured by Debtor's primary residence, the antimodification provision of 11 U.S.C. § 1322(b)(2) prohibits the mortgage from being discharged.<sup>2</sup>

Debtor also argues that, regardless of whether the Credit Union's mortgage was provided for by the plan, it was discharged because the Credit Union failed to file a proof of claim for it. This argument was not raised before the bankruptcy court and therefore was not properly preserved for appeal. Even if considered, § 1322(b)(2) prohibits discharge in spite of the Credit Union's failure to file a proof of claim.

# A. Whether the Plan "Provided for" the Credit Union's Mortgage

[3] Debtor asserts that the Credit Union's first mortgage was discharged because the plan "provided for" it by stating that it would be paid outside the plan. The Credit Union contends—and the bankruptcy court and district court agreed—that mere reference to the mortgage is insufficient for the plan to have "provided for" it, so the debt was not discharged. After careful review, we agree with the Credit Union, the district court, and the bankruptcy court.

# 1. <u>Defining "provided for" in \$\ 1328(a)</u>

The bankruptcy court's discharge covered "all debts provided for by the plan." 11 U.S.C.

§ 1328(a). The plan itself does not set forth a payment schedule or modify the terms for the Credit Union's mortgage. The plan and its implementing order do, however, expressly state that any mortgage payments will be made directly to the Credit Union "rather than through the Chapter 13 Trustee." The question before us then is whether the plan's reference to the Credit Union's mortgage as being paid outside the plan means that the mortgage was "provided for" by the plan and thereby included in the discharge. So, as a matter of first impression, we must determine the meaning of "provided for" in \$\bigcit \{ 1328(a).}

[6] "When construing the language of a statute, we 'begin [ ] where all such inquiries must begin: with the language of the statute itself,' and we give effect to the plain terms of the statute." Valone v. Waage (In re Valone), 784 F.3d 1398, 1402 (11th Cir. 2015) (alteration in original) (quoting *United States* v. Ron Pair Enters., Inc., 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) ). In doing so, "we read the statute to give full effect to each of its provisions ... [and] look to the entire statutory context." Davidson v. Capital One Bank (USA ), N.A., 797 F.3d 1309, 1315 (11th Cir. 2015) (alteration in original) (quoting United States v. DBB, Inc., 180 F.3d 1277, 1281 (11th Cir. 1999)).

[7] In determining the meaning of "provided for" in \$\bigs\_{\circ}\$ 1328(a), we do not write on a clean slate. In \$\bigs\_{\circ}Rake v. Wade,\$ the Supreme Court interpreted the phrase "provided for" in \$\bigs\_{\circ}\$ 1325(a)(5) of the Bankruptcy Code. \$\bigs\_{\circ}\$508 U.S. 464, 113 S.Ct. 2187, 124 L.Ed.2d 424 (1993). Because "[a] word or phrase is

Bankr. L. Rep. P 83,334, 27 Fla. L. Weekly Fed. C 1559

presumed to bear the same \*1314 meaning throughout a text," \*\*Appling v. Lamar, Archer & Cofrin, LLP (In re Appling), 848 F.3d 953, 958 (11th Cir. 2017) (alteration in original) (quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 170 (2012)), aff'd, \*\*Legal U.S.\*\*—, 138 S.Ct. 1752, 201 L.Ed.2d 102 (2018), the Supreme Court's interpretation of "provided for" in \*\*§ 1325(a)(5) necessarily informs our interpretation of "provided for" in \*\*§ 1328(a).

In *Rake*, the debtors filed for Chapter 13 bankruptcy while in default on their home mortgages, and their bankruptcy proposed to plans cure the defaults through repayment schedules that would be administered inside the plans. 508 U.S. at 466-67, 113 S.Ct. 2187. Future payments of principal and interest on the mortgages, however, would be paid directly to the creditor. *Id.* The debtors argued that the arrearages (overdue debts) were not provided for by the plan and therefore did not have to comply include postconfirmation interest. *Id.* at 472, 113 S.Ct. 2187. The Supreme Court disagreed. The Court determined that "[t]he most natural reading of the phrase to 'provid[e] for by the plan' is to 'make a provision for' or 'stipulate to' something in a plan." Ltd. at 473, 113 S.Ct. 2187 (second alteration in original) (citing American Heritage Dictionary 1053 (10th ed. 1981) ). Applying this definition, the Court concluded that the bankruptcy plans "clearly 'provided for' respondent's home mortgage claims by establishing repayment schedules for the satisfaction of the arrearages portion

of those claims." Id. Importantly, the Court acknowledged that the plans split the debt into two separate claims: "the underlying debt and the arrearages." Id. "While payments of principal and interest on the underlying debts were simply 'maintained' according to the terms of the mortgage documents during the pendency of petitioners' cases, each plan treated the arrearages as a distinct claim to be paid off within the life of the plan pursuant to repayment schedules established by the plans."

Id. Hence the Court concluded that the arrearages were "provided for" by the plans and the creditor was entitled to interest under \( \bigcirc \) \( \bi

[12] Rake teaches [8] [9] [10][11] two critical lessons that apply here. First, "provided for" by the plan means to "make a provision for" or "stipulate to" something in the plan. <u>Id</u>. Here, Debtor's plan neither made provisions for, nor stipulated to, anything regarding the Credit Union's mortgage. Unlike the plan in *Rake*, Debtor's plan did not set forth any repayment terms for any portion of the Credit Union's mortgage. Instead, the plan merely stated that the Credit Union's mortgage would be paid outside the plannothing more.<sup>3</sup> The \*1315 statement that Debtor was to make payments directly to the Credit Union was merely a clarification of what was included and what was excluded from the plan. It could not be used, either by Debtor or the Credit Union, to enforce any rights regarding repayment of the mortgage because it created none. By failing to set forth any terms governing repayment of the Credit

In re Dukes, 909 F.3d 1306 (2018)

Bankr. L. Rep. P 83,334, 27 Fla. L. Weekly Fed. C 1559

Union's mortgage, the plan did not "provide for" it.

[13] Second, Rake's distinction between the two claims for underlying debt and arrearages is instructive here. Under the Supreme Court's analysis, the arrearages on the mortgages were " 'provided for' by the plan[s]" because they were to be "paid off within the life of the plans pursuant to repayment schedules established by the plans." Ltd. (emphasis added). By contrast, the underlying debts paid outside the plan "were simply 'maintained' according to the terms of the mortgage documents." Ld. Although the Court did not address whether the underlying debts were "provided for by the plan," its analysis suggests that claims wholly governed by the original loan instruments rather than the terms of the bankruptcy plan are not "provided for by the plan" in the sense Chapter 13 contemplates.

Applying this here, we find that, by doing nothing more than mentioning that the Credit Union's mortgage would be paid outside the plan, the plan did not "provide for" the mortgage. The underlying debts paid outside the plan in *Rake* that were merely "maintained" are analogous to the Credit Union's mortgage here. And, again, the plan did not set a repayment schedule for the mortgage and did not establish any repayment terms. The plan simply stated that Debtor would make any payments directly to the Credit Union. The Credit Union's rights and Debtor's liability remained governed solely by the original loan documents. By neither stipulating to nor making provisions for the Credit Union's mortgage, the plan did not [14] In arguing otherwise, Debtor reads Rake far too broadly to support her position that mere reference to the mortgage is sufficient for the plan to "provide for" it. Debtor relies on dicta from Rake that, "[a]s used in commonly understood to mean that a plan 'makes a provision' for, 'deals with,' or even 'refers to' a claim." Ltd. at 474, 113 S.Ct. 2187 (citing 5 Collier on Bankruptcy ¶ 1328.01, at 1328-29 (15th ed. 1993)). Yet, as the discussion above shows, Rake does not stand for the proposition that a plan "provides for" a claim merely by mentioning it. To the contrary, it suggests that a claim is "provided for" where the plan supplies terms that will govern the repayment of the claim. Dicta from *Rake*. unmoored from the Court's actual holding and analysis, is not persuasive.

### 2. Debtor's plan in the context of Chapter 13

Reviewing Debtor's plan in the context of Chapter 13 bankruptcy confirms that the Credit Union's mortgage was not "provided for" by the plan. Chapter 13 prohibits the modification of a secured claim unless the debtor either provides value to \*1316 the secured creditor or the secured creditor consents. And creditors' rights on claims secured by the debtor's primary residence are expressly prohibited from being modified. Further, Chapter 13 plans last no longer than five years. So, likely because Chapter 13 bankruptcy is particularly ill-suited

Bankr. L. Rep. P 83,334, 27 Fla. L. Weekly Fed. C 1559

for most debtors who have long-term mortgage debt due to the inability to either modify such debt or repay it on an accelerated five-year schedule, Debtor chose not to address the Credit Union's mortgage in her plan. The simplest conclusion then is that Debtor's plan, by not addressing the Credit Union's mortgage, did not "provide for" it.

[15] The goal of a Chapter 13 bankruptcy is to aggregate the debtor's outstanding debts, create a repayment plan for those debts, and prescribe the order, manner, and terms of repayment. The plan is proposed by the debtor, is subject to approval by certain classes of creditors, and must ultimately be confirmed by the bankruptcy court under a specific set of criteria. See 11 U.S.C. § 1325.

The Chapter 13 plan takes stock of the allowed claims of both secured and unsecured creditors, ranks creditors in order of their priority, and creates a repayment plan to be administered by an assigned trustee. *See id.* § 1302. The plan must provide for the repayment of debts over a period of no longer than five years. *Id.* § 1322(d). And "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." *Id.* § 1328(a).

[16] Generally, under these criteria, a Chapter 13 plan may "modify the rights of holders of secured claims" or simply leave them "unaffected," thus allowing the terms of the original loan agreements to govern the debtor's obligations. *See id.* § 1322(b)(2). The plan cannot, however, unilaterally deprive secured creditors of their rights. To modify a secured

creditor's claim, a plan must meet at least one of three criteria: (1) the holder of a secured claim must accept the plan; (2) the plan must provide that the secured creditor will receive the full value of the secured claim and will not lose its security interest in the debtor's property until the claim is paid; or (3) the debtor must surrender the collateral. See id. § 1325(a)(5). In other words, the plan may not give the secured creditor less than the value of its claim, or otherwise force it to accept a modification of the debt obligation (such as a change in interest rate or maturity date), unless the creditor specifically consents.

[17] The antimodification provision in § 1322(b)(2) goes even further and expressly prohibits a plan from modifying "the rights of holders of ... a claim secured only by a security interest in real property that is the debtor's principal residence." The Supreme Court has clarified that the "rights" protected by § 1322(b)(2) "are reflected in the relevant mortgage instruments" and are governed by state law. Nobelman v. Am. Sav. Bank, 508 U.S. 324, 329, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993). <sup>4</sup> A debtor can, however, cure arrears on mortgage debt without violating the antimodification provision under the \*1317 explicit exception to § 1322(b)(2) contained in § 1322(b)(5). <sup>5</sup> *Id.* at 330, 113 S.Ct. 2106.

Also, some debts may mature after the three-to-five-year target date for the completion of all payments under the plan. The Code gives debtors a choice to either repay such long-term debt "inside" the plan—with the trustee acting as disbursing agent—or "outside" the plan, with payments coming directly from the

In re Dukes, 909 F.3d 1306 (2018)

Bankr. L. Rep. P 83,334, 27 Fla. L. Weekly Fed. C 1559

debtor, often under the terms of the original debt instruments.

If the debtor elects to leave the rights of long-term lenders "unaffected" by the plan under § 1322(b)(2), then she continues to make the required payments outside the plan directly to the lender rather than through the bankruptcy trustee. If the debtor chooses this path, the plan need not address (or even mention) the long-term debt and would not include the value of that debt in its calculation of plan payments. Obligations handled like this are governed by the preexisting contractual terms, not by any provisions of the plan. Thus, the debt retains its original maturity date and may not be extinguished until the debtor's obligations are fully met. <sup>6</sup>

Importantly, long-term debt even a incorporated into the plan under § 1322(b)(5) may not be discharged once the debtor finishes making payments under the plan. 11 U.S.C. § 1328(a)(1)<sup>7</sup>; see 8 Collier on Bankruptcy ¶ 1328.02, at 1328-14 (16th ed. 2016) ("It would be inequitable to provide for the payment of long-term debts in accordance with an installment payment schedule extending beyond the term of the plan, and still discharge those debts upon completion of payments under the plan."). So, once the plan terminates, the debtor must continue to maintain her longterm obligations even though her short-term obligations have been discharged.

In light of Debtor's successful efforts to structure her plan to permit direct payments to the Credit Union without any modification of the repayment terms, the most obvious conclusion regarding the Credit Union's mortgage is that it was left unaltered by Debtor's bankruptcy. Because the plan did not propose any modification—likely because Debtor could not do so under § 1322(b)(2)—or stipulate to any terms about the Credit Union's mortgage, the mortgage must, by default, have remained governed by the original loan instruments, \*1318 and thus was not "provided for" by the plan.

Debtor's contention is that, by mentioning that the Credit Union's mortgage will be paid directly, the mortgage was provided for by the plan and covered by the discharge—despite the fact that the plan never supplies any terms to govern the mortgage's repayment. Debtor's paradoxical position is that by saying essentially nothing about the mortgage's repayment, the plan still somehow "provided for" the mortgage and discharged it. In essence, Debtor's argument amounts to wanting something for nothing, after Debtor expressly stated that she wanted nothing. Here, that result is plainly not allowed by the Bankruptcy Code. 8

#### 3. Other courts' treatment of this issue

Although no binding authority has directly addressed the issue of what it means for a claim to be "provided for" by a plan under \$ 1328(a), a number of courts that have broached this issue have reached the same conclusion we do. In \*\*Mayflower Capital Company v. Huyck (In re Huyck), a mortgage that was in default when the debtors filed for bankruptcy was at issue. \*\*252 B.R. 509, 510–11 (Bankr. D. Colo. 2000). The Chapter

Bankr. L. Rep. P 83,334, 27 Fla. L. Weekly Fed. C 1559

13 plan effectively split the arrearages on the mortgage and the future payments still due on the loan into two separate debts under § 1322(b) (5). Ld. at 511. The plan explicitly stated that the arrearages would be cured through the plan (with disbursements to be made by the trustee), while future payments on the loan would be made "outside the plan." Ltd. at 510. And, similar to this case, the question presented was whether the future payments due on the loan paid outside the plan were nonetheless discharged along with the debts that were paid under the plan. See <u>lid</u>. at 510– 11. The court concluded that two consequences flowed from the debtors' decision to specify only that payments to the mortgage lender would be made outside the plan. First, the debtors, "outside of the Chapter 13 Plan, would be required to either pay the debt according to the original contract or work out some arrangement with [the lender] to pay the debt at some reduced amount or under different repayment terms." Ltd. at 514. That is, the original loan instruments governed repayment and were unaffected by the bankruptcy. The second "byproduct of the [debtors'] choice to make regular ongoing payments to [the lender] outside of the Plan was that the debt would not 

The bankruptcy court in *In re Hunt*, No. 14-02212-5-DMW, 2015 WL 128048 (Bankr. E.D.N.C. Jan. 7, 2015), held the same. Based on analogous facts where the debtor's plan stated that the debtor would continue making mortgage payments directly to the lender, the court held that the mortgages were not entitled to be discharged. *Id.* at \*4. The court observed that allowing the mortgages to be

discharged would "provide[] relief to a debtor with no corresponding benefit to the creditor and may actually cause potential harm to the creditor." *Id.* Further, "[g]ranting a discharge on long-term debts prior to the \*1319 final payment being made is not consistent with the underlying policies behind Chapter 13." *Id.* To hold otherwise would provide the debtor "the reward of the discharge" without requiring her to meet "all of the obligations of paying the debt over the original term of the loan." *Id.* 

Although the case did not directly address the the district court in Bank of America, N.A. v. Dominguez (In re Dominguez), No. 1:12-CV-24074-RSR (S.D. Fla. Sept. 24, 2013) (Rosenbaum, J.) analyzed the meaning of "provided for" under § 1322(b)(5) and came to the same conclusion. In Dominguez, the plan specified that the debtor's mortgage would "be paid directly" rather than through the trustee. Slip op. at 7. The plan made no other mention of the mortgage, did not detail the monthly mortgage payment amounts, and did not set a schedule under which payments would be made. Id. Because the debtor made her mortgage payments "directly to Bank of America on a schedule governed by the original mortgage documents, not by the Plan," the court concluded that the mortgage was "not governed by the chapter 13 plan." Id. By explicitly stating that the mortgage payments would be paid outside the plan, the debtor:

> clarified to the Bankruptcy Court that she intended to keep current on her first mortgage payments, and she

Bankr. L. Rep. P 83,334, 27 Fla. L. Weekly Fed. C 1559

did not intend for those payments to be subject to the oversight of the Bankruptcy Court or otherwise governed by the Bankruptcy Code. The Plan's mere reference to the first mortgage as a claim that is not governed by the Plan does not, as Bank of America suggests, somehow accomplish the exact opposite of the language and make it a claim governed by the Plan for purposes of § 1322(b)(5). In the same way that § 1322(b) (5) does not apply to a claim that is not referenced on the face of a chapter 13 plan at all, it does not govern a claim listed on a chapter 13 plan only for the purposes of identifying it as a claim not subject to the plan.

*Id.* at 12 (emphasis in original). So, like here, the court concluded that the plan did not "provide for" the creditor's claim by merely mentioning that it would be paid outside the plan. *Id.* 

Lawrence Tractor Company v. Gregory (In re Gregory), 705 F.2d 1118 (9th Cir. 1983), the only case aside from Rake relied upon by Debtor to support her expansive interpretation of "provided for," is distinguishable. In that case, decided before Rake, the Ninth Circuit addressed a bankruptcy plan that "provide[d] for -0- payment to unsecured creditors

requesting that said debts be discharged." Id. at 1120. In other words, the plan proposed to pay unsecured creditors nothing yet still discharge the debt. Id. at 1122. The court held that the plan "provided for" the unsecured creditor's debt and that it was accordingly discharged. Id. at 1123. In doing so, the court noted that "provided for" in \$ 1328(a) "simply requires that for a claim to become dischargeable the plan must 'make a provision for' it, i.e., deal with it or refer to it." Id. at 1122.

Egregory, however, set forth its expansive definition to address a situation much different than the one before us. First, unlike this case where the plan failed to address the repayment terms for the Credit Union's mortgage, the plan in *Gregory* did stipulate to terms for the unsecured creditor's debt: it proposed to pay nothing. This put the unsecured creditor on notice that the plan would affect his rights. Id. at 1122–23. Here, because Debtor's plan did not address the treatment of the Credit Union's mortgage aside from stating that it would be paid directly, the Credit Union received no notice that its \*1320 rights were being modified. See Fawcett v. United States (In re Fawcett), 758 F.2d 588, 591 (11th Cir. 1985) ("[I]t is the debtor's duty to put the creditor on notice by specifically detailing [the plan's treatment of a creditor's claim]. Failing this, the debtor as draftsman of the plan has to pay the price if there is any ambiguity about the meaning of the terms of the plan."). Second, the unsecured creditor in *Gregory* argued only that there was no "practical difference" between the plan paying zero and the plan not [18]

In re Dukes, 909 F.3d 1306 (2018)

Bankr. L. Rep. P 83,334, 27 Fla. L. Weekly Fed. C 1559

acknowledging the debt at all. Id. Thus, the Ninth Circuit did not address a plan like the one we have here, which does not indicate how the debt should be treated. Finally, the creditor in Gregory was unsecured and did not have the protection of the antimodification provision that the Credit Union does here. See infra Section III.B. In sum, Gregory addressed materially different facts and circumstances than those before us today. And based on the facts before us, we cannot conclude that the mere reference to a secured creditor's claim on a debtor's primary residence is sufficient to find that the claim was "provided for" by the plan and included in the discharge.

# B. Whether Discharging the Credit Union's Mortgage Would Violate the Antimodification Provision in § 1322(b) (2)

Even if the plan were somehow construed as "provid[ing] for" the Credit Union's mortgage, there could still be no discharge of the mortgage given the antimodification provision in § 1322(b)(2). The antimodification provision prohibits a plan from modifying "the rights of [a] holder[] of ... a claim secured only by a security interest in real property that is the debtor's principal residence." Clearly, a discharge of a debtor's obligations under his residential mortgage would dramatically modify the rights of the holder of that mortgage. Nonetheless, Debtor attempts to evade the clear prohibition of the antimodification provision based on two arguments. First, Debtor contends that the Credit Union consented to the modification by having notice of it and failing to object. Second, Debtor asserts that discharge is not a modification because it is a statutory

injunction and only removes *in personam* liability. Neither argument is persuasive.

[19] As to the first argument—that the

Credit Union consented to a modification that discharged the mortgage—although it is true that the Credit Union did not object, the Credit Union failed to object because the plan did not contain any modification that would be objectionable. "It is the debtor's obligation ... to specify as accurately as possible the amounts which it intends to pay the creditors." Fawcett, 758 F.2d at 590. So Debtor must "pay the price if there is any ambiguity" in her plan's terms. Ld. at 591. Debtor's plan merely stated that payments on the Credit Union's mortgage would be made directly to the Credit Union "rather than through the Chapter 13 Trustee." Nothing about that representation indicated that the mortgage's repayment terms would be modified, that the 2022 maturity date would be shortened, or that the Credit Union would be paid less than the full value of its claims. Because there was nothing to object to, the Credit Union's silence does not imply that it consented to having its mortgage cut short and discharged in return for nothing.

[20] [21] Debtor's argument that discharge is not a modification is also unpersuasive. According to Debtor, upon discharge, the Credit Union could still foreclose on the property when and if the Debtor ceased making payments, but it could not seek a deficiency judgment \*1321 against Debtor based on the difference between the loan balance and the value of the foreclosed property. Removal of the Credit Union's right to pursue *in personam* liability against Debtor, however, would necessarily modify the Credit

Bankr. L. Rep. P 83,334, 27 Fla. L. Weekly Fed. C 1559

Union's rights because it strips the Credit Union of a right provided by the original loan instruments. A creditor's rights "protected from modification by § 1322(b)(2)" are the rights under the original loan instruments as defined by state law. Nobelman, 508 U.S. at 329-30, 113 S.Ct. 2106. 9 Under Florida law (the law governing the Credit Union's mortgage), the Credit Union has the right to seek a deficiency judgment against Debtor. See Fla. Stat. § 702.06; see also Royal Palm Corp. Ctr. Ass'n v. PNC Bank, NA, 89 So.3d 923, 929-33 (Fla. 4th DCA 2012) (discussing a mortgagee's rights under Florida law to both foreclose on the property and obtain a deficiency judgment against the mortgagor). By terminating the Credit Union's right to obtain an in personam judgment against the debtor, discharge undoubtedly modifies the Credit Union's rights and runs afoul of the antimodification provision. See Universal Am. Mortg. Co. v. Bateman (In re Bateman), 331 F.3d 821, 822 (11th Cir. 2003) (holding that a mortgagee's secured claim for arrearage "survives ... to the extent it is not satisfied in full by payments under the plan, or otherwise satisfied under the terms [of] [8 1325(a)(5), because to permit otherwise would deny the effect of 11 U.S.C. § 1322(b)(2)").

Finally, Debtor argues that because discharge is provided as a statutory remedy for completing a Chapter 13 plan, see 11 U.S.C. § 1328(a), a discharge is not covered by the antimodification provision. Debtor, however, cites no authority that holds that, because discharge is provided for by statute, discharge of a creditor's claim can never be challenged as a modification of the creditor's rights. On

its face, Debtor's contention is implausible. If a violation of the antimodification provision could be ignored based on nothing more than an argument that a debtor's right to a discharge of his debt should be deemed to be superior to the provision, it is hard to imagine when the antimodification provision would ever apply.

Indeed, in *Nobelman*, the Supreme Court refused "to give effect to [the] valuation and bifurcation of secured claims" provided to a Chapter 13 plan by § 506(a) because doing so "would require a modification of the rights of the holder of the security interest" prohibited by the antimodification provision. \[ \bigcup\_{508} \] U.S. at 332, 113 S.Ct. 2106. Nobelman did recognize two instances in which the antimodification provision of § 1322(b)(2) does not apply. One is § 1322(b)(5)'s provision for curing arrearage, which is expressly exempted from the antimodification provision. *Id.* at 330, 113 S.Ct. 2106; see also 11 U.S.C. § 1322(b)(5) (allowing a debtor to cure arrearages "notwithstanding paragraph (2) of this subsection"). The second is the automatic stay provision found in \(\bigcup\_{\} \) 362, which the Court recognized as being "independent of the debtor's plan," Nobelman, 508 U.S. at 330, 113 S.Ct. 2106, and which of course is merely a temporary maintenance of the status quo that does not alter future rights or obligations. Neither exception applies here. A discharge under [8] 1328(a) is nowhere expressly exempted from the antimodification provision of § 1322(b)(2). Further, unlike the automatic \*1322 stay provision, a discharge, which applies only to those debts "provided for by the plan," is inextricable from the plan and wholly dependent on it. In addition, the

Bankr. L. Rep. P 83,334, 27 Fla. L. Weekly Fed. C 1559

"the automatic stay and cure [provisions] deal with past defaults, whereas the modifications permitted (or prohibited) by § 1322(b)(2) concern future obligations." Bank of Am., N.A. v. Garcia (In re Garcia), 276 B.R. 627, 635 (Bankr. D. Ariz. 2002). By modifying the Credit Union's right to collect future obligations, a discharge of Debtor's mortgage obligations would violate the antimodification provision.

# C. Whether the Credit Union's Failure to File a Proof of Claim Discharged the Mortgage

[22] Regardless of whether the plan "provided for" the Credit Union's first mortgage, Debtor argues that the mortgage was discharged because the Credit Union failed to file a proof of claim for it. See 11 U.S.C. § 502(b) (9) (disallowing claims that are not "timely filed" except in certain circumstances). If no proof of claim is filed at the outset of bankruptcy, the creditor typically loses its right to repayment and the debt will be discharged under \$ 1328(a) as "disallowed." Hence, Debtor contends that, due to the Credit Union's failure to file a proof of claim for the first mortgage, the Credit Union cannot pursue her in personam for any deficiency.

[23] [24] [25] [26] But, because Debtor raised this issue for the first time on appeal to the district court, she has waived it. "As a general rule," an issue raised for the first time on appeal will not be considered. Blue Martini Kendall, LLC v. Miami Dade Cty., 816

F.3d 1343, 1349 (11th Cir. 2016). Debtor argues that this issue fits into an exception because

the issue here is a "pure question of law," but that exception also requires that our refusal to consider the issue result in a miscarriage of justice. See id. (quoting Dean Witter Reynolds, Inc. v. Fernandez, 741 F.2d 355, 360–61 (11th Cir. 1984)). Debtor voluntarily entered into the first mortgage knowing that she would eventually have to repay it. She also had the opportunity to raise this issue in the bankruptcy court, but simply failed to do so. So not considering the issue here does not result in a miscarriage of justice.

[27] [28] Even if we were to consider this, the merits favor the Credit Union. In **Southtrust** Bank of Alabama, N.A. v. Thomas (In re Thomas ), we recognized that a secured creditor's lien survives even though the secured creditor failed to file a proof of claim. 883 F.2d 991, 997 (11th Cir. 1989). And we later acknowledged that, for secured creditors protected by the antimodification provision in § 1322(b)(2), in personam liability survives as well. See Bateman, 331 F.3d at 834 & n.12. Because the Credit Union's mortgage was nondischargeable under the antimodification provision, it passed through the bankruptcy unaffected even though no proof of claim was filed, and the Credit Union retained its right to pursue Debtor's liability in personam.

### **CONCLUSION**

A long-term debt with a post-plan maturity date is not "provided for" by a Chapter 13 plan under \[ \bigsep \] \[ \sqrt{328(a)} \] if the plan only states that the debt will be paid outside the plan without setting terms for the debt's repayment. So,

In re Dukes, 909 F.3d 1306 (2018)

Bankr. L. Rep. P 83,334, 27 Fla. L. Weekly Fed. C 1559

Accordingly, we AFFIRM.

JILL PRYOR, Circuit Judge, concurring in part and concurring in the judgment:

I concur in the judgment affirming the district court. I also join in Parts III.B and III.C. of the majority opinion. I do not join in Part III.A, however The majority opinion sets forth two alternative reasons for concluding that the bankruptcy court's discharge order did not discharge debtor Mildred Dukes's mortgage debt owed to creditor Suncoast Credit Union. In Part III.A. the majority explains that the debt was not "provided for by the plan" and thus not discharged. 11 U.S.C. § 1328. And in Part III.B., the majority concludes that the Bankruptcy Code's antimodification provision barred the bankruptcy court from discharging or otherwise modifying **Dukes's** mortgage debt to Suncoast, which was secured by her principal residence. See id. § 1322(b)(2). I would affirm on the basis of the antimodification provision in § 1322(b)(2) alone, without reaching the "provided for" issue. For that reason, I do not join Part III.A. of the majority opinion.

#### **All Citations**

909 F.3d 1306, Bankr. L. Rep. P 83,334, 27 Fla. L. Weekly Fed. C 1559

#### **Footnotes**

- \* Honorable Anne C. Conway, United States District Judge for the Middle District of Florida, sitting by designation.
- Although these totals only add up to \$5,666.60, the plan states that the grand total is \$5,666.66.
- Both parties also raised the issue of whether the Credit Union's mortgage was exempt from discharge as long-term debt under § 1322(b)(5). See ≥11 U.S.C. § 1328(a)(1). We do not address this issue because it is unnecessary for the resolution of this appeal.
- 3 Debtor also contends that the plan's terms setting forth the adequate protection payment amounts for the Credit Union show that the mortgage was "provided for."

Bankr. L. Rep. P 83,334, 27 Fla. L. Weekly Fed. C 1559

Adequate protection payments, however, have nothing to do with the repayment of a debt. Adequate protection payments are required by the Bankruptcy Code to protect the value of secured creditors' collateral while the creditor is unable to enforce a lien on the debtor's property during the bankruptcy. See 11 U.S.C. § 1326(a)(1)(C); In re Robson, 369 B.R. 377, 379–80 (Bankr. N.D. III. 2007) (describing the history behind § 1326(a)(1)(C) and how it is designed to protect secured creditors from depreciation). Hence, if they meet the statutory criteria, secured creditors have a right to adequate protection. See In re Warrington, 424 B.R. 186, 191 (Bankr. E.D. Pa. 2010). Adequate protection payments are wholly different from maintenance payments due under the original loans or payments made under a bankruptcy plan. See In re Perez, 339 B.R. 385, 398–99 (Bankr. S.D. Tex. 2006) (describing how "[a]dequate protection payments to real estate lien holders are not payments made under a proposed plan"); In re Cook, 205 B.R. 437, 440 (Bankr. N.D. Fla. 1997) ("[A]dequate protection payments do not constitute payments under a plan."). As a result, the debtor can be required to provide adequate protection payment to any secured creditor unable to enforce its lien, even if the creditor's debt is not treated or repaid under the plan. See Perez, 339 B.R. at 400-01 (acknowledging that, although Chapter 13 bankruptcy could not modify a mortgage lender's rights, the lender was still entitled to adequate protection).

4 In Nobelman, those rights included:

the right to repayment of the principal in monthly installments over a fixed term at specified adjustable rates of interest, the right to retain the lien until the debt is paid off, the right to accelerate the loan upon default and to proceed against petitioners' residence by foreclosure and public sale, and the right to bring an action to recover any deficiency remaining after foreclosure.

508 U.S. at 329, 113 S.Ct. 2106.

5 11 U.S.C. § 1322(b)(5) states that a plan may:

notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any ... secured claim on which the last payment is due after the date on which the final payment under the plan is due.

11 U.S.C. § 1322(b)(5).

One reason a debtor might choose to make payments directly to a creditor rather than rolling payments into the bankruptcy process is to avoid trustee's fees, which are a percentage of the total amount owed by the debtor over the plan period. As discussed above, a home mortgage loan cannot be modified in bankruptcy, so there would be no benefit in dealing with the debt through the bankruptcy process. Thus, it is generally in the debtor's best interest to pay her mortgage outside the Chapter 13 plan rather than pull it into the plan and owe fees on payments she is obligated

In re Dukes, 909 F.3d 1306 (2018)

Bankr. L. Rep. P 83,334, 27 Fla. L. Weekly Fed. C 1559

to make either way. Nothing in the Code requires such debts to be handled through the bankruptcy process.

- 7 11 U.S.C. § 1328(a)(1) states:
  - (a) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, ... the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt—(1) provided for under section 1322(b)(5).
  - 11 U.S.C. § 1328(a)(1).
- This conclusion is reinforced by the fact that, if the plan's statement that Debtor would continue to make payments outside the plan "rather than through the Trustee" did somehow govern the Credit Union's mortgage, then presumably the payments would stay on the same terms as they were under the original loan documents because the plan provided no other repayment terms. If that is the case, then Debtor likely was not entitled to discharge because she defaulted on her payments under the original loan terms. See 11 U.S.C. § 1328(a) (stating that debts provided for by the plan shall be discharged "after completion by the debtor of all payments under the plan").
- 9 Applying Texas law, the Supreme Court specifically noted that this included "the right to bring an action to recover any deficiency remaining after foreclosure."

  Nobelman, 508 U.S. at 329, 113 S.Ct. 2106.

**End of Document** 

© 2022 Thomson Reuters. No claim to original U.S. Government Works.

In re Kinney, 5 F.4th 1136 (2021)

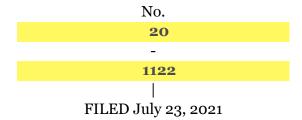
70 Bankr.Ct.Dec. 133

KeyCite Yellow Flag - Negative Treatment
Superseded by Statute as Stated in In re Albert, Bankr.D.Colo., October
27, 2021

5 F.4th 1136 United States Court of Appeals, **Tenth Circuit**.

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.



### **Synopsis**

Background: When injuries that Chapter 13 debtor sustained in car accident caused her to miss mortgage payments during the final months of her maximum 60-month plan, the United States Bankruptcy Court for the District of Colorado, No. 1:13-27912, Elizabeth E. Brown, J., 2019 WL 7938815, entered order dismissing case prior to grant of a discharge, and debtor moved for reconsideration. The Bankruptcy Court, Brown, J., 2019 WL 7938816, denied motion for reconsideration. Debtor appealed.

[Holding:] The Court of Appeals, Bacharach, Circuit Judge, held that bankruptcy court had no discretion, when injuries that Chapter 13

debtor sustained in car accident caused her to miss mortgage payments during the final months of her maximum 60-month plan, to allow debtor to "cure" this payment default after the plan's term had ended.

Affirmed.

Eid, Circuit Judge, filed opinion concurring in the judgment.

**Procedural Posture(s):** On Appeal; Motion to Convert or Dismiss Case; Motion for Reconsideration.

West Headnotes (21)

[1] Bankruptcy Time for completion; extension or modification

Confirmed Chapter 13 plan may be modified to allow debtor to cure a default in his or her required monthly mortgage payments. 11 U.S.C.A. § 1329(a).

[2] Bankruptcy • Conversion or Dismissal

**Bankruptcy** ← Completion of plan; hardship

Chapter 13 bankruptcy cases end in the grant of a discharge, in conversion to Chapter 7, or in dismissal. 11 U.S.C.A. §§ 1307, 1328.

70 Bankr.Ct.Dec. 133

#### [3] Bankruptcy Discretion

Orders dismissing a Chapter 13 case under the "for cause" provision are ordinarily reviewed only for an abuse of discretion. 11 U.S.C.A. § 1307(c).

## [4] Bankruptcy — Conclusions of law; de novo review

#### **Bankruptcy** • Discretion

While orders dismissing a Chapter 13 case under the "for cause" provision are ordinarily reviewed only for an abuse of discretion, to determine whether a bankruptcy court abused its discretion dismissing case based on interpretation of statute establishing a maximum five-year length of plans and its inability to allow debtor to cure a default that occurred in the final months of her five-year plan, the Bankruptcy Appellate Panel had to conduct de novo review of bankruptcy court's determinations on questions of statutory interpretation.

11 U.S.C.A. §§ 1307(c), 1329(c).

#### [5] Bankruptcy - Discretion

Bankruptcy court abuses its discretion by making a legal error.

## [6] **Bankruptcy** Failure to make payments or comply with plan

## **Bankruptcy** ← Completion of plan; hardship

Bankruptcy court had no discretion, when injuries that Chapter 13 debtor sustained in car accident caused her to miss mortgage payments during the final months of her maximum 60-month plan, to allow debtor to "cure" this payment default after the plan's term had ended and to obtain a discharge, but instead had to dismiss case under the "for cause" provision without the grant of a discharge; any payments that debtor made after the plan's five-year term had ended would not be "payments under the plan," of kind required for entry of discharge order. 11 U.S.C.A. §§ 1307(c), 1328(a).

#### 2 Cases that cite this headnote

## [7] **Bankruptcy** Construction and Operation

In interpreting a Bankruptcy Code provision, courts start with the language of the Code, giving undefined terms their ordinary meaning. 11 U.S.C.A. § 101 et seq.

## [8] Bankruptcy Construction and Operation

To avoid interpretations of a Bankruptcy Code provision that are incompatible with the rest of the Code, courts reads such provisions in

In re Kinney, 5 F.4th 1136 (2021)

70 Bankr.Ct.Dec. 133

the context of the other provisions.

₹ 11 U.S.C.A. § 101 et seq.

## [9] Bankruptcy • Construction and Operation

Bankruptcy Code provision is ambiguous, if it can be understood by reasonably well-informed persons in two or more different senses. 11 U.S.C.A. § 101 et seq.

## [10] Statutes • What constitutes ambiguity; how determined

**Statutes** — Context

Statutory ambiguity depends on the language of statute itself, the specific context in which that language is used, and the broader context of the statute as whole.

## [11] **Bankruptcy** Construction and Operation

When Bankruptcy Code provision is ambiguous, court can consider Congressional intent. 11 U.S.C.A. § 101 et seq.

## [12] Statutes • Mandatory or directory statutes

Use of the word "may" in statute generally implies some discretion.

## [13] **Bankruptcy** — Completion of plan; hardship

Congress' use of the word "shall" in bankruptcy statute providing that the court "shall" grant a discharge to debtor, "after completion by the debtor of all payments under the plan," means that discharge is mandatory if debtor complete the payments under his or her plan. 11 U.S.C.A. § 1328(a).

#### 2 Cases that cite this headnote

## [14] Statutes Particular Words and Phrases

Term "under" is a chameleon, bearing ambiguity in light of its multiple possible meanings in statute.

#### [15] Statutes • Context

To ascertain the better interpretation of an ambiguous statutory term, court must focus on context.

## [16] **Bankruptcy** • Completion of plan; hardship

"Payments under the plan," the completion of which by Chapter 13 debtor will trigger a mandatory duty on part of the court to grant the debtor a discharge, should be interpreted as payments that are subject to or

70 Bankr.Ct.Dec. 133

under the authority of the plan. 11 U.S.C.A. § 1328(a).

1 Cases that cite this headnote

## [17] **Bankruptcy** Completion of plan; hardship

Payment can be a payment "under the plan," as that phrase is used in bankruptcy statute governing a Chapter 13 debtor's right to a discharge, only if the plan remains in existence when payment is made; Chapter 13 debtor will have completed his or her "payments under the plan," as required for debtor to be entitled to discharge, only if all payments are made during the existence of the plan, before it has expired. 11 U.S.C.A. § 1328(a).

1 Cases that cite this headnote

# [18] Bankruptcy → Failure to make payments or comply with plan Bankruptcy → Completion of plan; hardship

Interpreting bankruptcy statute that governed the grant of a Chapter 13 discharge as providing for entry of discharge order only if all of debtor's plan payments are completed prior to the expiration of the plan's maximum five-year term, and as forbidding any belated "cures" and requiring dismissal of case if debtor has not completed his or her plan payments and more than five years have passed since the deadline for

the first plan payment, did not conflict with the permissive nature of the "for cause" dismissal provision, which provides that bankruptcy court "may" dismiss a Chapter 13 case for cause; word "may," as used in "for cause" dismissal provision, still had meaning as giving discretion to the court in various situations involving material defaults. 11 U.S.C.A. §§ 1307(c), 1328(a).

[19] **Statutes** • Purpose and intent; determination thereof

**Statutes** ← Plain, literal, or clear meaning; ambiguity

When text of statute is ambiguous, court may seek guidance from Congress' intent, a task aided by a review of statute's legislative history.

[20] Statutes • In general; factors considered

**Statutes** ← Plain, literal, or clear meaning; ambiguity

In interpreting ambiguous statute, courts, in addition to considering legislative history, will consider which of the different interpretations best fits statutory language.

[21] Bankruptcy Protection Against Discrimination or Collection Efforts in General; "Fresh Start."

In re Kinney, 5 F.4th 1136 (2021)

70 Bankr.Ct.Dec. 133

Principal purpose of the Bankruptcy Code is to grant a fresh start to the honest but unfortunate debtor. 11 U.S.C.A. § 101 et seq.

\*1138 APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF COLORADO (Bankr. Ct. No. 1:13-27912-EEB)

**Attorneys and Law Firms** 

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.

#### **Opinion**

BACHARACH, Circuit Judge.

\*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.

- [1] 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).

[2] 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. §

#### 2022 ALEXANDER L. PASKAY MEMORIAL BANKRUPTCY SEMINAR

In re Kinney, 5 F.4th 1136 (2021)

70 Bankr.Ct.Dec. 133

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. <sup>1</sup>

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

[3] 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").

[4] [5] 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.

[6] 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

70 Bankr.Ct.Dec. 133

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.

[7] [8] 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).

[9] [10] [11] The code is ambiguous if it can be "understood by reasonably well-informed persons in two or more different senses." 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." \*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." 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.

70 Bankr.Ct.Dec. 133

[12] 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.

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?

[14] [15] 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"). <sup>5</sup> 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.

[16] "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.

70 Bankr.Ct.Dec. 133

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 \*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.

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)).

[17] 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.

[18] 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

70 Bankr.Ct.Dec. 133

• 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 \*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

70 Bankr.Ct.Dec. 133

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."

that because \( \bigsis \) \( \bigsis \) 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 \*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 \[ \bigsep \{ \} 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 \[ \bigsep 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

70 Bankr.Ct.Dec. 133

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.

[19] [20] 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.

[21] "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 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 \*1146 to prevent. This concern is not entirely hypothetical. In In re Henry, 368 B.R. 696

In re Kinney, 5 F.4th 1136 (2021)

70 Bankr.Ct.Dec. 133

(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. 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 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.

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, \*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 ....

Appropriations Act, 2021, Pub. L. 116-260, Div. FF, Title X, § 1001(b)(1)–(2), Dec. 27, 2020, 134 Stat. 3217. This provision, which

#### 2022 ALEXANDER L. PASKAY MEMORIAL BANKRUPTCY SEMINAR

In re Kinney, 5 F.4th 1136 (2021)

70 Bankr.Ct.Dec. 133

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 \[ \sum\_{\subset} 1328(a), within five years, as required by § 1322, the bankruptcy court was without \*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"). <sup>1</sup>

The majority concludes that the language is ambiguous because "[i]n the end, there's

In re Kinney, 5 F.4th 1136 (2021)

70 Bankr.Ct.Dec. 133

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.

**All Citations** 

5 F.4th 1136, 70 Bankr.Ct.Dec. 133

#### **Footnotes**

- 1 The parties agree that Ms. Kinney's mortgage payments during the plan were payments "under the plan."
- 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.
- 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. III. 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." Hanley, 575 B.R. 207, 217–19 (Bankr.

70 Bankr.Ct.Dec. 133

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. III. 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).

- 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).
- 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.
- 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.
- 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.

In re Kinney, 5 F.4th 1136 (2021)

70 Bankr.Ct.Dec. 133

- 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).
- 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.

**End of Document** 

© 2022 Thomson Reuters. No claim to original U.S. Government Works.

Justice v. United States (In re Justice), 817 F.3d 738 (11th Cir. 2016)

817 F.3d 738

In re Christopher Michael JUSTICE, Debtor.

Christopher Michael Justice, Plaintiff– Appellant,

 $\mathbf{v}$ .

United States of America, Treasury Department, Internal Revenue Service, Defendant–Appellee.

No. 15-10273.

United States Court of Appeals, Eleventh Circuit.

March 30, 2016.

[817 F.3d 740]

Keith H. Johnson, Adam Louis Heiden, Johnson & Johnson, PA, Jacksonville, FL, for Plaintiff—Appellant.

Julie Ciamporcero Avetta, Ellen Page Delsole, Gilbert Steven Rothenberg, Thomas K. Vanaskie, U.S. Department of Justice—Tax, Washington, DC, for Defendant—Appellee.

Before TJOFLAT, MARTIN and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge:

The issue in this case is whether the Forms 1040 belatedly filed by Plaintiff—Appellant Christopher Michael Justice ("Justice") for the tax years 2000 through 2003 constitute "returns" for purposes of 11 U.S.C. § 523(a) relating to the dischargeability vel non of tax debts. Justice declared bankruptcy in 2011 and sought to discharge his federal income tax liability for tax years 2000 through 2003. Justice had filed Forms 1040 for those tax years many years late, and only after the Internal Revenue Service ("IRS") had issued notices of deficiency and had assessed the amount of taxes he owed. The United States Bankruptcy Court for the Middle District of Florida determined that

Justice's tax debts were non-dischargeable and granted the United States of America's motion for summary judgment. Justice appealed to the district court, which affirmed.

The criteria for a document to qualify as a tax return are set out in the *Beard* test articulated by the United States Tax Court in 1984. *Beard v. Comm'r of Internal Revenue*, 82 T.C. 766, 777, 1984 WL 15573 (1984), *aff'd sub nom. Beard v. C.I.R.*, 793 F.2d 139 (6th Cir.1986). The *Beard* test was derived from the Supreme Court opinions in *Zellerbach Paper Company v. Helvering*, 293 U.S. 172, 180, 55 S.Ct. 127, 79 L.Ed. 264 (1934) and *Germantown Trust Co. v. Commissioner of Internal Revenue*, 309 U.S. 304, 306–09, 60 S.Ct. 566, 567–69, 84 L.Ed. 770 (1940). It establishes four requirements for a document to serve as a tax return:

[817 F.3d 741]

(1) it must purport to be a return; (2) it must be executed under penalty of perjury; (3) it must contain sufficient data to allow calculation of tax; and (4) it must represent an honest and reasonable attempt to satisfy the requirements of the tax law. See In re Hindenlang, 164 F.3d 1029, 1033 (6th Cir.1999). Only the fourth¹ prong of the Beard test is at issue in this case: whether Justice's Forms 1040 represented an honest and reasonable effort to comply with the tax law.

At least three<sup>2</sup> other circuit courts have held that delinquency in filing is relevant to the fourth Beard factor. See In re Payne, 431 F.3d 1055, 1057 (7th Cir.2005) (holding that the debtor's "belated filing was not a reasonable effort to satisfy the requirements of the tax law," relying significantly on the debtor's delinquency in failing to file his tax returns until after the IRS assessment, thus "defeating the main purpose" of the self-reporting requirement of our tax system); In re Moroney, 352 F.3d 902, 906 (4th Cir.2003) (holding that "a debtor's delinquency is relevant to determining whether the debtor has filed a return," and holding that failing to file until after IRS assessment undermines the self-reporting, self-assessment essence of our tax system, and is



#### Justice v. United States (In re Justice), 817 F.3d 738 (11th Cir. 2016)

"hardly how honest and reasonable taxpayers attempt to comply with the tax code"); *Hindenlang*, 164 F.3d at 1034–35 (holding that the government had met its burden of proving that debtor's actions were not an honest and reasonable effort to satisfy the tax law when the debtor failed to file a timely return, failed to respond to the thirty-day letter and the ninety-day letter, and belatedly filed the Forms 1040 only after the IRS assessed the taxes).

In this case, Justice failed to file timely tax returns for tax years 2000 through 2003. As a result, the IRS attempted to determine Justice's liability for those years using third-party information. The IRS's estimates of tax liability for a taxpayer who has failed to file a return are known as Substitute for Return ("SFR") tax assessments. Once it had prepared the SFRs, the IRS issued Justice notices of deficiency for all four tax years. Justice did not challenge the notices of deficiency in the Tax Court, so on August 28, 2006, the IRS assessed tax deficiencies against Justice in the amounts it had determined through the SFRs.

On October 22, 2007, after the IRS had issued notices of deficiency to him and assessed his liability, Justice prepared Forms 1040 for all four tax years and delivered them to the IRS. The forms were

#### [817 F.3d 742]

tendered between three (for the 2003 tax year) and six (for the 2000 tax year) years late. For each tax year, Justice reported a lower tax liability than the IRS had assessed in the SFRs. The IRS reviewed Justice's Forms 1040 and abated a portion of the tax it had assessed against him for each year. Justice has not offered any excuse or explanation for his tardiness in filing his tax returns.

Justice filed a voluntary petition for Chapter 7 bankruptcy on July 22, 2011. He received a Discharge of Debtor on November 4, 2011. On January 10, 2012, his attorney filed an administrative claim with the IRS requesting a

write-off for Justice's tax debts for years 2000 through 2003. The IRS denied the request, and this lawsuit followed.

The law restricts the circumstances under which tax debts may be discharged in bankruptcy. Specifically, a bankruptcy discharge does not relieve a debtor from any debt

- (1) for a tax or a customs duty-
- (B) with respect to which a return, or equivalent report or notice, if required—
- (i) was not filed or given; or
- (ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition....

11 U.S.C. § 523(a). It is undisputed that Justice filed his Forms 1040 after the dates on which they were last due and at least two years before filing his bankruptcy petition. As a result, if Justice's Forms 1040 constitute tax returns, his tax debts are not excluded from discharge under § 523(a)(1)(B)(ii).3 If, however, the Forms 1040 do not qualify as "returns" at all, then Justice's tax debts are non-dischargeable under 523(a)(1)(B)(i) -i.e., Justice is deemed never to have filed "returns." The issue in this case is whether the Forms 1040 that Justice belatedly filed constitute "returns" for purposes of § 523(a)(1)(B)(i).

Until 2005, the bankruptcy code did not include any language defining "return." The Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") of 2005 added, for the first time, a definition of "return" to the bankruptcy code. That definition reads:

For purposes of this subsection, the term "return" means a return that



Justice v. United States (In re Justice), 817 F.3d 738 (11th Cir. 2016)

satisfies requirements the of nonbankruptcy applicable law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

11 U.S.C. § 523 (\*) (herein referred to as the "hanging paragraph" and cited as § 523 (\*)).4

[817 F.3d 743]

Three of our sister circuits-the First, Fifth, and Tenth Circuits—have interpreted this definition in a manner that we need not address in this opinion. Those courts decided that the phrase "applicable filing requirements" in the BAPCPA definition includes filing deadlines. Therefore, those courts held, late-filed tax documents do not comply with applicable filing requirements and cannot be "returns." This approach has been termed the "one-day-late rule" because it prohibits discharge of a tax debt with respect to which a return was filed even one day late. In these "one-day-late" jurisdictions, there are only the narrow statutory exceptions to the "one-daylate rule," e.g., late-filed documents that qualify as returns under this interpretation are those filed in accordance with § 6020(a) of the Internal Revenue Code of 1986.5 See In re Fahey, 779 F.3d 1, 4 (1st Cir.2015) ("So the question is whether timely filing is a 'filing requirement' ... The answer is plainly yes."); In re Mallo, 774 F.3d 1313 (10th Cir.2014), cert. denied sub nom. Mallo v. I.R.S., --- U.S. ----, 135 S.Ct. 2889, 192 L.Ed.2d 924 (2015); In re McCoy, 666 F.3d 924, 932 (5th Cir.2012) ("Unless it is filed under a 'safe harbor' provision similar to § 6020(a), a state income tax return that is filed late under the applicable nonbankruptcy state law is not a

'return' for bankruptcy discharge purposes under § 523(a).").

Partly because the one-day-late rule limits the application of § 523(a)(1)(B)(ii) to the unusual situations in which the IRS prepares a return with the taxpayer's cooperation under § 6020(a), both Justice and the IRS argue that the rule is an incorrect interpretation of the statute. However, we hold that, even under Justice's preferred interpretation of § 523 (\*), his tax debts are non-dischargeable. We can assume *arguendo*, although we expressly do not decide, that the one-day-late rule is incorrect. We can do this because, even under this assumption, Justice's tax debts are nevertheless non-dischargeable for the following reasons.

Thus, we assume arguendo that the applicable filing requirements Congress envisioned in the hanging paragraph do not include filing deadlines. Even if late-filed tax documents can sometimes qualify as returns, the BAPCPA definition also demands that a return satisfy "the requirements of applicable nonbankruptcy law." Both parties to this case, and all courts to consider the issue, agree that the term "applicable nonbankruptcy law" incorporates the Beard test. See, e.g., In re Martin, 500 B.R. 1, 8 (D.Colo.2013) aff'd sub nom. In re Mallo, 774 F.3d 1313 (10th Cir.2014) (holding that the Beard test "constituted the 'applicable nonbankruptcy law' pursuant to the first sentence of the hanging paragraph provided by the BAPCPA-for purposes of determining whether

[817 F.3d 744]

a filing is a 'return' under § 523(a)(1)(B)(i)"); In re Rhodes, 498 B.R. 357, 367 (Bankr.N.D.Ga.2013) (applying Beard test "to determine whether a late-filed, post-assessment return is, in fact, a purposes of dischargeability 'return' for under clause considerations (i) 523(a)(1)(B)"); cf. In re Casano, 473 B.R. 504, 507 (Bankr.E.D.N.Y.2012) (declining to apply Beard test because the one-day-late rule meant that late tax filings could never be returns, and



therefore declining to apply any "applicable nonbankruptcy law" at all).

Only the fourth prong of the Beard test-that there must be an honest and reasonable attempt to satisfy the requirements of the tax law-is disputed in this case. The parties advocate competing interpretations of that language. The IRS argues, consistent with the holdings of the Fourth, Sixth, Seventh, and Ninth Circuits, that delinquency in filing a tax return is relevant to determining whether the taxpayer made an honest and reasonable effort to comply with the law. Justice urges the contrary approach adopted by the Eighth Circuit, which holds "that the honesty and genuineness of the filer's attempt to satisfy the tax laws should be determined from the face of the form itself, not from the filer's delinquency or the reasons for it. The filer's subjective intent is irrelevant." In re Colsen, 446 F.3d 836, 840 (8th Cir.2006).

We join the majority of federal appeals courts in holding that the fourth Beard factor requires analysis of the entire time frame relevant to the taxpayer's actions. Failure to file a timely return, at least without a legitimate excuse or explanation, evinces the lack of a reasonable effort to comply with the law. This interpretation comports with the common-sense meaning of "honest and reasonable." It is also consistent with the purpose of bankruptcy generally: to provide a "fresh start" to the "honest but unfortunate debtor." In re Mitchell, 633 F.3d 1319, 1326 (11th Cir.2011). Indeed, we have observed that Congress's purpose in enacting the exceptions to discharge in § 523 was "[t]o ensure that only the honest but unfortunate debtors receive the benefit of discharge...." Id. It would impede that goal to permit a taxpayer who has not made an honest and reasonable effort to comply with the tax laws to discharge his tax debts by limiting our analysis to the face of his tax documents.

A significant factor in our decision to adopt the majority position espoused by the Fourth, Fifth, Seventh, and Ninth Circuits<sup>z</sup> is the fact that our system of taxation relies on prompt and honest self-reporting by taxpayers. A taxpayer who does

not file a timely return and who submits no information at all until contacted by the IRS frustrates the requirements and objectives of that system. Indeed, filing tax documents only after the IRS has gathered the relevant information and assessed a deficiency significantly undermines the self-assessment system. Delinquency in filing, therefore, is evidence that the taxpayer failed to make a reasonable effort to comply with the law.

As the Fourth Circuit in *Moroney* points out, a fundamental disagreement between the majority position and that of the Eighth Circuit, is "about the relevant time frame in which to assess the honesty and reasonableness" of the taxpayer's efforts to comply with the tax laws. *Moroney*, 352 F.3d at 905. We agree with the majority

[817 F.3d 745]

position that the relevant time frame is the entire time frame of the taxpayer's action (and inaction), which of course includes the time from the taxpayer's delinquency through the time when the belated return is filed. The truncated time frame considered by the Eighth Circuit-i.e. only the time frame in which the belated return itself is filed-seems to us to be flawed for several reasons. It narrows the inquiry to the "face of the form itself." See Colsen, 446 F.3d at 840 ("We therefore hold that the honesty and genuineness of the filer's attempt to satisfy the tax laws should be determined from the face of the form itself...."). However, there is no suggestion in the fourth Beard prong-"there must be an honest and reasonable attempt to satisfy requirements of the tax law," Beard, 82 T.C. at 777 -that the honesty and reasonableness of the taxpayer's attempts should be evaluated in such a truncated time frame. Nor does limiting our inquiry to such a truncated time frame capture the common-sense meaning of an inquiry to determine a taxpayer's efforts to comply with the law.

The Eighth Circuit's decision in *Colsen* and Judge Easterbrook's dissent from the Seventh Circuit's majority opinion in *Payne* make three primary arguments against the majority interpretation of



#### 2022 ALEXANDER L. PASKAY MEMORIAL BANKRUPTCY SEMINAR

Justice v. United States (In re Justice), 817 F.3d 738 (11th Cir. 2016)

the "honest and reasonable" prong of the *Beard* test. First, they argue that a belated return is still useful to the IRS, even if filed after the authorities have assessed the taxpayer's liability, because even a late return replaces the agency's estimates with facts. *See, e.g., Payne, 431 F.3d* at 1060–61 (Easterbrook, J., dissenting). However, the focus of the fourth prong *Beard* test is not the document's utility to the IRS, but the *taxpayer's* efforts to comply with the law. Regardless of its usefulness to the IRS, a return filed only after the IRS has issued a notice of deficiency is evidence of a lack of effort to comply with the self-reporting requirements of our tax system. As the *Payne* majority wrote:

And neither Payne's purpose nor whether his return had any value to the IRS is critical. The legal test is not whether the filing of a purported return has some utility for the tax authorities, but whether it is a *reasonable* endeavor to satisfy the taxpayer's obligations....

Id. at 1058 (emphasis in original).

Second, they argue that one purpose of the filing requirement is that the person with the best knowledge of his particular income and deductible expenses—the taxpayer—provides that information. See id. at 1061 (Easterbrook, J., dissenting). While it is true that accuracy is one of the benefits of self-reporting (so long as it is honest), the primary rationale of the selfreporting system is that the IRS, as a practical matter, does not have the resources to investigate everyone's tax liability. See Moroney, 352 F.3d at 906 (4th Cir.2003) ("The very essence of our system of taxation lies in the self-reporting and self-assessment of one's tax liabilities."). Again, a taxpayer who fails to timely self-report and instead waits until the IRS has determined his liability defeats the primary purpose of selfreporting and self-assessment. Thus a belated return filed only after the IRS has produced an SFR and issued a notice of deficiency is evidence that the taxpayer did not make a reasonable attempt to comply with the tax law.

Finally, they point out that a strict interpretation of the honesty requirement might render § 523(a)(1)(C) superfluous. *Payne*, 431 F.3d at 1062 (Easterbrook, J., dissenting). Section 523(a)(1)(C) precludes the discharge of any tax debt "with respect to which the debtor made a fraudulent return or willfully attempted in any manner

[817 F.3d 746]

to evade or defeat such tax." 11 U.S.C. § 523(a)(1)(C). If a tax document cannot be a return unless filed honestly, Judge Easterbrook argues, then any fraudulent tax document is not a return by the operation of § 523(a)(1)(B)(i), thus rendering § 523(a)(1)(C) superfluous. We disagree for several reasons.

First, although there is overlap, the category of filings which are not honest and reasonable is much broader than the category of fraudulent returns. Congress had ample reason to deny dischargeability in cases where it would be difficult for the Government to prove fraud. And indeed, although a taxpayer's actions might not rise to the level of fraud, Congress understandably intended to deny dischargeability to a taxpayer who did not make an honest and reasonable effort to comply with the tax laws.

Second, we note that the canon of statutory interpretation prohibiting a reading that renders one section of a statute superfluous is not absolute. "[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to ... [the] cardinal canon before all others.... [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992). Additionally, "[r]edundancies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between two laws, a court must give effect to both." Id. (internal citation omitted). Our interpretation of the Beard test does not create a positive repugnancy with § 523(a)(1)(C). In fact, both



Justice v. United States (In re Justice), 817 F.3d 738 (11th Cir. 2016)

sections have the same goal; Congress has provided that non-dischargeability should result both from fraudulent returns and also from returns with respect to which the taxpayer has not made honest and reasonable efforts to comply with the law. We must give effect to both provisions. Thus we have no qualms in adopting this interpretation of "honest and reasonable"—i.e. the Hindenlang, Moroney, Payne, and Hatton case law which in turn adopted the Beard test to determine whether a filing constitutes a "return."

Thus we hold that the time frame for evaluation of a taxpayer's apparent effort to comply with the law under the fourth *Beard* factor includes all of the taxpayer's conduct with respect to the relevant tax years. In a case such as this one, where a taxpayer files many years late, without any justification at all, and only after the IRS has issued notices of deficiency and has assessed his tax liability, the taxpayer's behavior does not evince an honest and reasonable effort to satisfy the requirements of the tax law. Thus, Justice's tax debts associated with his delinquent returns may not be discharged in bankruptcy.<sup>8</sup>

We assume, without deciding, that Congress did not intend to include filing deadlines when it required, in the hanging paragraph, that tax returns comply with "applicable filing requirements." Even making that assumption, however, we hold that Justice's late-filed Forms 1040 do not qualify as tax returns under the *Beard* test because they do not evince an honest and reasonable effort to comply with the tax law. As a result, his tax debts for tax

[817 F.3d 747]

years 2000 through 2003 are debts for tax obligations with respect to which no return was filed. They are not dischargeable in bankruptcy pursuant to 11 U.S.C. § 523(a)(1)(B)(i). The judgment of the district court is

AFFIRMED.

-----



#### Notes:

- We note that this was actually the third prong of the original Beard and Zellerbach tests. See Zellerbach, 293 U.S. at 180, 55 S.Ct. at 131; Beard, 82 T.C. at 777. However, the Sixth Circuit in Hindenlang altered the order of the factors, and since then appeals courts have consistently adopted the Sixth Circuit's ordering. See, e.g., Hindenlang, 164 F.3d at 1033-34; In re Payne, 431 F.3d 1055, 1057 (7th Cir.2005); In re Hatton, 220 F.3d 1057, 1060-61 (9th Cir.2000). The Seventh Circuit actually referred to this factor as "the fourth element of Zellerbach." Payne, 431 F.3d at 1061. But the Zellerbach test included only three factors. Zellerbach, 293 U.S. at 180, 55 S.Ct. at 131 (A document qualifies as a return "if it purports to be a return, is sworn to as such, and evinces an honest and genuine endeavor to satisfy the law."). In this opinion, we refer to the "honest reasonable" factor as the fourth prong.
- <sup>2</sup> The Ninth Circuit also reached a similar conclusion in *Hatton*. 220 F.3d at 1061. However, *Hatton* involved a taxpayer who never filed a purported return at all and instead accepted the IRS's assessment of his tax debts. Although the Ninth Circuit's reasoning was similar to that of the Fourth, Sixth, and Seventh Circuits, *Hatton* is not directly on point. *Hatton* did, however, indicate that a taxpayer's delinquency is relevant to the fourth *Beard* factor.
- In other words, under § 523(a)(1)(B)(ii) a tax debt is non-dischargeable *only* if the return is *both* filed late *and also* filed within two years of filing for bankruptcy. *See In re Moroney*, 352 F.3d 902, 904–05 n. 1 (4th Cir.2003). Because the belated Forms 1040 filed by Justice in 2007 were not filed within two years of his bankruptcy filing in 2011, his tax debts are not excluded from discharge pursuant to § 523(a)(1)(B)(ii).
- 4 This definition of the term "return" appears at the end of subsection (a) of § 523. Because it is unattached to any lettered subsection of § 523, it is often cited as § 523 (\*) and referred to as the "hanging paragraph" or the "flush language." *See, e.g., In re Mallo, 774* F.3d 1313, 1318 (10th Cir.2014).

#### 2022 ALEXANDER L. PASKAY MEMORIAL BANKRUPTCY SEMINAR

Justice v. United States (In re Justice), 817 F.3d 738 (11th Cir. 2016)

- <sup>5</sup> Explicitly included as a return under the hanging paragraph is "a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986...." 11 U.S.C. § 523 (\*). Section 6020(a) of the Internal Revenue Code permits the IRS, when a taxpayer has failed to file a return, to cooperate with the taxpayer to produce one. The IRS informs us that § 6020(a) returns represent "only a tiny minority of cases."
- <sup>6</sup> The IRS also proposes an alternative rule, under which a tax document filed after the IRS has conducted an independent assessment of the taxpayer's liability is not a return with respect to the portion of the liability the IRS has already assessed (though it may be a return for additional taxes owed). For the same reasons, we also need not decide whether the IRS's preferred approach is correct.
- <sup>2</sup> In re Payne, 431 F.3d 1055 (7th Cir.2005); In re Moroney, 352 F.3d 902 (4th Cir.2003); In re Hatton, 220 F.3d 1057 (9th Cir.2000); In re Hindenlang, 164 F.3d 1029 (6th Cir.1999).
- B However, we do not adopt a *per se* rule. We agree with the Fourth Circuit that "[c]ircumstances not presented in this case might demonstrate that the debtor, despite his delinquency, had attempted in good faith to comply with the tax laws." *Moroney*, 352 F.3d at 907.

-----



947 F.3d 770

IN RE: John Robert SHEK, Debtor.

Massachusetts Department of Revenue, Defendant-Appellant,

v.

John Robert Shek, Plaintiff-Appellee.

No. 18-14922

United States Court of Appeals, Eleventh Circuit.

January 23, 2020

[947 F.3d 772]

Celine Elizabeth de la Foscade-Condon, Massachusetts Department of Revenue, Boston, MA, for Plaintiff-Appellant.

Robert Conrad, Robert C Meyer, PA, Coral Gables, FL, for Defendant-Appellee.

John A.E. Pottow, Pro Se.

Before GRANT and ANDERSON, Circuit Judges, and ROYAL,\* District Judge.

ANDERSON, Circuit Judge:

The Massachusetts Department of Revenue ("DOR") appeals the district court's

[947 F.3d 773]

conclusion that John Shek's Massachusetts income tax return debt is dischargeable in bankruptcy. Because, under the circumstances of this case, we conclude that the Bankruptcy Code permits discharge of Shek's late-filed tax return debt, we affirm.

I.

John Shek filed his 2008 state income tax return in November 2009, seven months late. He owed the government of Massachusetts \$11,489, which remained unpaid.

Six years later, Shek filed for Chapter 7 bankruptcy in Florida. He received an order of discharge in January 2016, wiping his slate clean of previously held debts. DOR then resumed its collection activities on Shek's outstanding tax debt. Shek filed a motion to reopen his bankruptcy case to determine whether the order of discharge encompassed his tax liability to Massachusetts. The parties cross-moved for summary judgment, and the bankruptcy court held that his late-filed tax return was dischargeable in bankruptcy.

The parties filed a joint motion agreeing to a stipulated final order and judgment to facilitate DOR's appeal of the central issue in the dispute—whether Shek's late-filed tax return debt was dischargeable under the Bankruptcy Code. DOR appealed to the district court, which agreed with the bankruptcy court. This appeal followed.

II.

The Bankruptcy Code provides for discharge of most of an individual debtor's debts. This discharge voids judgments determining a debtor's personal liability with respect to discharged debts and enjoins commencement or continuation of actions to collect those debts. 11 U.S.C. § 524. The Code tends to favor discharges, in accordance with Congress' purpose in enacting the Code: "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) (internal citations and quotations omitted).

But Congress exempts certain debts from discharge. These non-dischargeable debts are set forth in 11 U.S.C. § 523. Section 523(a) specifically carves out certain kinds of tax debts from the Code's dischargeability rule, stating:

- (a) A discharge under section 727 ... of this title does not discharge an individual debtor from any debt—
- (1) for a tax or a customs duty- ...



#### 2022 ALEXANDER L. PASKAY MEMORIAL BANKRUPTCY SEMINAR

Mass. Dep't of Revenue v. Shek (In re Shek), 947 F.3d 770 (11th Cir. 2020)

(B) with respect to which a return, or equivalent report or notice, if required—

(i) was not filed or given; or

(ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition.<sup>3</sup>

#### [947 F.3d 774]

In essence, the statute provides that a tax debt is not dischargeable if a return (1) was not filed at all, or (2) was filed after the date on which the return was due, and that filing was within two years before the debtor's bankruptcy was filed.<sup>4</sup>

Before 2005, neither the Bankruptcy Code nor the Internal Revenue Code defined "return." Courts adopted a test developed in the Tax Court known as the Beard test (first fleshed out in Beard v. Comm'r of Internal Revenue, 82 T.C. 766 (1984), aff'd, 793 F.2d 139 (6th Cir. 1986)) to determine whether a document analogous to a Form 1040 constitutes a "return" for purposes dischargeability under the Code.5 The Beard test established four requirements a putative return must satisfy to constitute a "return": (1) it must purport to be a return; (2) it must be executed under penalty of perjury; (3) it must contain sufficient data to allow calculation of tax; and (4) it must represent an honest and reasonable attempt to satisfy the requirements of the tax law. See In re Justice, 817 F.3d 738, 741 (11th Cir. 2016).

In 2005, Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), which for the first time added a definition of "return" to the Code. The definition states:

For purposes of this subsection, the term "return" means a return that

requirements satisfies the of nonbankruptcy applicable law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or similar State or local law.

#### 11 U.S.C. 523(a) (\*).6

Note that this definition refers in part to §§ 6020(a) and (b) of the Internal Revenue Code. These sections govern "substitutes for returns." When the IRS discovers that a tax return is missing, it can draft a return itself with the taxpayer's cooperation under 26 U.S.C. § 6020(a). This procedure is almost never used and results in a "minute" number of returns, according to the IRS. See Justice, 817 F.3d at 743 n.5; In re Fahey, 779 F.3d 1, 6 (1st Cir. 2015). The IRS can also file a substitute for return without the taxpayer's cooperation under 26 U.S.C. § 6020(b). The hanging paragraph thus makes clear that § 6020(a) returns constitute "returns" for purposes of dischargeability, while § 6020(b) returns do not, resolving a pre-2005 dispute between bankruptcy courts as to the proper categorization of §§ 6020(a) and (b) returns. Shek did not file his return under

[947 F.3d 775]

§ 6020, but the inclusion of § 6020 returns in the hanging paragraph will affect our interpretation of the provision, as indicated below.

The dispute in this case concerns the first sentence of the hanging paragraph's definition of "return", which provides that a "return" for purposes of § 523 means "a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements)."



Mass. Dep't of Revenue v. Shek (In re Shek), 947 F.3d 770 (11th Cir. 2020)

DOR raises two arguments in an attempt to demonstrate that Shek's putative return, which was filed seven months late, does not qualify as a "return" under § 523(a) (\*). First, DOR argues that the return did not satisfy "applicable filing requirements" because it did not comply with Massachusetts' April 15th tax return deadline. Second, and relatedly, DOR argues that the "applicable nonbankruptcy law" here is Massachusetts law, and that Massachusetts defines a "return" by reference to its timeliness. We address each argument in turn.

III.

DOR's first argument is that the phrase "applicable filing requirements" includes the relevant temporal deadline for filing a tax return. If a taxpayer does not timely file his or her return, so the argument goes, it has not complied with all "applicable filing requirements." Therefore, DOR argues, an untimely return is not a "return" for purposes of § 523. This court has termed this approach the "one-day-late rule" because it would prohibit "discharge of a tax debt with respect to which a return was filed even one day late." Justice, 817 F.3d at 743.8

DOR's syllogism-a return must comply with "applicable filing requirements," and a filing deadline is an "applicable filing requirement," so a return that does not meet its deadline has not complied with "applicable filing requirements" has some force to it. All three of our sister circuits to have considered this question have held that the plain language of the hanging paragraph requires DOR's interpretation. See Fahey, 779 F.3d at 4 ("So the question is whether timely filing is a 'filing requirement' under Massachusetts law. The answer is plainly yes."); Mallo, 774 F.3d at 1327 ("[T]he plain and unambiguous language of § 523(a) excludes from the definition of 'return' all late-filed tax forms, except for those prepared with the assistance of the IRS under § 6020(a)."); In re McCoy, 666 F.3d 924, 932 (5th Cir. 2012) ("Unless it is filed under a 'safe harbor' provision similar to § 6020(a), a state income tax return that is filed late under the applicable

nonbankruptcy state law is not a 'return' for bankruptcy discharge purposes under § 523(a).").

A.

We do not, however, agree that the phrase "applicable filing requirements" <u>unambiguously</u> includes filing deadlines. Of course, it is plausible that it means filing requirements that are relevant to the taxpayer filing the return at issue. Such an interpretation would encompass requirements relating to the content of the return, the location it must be filed, and the time by which it must be filed. This is the interpretation implicitly adopted by our sister circuits. And it may well be the best reading of the language "applicable filing

[947 F.3d 776]

requirements" when considered in isolation.

But it is not obvious that this is the interpretation Congress intended in drafting the hanging paragraph. Notably, this understanding of the word "applicable" would add little to the phrase "applicable filing requirements" that the phrase "filing requirements," standing alone, would not already encompass. We must strive, if possible, to give meaning to every word of the Code. See, e.g., United States v. Menasche, 348 U.S. 528, 538-39, 75 S. Ct. 513, 99 L.Ed. 615 (1955). This means we must look for an interpretation of "applicable" that distinguishes the set of "applicable filing requirements" from the set of all "filing requirements." Any interpretation that does not account for this word risks rendering it superfluous.9

The amicus proffers an interpretation of "applicable" that <u>would</u> distinguish between "applicable filing requirements" and other filing requirements. He notes that the Supreme Court, in interpreting a different section of the Code, has described "applicable" as meaning something different from "all"; it requires an analysis of context and typically means "appropriate, relevant, suitable or fit." <u>Ransom v. FIA Card Servs., N.A.</u>, 562 U.S. 61, 69-70, 131 S.Ct. 716, 178 L.Ed.2d 603 (2011) (citing Webster's Third New



International Dictionary 105 (2002); New Oxford American Dictionary 74 (2d ed. 2005); 1 Oxford English Dictionary 575 (2d ed. 1989)). The amicus argues that the "appropriate, relevant, suitable or fit" filing requirements are those concerning what constitutes a return. For example, "applicable" filing requirements could refer to considerations like a return's form and contents-aspects of the putative return that have a material bearing on whether or not it can reasonably be described as a "return"—but not to more tangential considerations, like whether it was properly stapled in the upper-left corner, or whether it was filed by the required date. This approach makes common sense; in a definition of what constitutes a "return," it makes sense that the term "applicable" would relate to matters that are relevant to the determination of whether the document at issue can reasonably be deemed a "return."

We are, therefore, presented with two plausible constructions of the phrase "applicable filing requirements" when considered without context: (1) those filing requirements that apply to a given taxpayer, or (2) those filing requirements that are "relevant" or "appropriate" to the task of defining a "return"-that is, those that deal with what a return is. Cf. Fahey, 779 F.3d at 5 (agreeing that "applicable filing requirements" "may acquire vagueness at the outer boundaries of its possible application" before concluding that there is no "room for reasonable argument" that a filing deadline "is somehow not a 'filing requirement'"). Statutory context, however, makes clear that only the latter interpretation accords with § 523 as a whole.10

В.

Statutory provisions are not written in isolation and do not operate in

[947 F.3d 777]

isolation, so we cannot read them in isolation. The plain meaning of a statutory provision derives not only from the "particular statutory language at issue," but also "the language and

design of the statute as a whole." K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988). As one prominent treatise on statutory interpretation puts it, "[c]ontext is a primary determinant of meaning," and "[t]he entirety of the document thus provides the context for each of its parts." Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts ("Reading Law") 167 (2012). We must interpret statutes "harmoniously," reconciling separate sections so that they are compatible and not contradictory. Reading Law at 180.

Most importantly for present purposes, we must attempt to give effect to every word or provision in § 523. See Hibbs v. Winn, 542 U.S. 88, 101, 124 S. Ct. 2276, 159 L.Ed.2d 172 (2004) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."); Reading Law at 174. "Because legal drafters should not include words that have no effect, courts avoid a reading that renders some words altogether redundant." Reading Law at 176.11 This surplusage canon obliges us, whenever possible, to disfavor an interpretation when that interpretation would render a "clause, sentence, or word ... superfluous, void, or insignificant." TRW Inc. v. Andrews, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (quoting Duncan v. Walker, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) ).

The most telling evidence that DOR's reading of the hanging paragraph is incorrect is its proposed interpretation's effect on § 523(a)(1)(B)(ii), which would violate the principles described above. When Congress in 2005 added the hanging paragraph, it left § 523(a)(1)(B)(ii) unchanged, and left unchanged its clear provision that a latefiled return can qualify for discharge if the return is filed more than two years before the bankruptcy. Section 523(a)(1)(B)(ii) excludes from dischargeability a tax debt for which a return "was filed or given after the date on which such return ... was last due, ... and after two years before the date of the filing of the [bankruptcy] petition." In other words, a tax debt stemming from a late return cannot be discharged if the



debtor's bankruptcy occurred within two years of the date he filed the return. By negative implication, such a debt <u>can</u> be discharged if there is a delay of at least two years between the filing of the return and the filing of the petition for bankruptcy.

The one-day-late approach would render § 523(a)(1)(B)(ii) a near nullity. Recall that DOR's interpretation of "applicable filing requirements" would deem all late-filed returns not actual returns for purposes of § 523. But § 523(a)(1)(B)(ii) explicitly permits the discharge of at least some late-filed returns. There is a clear conflict between DOR's interpretation of the hanging paragraph and § 523(a)(1)(B)(ii). An untimely (putative) return would apparently constitute a "return" under 523(a)(1)(B)(ii). What, then, is the purpose of the dischargeability exclusion in § 523(a)(1)(B)(ii)?

DOR and the one-day-late approach reply that there still remains a role for § 523(a)(1)(B)(ii) — albeit a small one. I.R.C. § 6020(a) returns (which are late-filed

[947 F.3d 778]

returns jointly prepared by the IRS and the delinquent taxpayer) are explicitly defined as § 523 "returns" in the hanging paragraph. So are returns governed by "similar State or local law" (that is, returns jointly prepared by a state tax agency and the taxpayer under a scheme similar to that of § 6020(a) ), or returns prepared pursuant to a "written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal." These categories of "returns," DOR argues, would be dischargeable under § 523, unless barred from discharge by § 523(a)(1)(B)(ii) if a taxpayer's bankruptcy petition was filed within two years of the date these "returns" were filed. Thus, according to DOR's argument, § 523(a)(1)(B)(ii) is not surplusage because it still bars discharge of some returns. Our sister circuits have found this argument persuasive. See Fahey, 779 F.3d at 6; Mallo, 774 F.3d at 1323-24.12

We do not agree. While the IRS has not appeared in this case, it filed its views on this matter in Justice, 817 F.3d at 743 n.5, and in Fahey, 779 F.3d at 6, where it noted that only a "tiny minority" or a "minute" number of returns were ever filed under § 6020(a). Given the atypical nature of a § 6020(a) return, this makes sense. But again, the Supreme Court has instructed us that the surplusage canon does not only apply when a potential interpretation would leave a statutory provision with no role; it also applies when an interpretation would render a "clause, sentence, or word ... superfluous, void, or insignificant." TRW, 534 U.S. at 31, 122 S. Ct. at 449 (internal quotations and citations omitted; emphasis added).

DOR's proposed interpretation would render the dischargeability limitation in § 523(a)(1)(B)(ii) insignificant. Section 523(a)(1)(B)(ii) would only limit discharge of returns filed under § 6020(a) or a related state or local provision.<sup>13</sup> And it would only bar discharge of such returns of taxpayers with respect to whom bankruptcy was filed within two years of the filing of the late return. Section 523(a)(1)(B)(ii) would therefore operate only on a subset of an already "minute" set of tax returns. In all other circumstances, it would be completely irrelevant, despite its facially broad language. Relegating § 523(a)(1)(B)(ii) to insignificance would run counter to the Supreme Court's consistent refusal to construe statutes "in a manner that renders [them] entirely superfluous in all but the most unusual circumstances." Roberts v. Sea-Land Servs., Inc., 566 U.S. 93, 103, 132 S. Ct. 1350, 1358, 182 L.Ed.2d 341 (2012).14

[947 F.3d 779]

We think it is deeply implausible that Congress intended § 523(a)(1)(B)(ii) to apply only in such a handful of cases despite no such limitation appearing in that provision itself. It would be a bizarre statute that set forth a broad exclusion for discharge of tax return debts, but limited the application of that exclusion via an opaque and narrow definition of the word "return." It would be even stranger to enact the broad exclusion in § 523(a)(1)(B)(ii), only to later <u>amend</u> the statute,



#### 2022 ALEXANDER L. PASKAY MEMORIAL BANKRUPTCY SEMINAR

Mass. Dep't of Revenue v. Shek (In re Shek), 947 F.3d 770 (11th Cir. 2020)

not by changing the text of § 523(a)(1)(B)(ii) itself, but with a different definitional provision that would cabin § 523(a)(1)(B)(ii) into applying only to the "minute" number of § 6020(a) returns. If Congress had intended this result, it could have achieved it in a much less abstruse manner simply by stating in § 523(a)(1)(B)(ii) itself that that section applied only to § 6020(a) returns.<sup>15</sup>

Our understanding of how Congress drafts statutes also accords with the Supreme Court's instructions that we attempt, where possible, to interpret the Bankruptcy Code post-BAPCPA harmoniously with pre-BAPCPA practice. See Hamilton v. Lanning, 560 U.S. 505, 517, 130 S.Ct. 2464, 2473, 177 L.Ed.2d 23 (2010) ("Pre-BAPCPA bankruptcy practice is telling because we will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure."). We do not think it is likely that Congress would significantly curtail the set of dischargeable returns so starkly without a clearer indication that it was indeed intending to do so.

Lastly, we note that our interpretation of the hanging paragraph is in harmony with the principle that "exceptions to discharge should be confined to those plainly expressed." <u>Kawaauhau v. Geiger</u>, 523 U.S. 57, 58, 118 S.Ct. 974, 977, 140 L.Ed.2d 90 (1998). In addition, we have noted in the past that we should, where possible, construe exceptions to discharge "in favor of the debtor, and recognize that the reasons for denying a discharge must be real and substantial, not merely technical and conjectural." <u>In re Miller</u>, 39 F.3d 301, 304 (11th Cir. 1994) (internal citations and quotations omitted).

IV.

DOR raises a second argument: that, as applied to Shek's return, the phrase "applicable nonbankruptcy law" refers to Massachusetts tax law, and that Massachusetts tax law defines "return" in part by reference to whether a putative return is timely filed. The argument proceeds as follows: (1) the applicable nonbankruptcy law is Massachusetts' definition of a "return"; (2)

Massachusetts regulation 830 C.M.R. 62C.26.1(2) defines "return" as "a taxpayer's signed declaration of the tax due, if any, properly completed by the taxpayer or the taxpayer's representative on a form prescribed by the Commissioner and duly filed with the Commissioner"; (3) the phrase "duly filed" encompasses a temporal requirement, so that a document is not "duly filed" unless it is filed on time: (4) therefore, the "applicable nonbankruptcy law" defines a "return" as, in part, a timely filing.

[947 F.3d 780]

This argument fails at step 3.16 The parties dispute whether "duly filed" does actually incorporate a timeliness requirement. DOR argues that "duly filed" means "filed" "in a due manner, time, or degree," citing Webster's Third (1961 ed.) (emphasis added), while the amicus points to Black's Law Dictionary, which instead defines "duly" as "[i]n a proper manner; in accordance with legal requirements," and argues that the traditional legal adverb for "time sensitivity" would instead be "timely."

This seems to be a close question, and the phrase "duly filed," standing alone, would likely be at least ambiguous. But the remainder of Massachusetts law undermines DOR's position, making clear that Massachusetts still treats latefiled returns as, definitionally speaking, "returns." For example, Massachusetts has a section in its tax code concerning late-filed returns (Ch. 62C, § 33) and a section concerning a taxpayer's complete failure to file a return (Ch. 62C, § 34). If Massachusetts did in fact define a return as, in part, a timely filing, it would only need the latter section, as anyone who filed a return out of time would not, definitionally speaking, have filed a return at all. In the same vein, the section of the code concerning late-filed returns speaks of compounding penalties on a late filer "until the return is filed." See Mass. Gen. Laws Ch. 62C, § 33(a). If Massachusetts defined returns by virtue of timeliness, this section would need to instead state "until the putative return is filed." And, for a third example, Massachusetts regulations require



#### Mass. Dep't of Revenue v. Shek (In re Shek), 947 F.3d 770 (11th Cir. 2020)

the Commissioner to send a written notification to a person who has not filed his return "requesting that the taxpayer file a proper return." 830 C.M.R. 62C.26.1(13)(c)(1). If a filing could only be a "return" if it met the statutory deadline, the dilatory taxpayer could <u>never</u> file a "proper return."

DOR responds that the hanging paragraph's definition of "return" only applies "for purposes of this subsection," 11 U.S.C. § 523(a) (\*), and we must therefore construe the definition of "return" "for purposes of evaluating dischargeability, not for purposes of tax law." This argument makes no sense. The DOR argument is that our statutory term "applicable nonbankruptcy law" incorporates the definition of a tax return under Massachusetts tax law. DOR cannot, in the same breath, disavow what Massachusetts tax law actually provides.

We reject DOR's argument that a late-filed return cannot be a "return" under Massachusetts tax law; we conclude that, considering the "duly filed" provision in the <u>context</u> of the whole of the relevant Massachusetts statutes, Massachusetts does not limit its definition of the term "return" only to <u>timely</u> filed returns.

Therefore, we also reject this second argument of DOR.

V.

Having determined that neither the hanging paragraph nor Massachusetts law defines a "return" by reference to a filing's timeliness, we are left to determine—with respect to Shek's Massachusetts income tax return at issue here—whether to apply the <u>Beard</u> test's definition of a "return" or the Massachusetts definition. But because the outcome is the

[947 F.3d 781]

same either way, we need not decide that issue.17

If we were to apply Massachusetts' definition of a "return"—which we concluded above does not

incorporate a timeliness requirement—we would find no basis for holding that Shek's return is not a "return." Massachusetts regulation 830 C.M.R. 62C.26.1(2) defines "return" as "a taxpayer's signed declaration of the tax due, if any, properly completed by the taxpayer or the taxpayer's representative on a form prescribed by the Commissioner and duly filed with the Commissioner." There is nothing in the record indicating that any of these requirements has not been met.

And if we were to apply the <u>Beard</u> test's definition of a return, we would also conclude that Shek's return is a "return." This is because, pursuant to a stipulation of the parties in the bankruptcy court, DOR conceded that Shek satisfied all four prongs of the <u>Beard</u> test, and that Shek's tax return debt would be discharged.

So under either test, Shek's return is a return for purposes of § 523. We hold that the bankruptcy court's discharge included Shek's tax return debt.

VI.

We conclude that § 523 does not incorporate a mandatory precondition that a tax return must be timely filed to be dischargeable. And we conclude that under Massachusetts tax law, a late-filed tax return does not automatically cease having the status of a "return" merely because it was filed late. Whether or not § 523 incorporates the Beard test or Massachusetts state law, the bankruptcy court's discharge order included Shek's tax debt. The order of the district court is therefore

AFFIRMED.

-----

#### Notes:

- \* Honorable C. Ashley Royal, United States District Judge for the Middle District of Georgia, sitting by designation.
- <sup>1</sup> The relevant facts are not in dispute. We review the district and bankruptcy court's conclusions of



#### 2022 ALEXANDER L. PASKAY MEMORIAL BANKRUPTCY SEMINAR

Mass. Dep't of Revenue v. Shek (In re Shek), 947 F.3d 770 (11th Cir. 2020)

law <u>de novo</u>. <u>In re Hood</u>, 727 F.3d 1360, 1363 (11th Cir. 2013).

- <sup>2</sup> The Court notes the contributions the amicus curiae, Professor John Pottow of the University of Michigan Law School. His briefing and oral argument were very helpful in untangling this corner of bankruptcy law.
- <sup>3</sup> Although not relevant here, § 523 also excludes from dischargeability debtors who file fraudulent returns. § 523(a)(1)(C). In addition, to discharge a tax debt, the tax return must have been due at least three years before the bankruptcy petition was filed. § 523(a)(7)(B).
- 4 Shek filed his bankruptcy petition more than five years after he filed his late return, so § 523(a)(1)(B)(ii) would not prevent discharge.
- 5 The <u>Beard</u> test builds upon Supreme Court precedent stating that, for some purposes, a document purporting to be a return need not strictly comply with the Internal Revenue Code's requirements, so long as it works, in essence, as a "constructive return." <u>See Zellerbach Paper Co. v. Helvering</u>, 293 U.S. 172, 180, 55 S.Ct. 127, 79 L.Ed. 264 (1934) ("Perfect accuracy or completeness is not necessary [if a filing] purports to be a return, is sworn to as such, and evinces an honest and genuine endeavor to satisfy the law.").
- <sup>6</sup> This definition of "return" appears at the end of subsection (a) of § 523. Because it has no numbered or lettered subsection designation of its own, courts often cite to it as § 523(a) (\*) and refer to it as the "hanging paragraph" or "flush language." See, e.g., Justice, 817 F.3d at 742 n.4; In re Mallo, 774 F.3d 1313, 1318 (10th Cir. 2014).
- <sup>2</sup> Compare In re Ridgway, 322 B.R. 19, 37 (Bankr. D. Conn. 2005) (holding that a § 6020(b) return is a "return" under § 523), with In re Lowrie, 162 B.R. 864, 866 (Bankr. D. Nev. 1994) (holding that a § 6020(b) return is not a "return" under § 523).
- § In <u>Justice</u>, we expressly did not <u>decide</u> whether the "one-day-late rule" was a correct or an incorrect interpretation of the statute. <u>Id.</u>

- <sup>2</sup> For example, the Tenth Circuit in <u>Mallo</u> provided a dictionary definition of "applicable" ("[c]apable of being applied; relevant or appropriate"), but went on to define the phrase "applicable filing requirement" as "something that must be done with respect to filing a tax return." 774 F.3d at 1321. It is not clear that this definition of "applicable filing requirement" adequately grapples with the meaning of the word "applicable."
- <sup>10</sup> Actually, we believe that this second plausible interpretation of the term "applicable" includes a subset of the first—i.e. those filing requirements that apply to a given taxpayer that are "relevant" or "appropriate" to the task of defining a return.
- <sup>11</sup> <u>See also id.</u> ("If a provision is susceptible of (1) a meaning that gives it an effect already achieved by another provision, or that deprives another provision of all independent effect, and (2) another meaning that leaves both provisions with some independent operation, the latter should be preferred.").
- <sup>12</sup> McCoy did not address the conflict between the hanging paragraph and § 523(a)(1)(B)(ii) at all. See n.14 infra.
- <sup>13</sup> It is not apparent how many states (or local governments) have mechanisms equivalent to § 6020(a). Massachusetts does not. See Perkins v. Mass. Dep't of Revenue, 507 B.R. 45, 53 n.6 (D. Mass. 2014).
- <sup>14</sup> We do not find <u>Fahey</u>, <u>Mallo</u>, or <u>McCoy</u> persuasive. In <u>Fahey</u>, the First Circuit discounted the force of the surplusage canon because there remained at least <u>some</u> role for § 523(a)(1)(B)(ii). <u>See</u> 779 F.3d at 6 ("While section 6020(a) may only apply in a small minority of cases, the fact that a late filed section 6020(a) return can still qualify as a 'return' for section 523(a) purposes means that the two-year provision still has <u>a role</u> to play if the hanging paragraph's plain meaning controls." (emphasis added)). <u>Accord Mallo</u>, 774 F.3d at 1324. Neither case addresses the fact that the Supreme Court in <u>TRW</u> and <u>Roberts</u> has held that the surplusage canon operates not only when a potential interpretation would leave a statutory



Mass. Dep't of Revenue v. Shek (In re Shek), 947 F.3d 770 (11th Cir. 2020)

provision with <u>no</u> role, but also when it would render the provision <u>insignificant</u>, or operative in only the <u>most unusual cases</u>. Similarly, the Fifth Circuit's decision in <u>McCoy</u> is not persuasive; it does not even recognize the conflict between its interpretation of § 523(a) (\*) and the clear provision in § 523(a)(1)(B)(ii) that at least some late-filed returns can qualify for discharge.

- <sup>15</sup> See also TRW, 534 U.S. at 31, 122 S. Ct. at 449 (rejecting a proposed interpretation because under that reading "a rule nowhere contained in the text of § 1681p would do the bulk of that provision's work, while a proviso accounting for more than half of that text would lie dormant in all but the most unlikely situations").
- <sup>16</sup> As noted in Part V n.17 <u>infra</u>, we need not in this opinion define the full scope or boundaries of "applicable nonbankruptcy law."
- <sup>17</sup> In <u>Justice</u>, we noted that both parties to that case, and all courts to have considered the issue, agreed that the phrase "applicable nonbankruptcy law" incorporated the Beard test. 817 F.3d at 743. But see Fahey, 779 F.3d at 10, and Mallo, 774 F.3d at 1325 (both suggesting that specific filing requirements would trump at least any conflicting application of the Beard test). In any event, Justice involved a federal income tax return, and therefore did not address the application of state law in a case involving a state income tax return, as here. As noted in this section, we need not in case decide whether "applicable nonbankruptcy law," as applied in this case, means only relevant Massachusetts law, or only the Beard test, or some combination thereof.
- <sup>18</sup> However, the timing of the filing of the return is relevant under the <u>Beard</u> test. <u>See Justice</u>, 817 F.3d at 744.

-----



McCoy v. Mississippi State Tax Comm'n, 666 F.3d 924 (5th Cir. 2012)

#### 666 F.3d 924

In the Matter of Linda Trenett McCOY, also known as Linda Trenett Hays, Debtor.Linda Trenett McCoy, Appellant,

v.

Mississippi State Tax Commission, State of Mississippi, Appellee.

No. 11-60146.

**United States Court of Appeals, Fifth Circuit.** 

Jan. 4, 2012.

[666 F.3d 924]

Richard Ray Grindstaff, Byram, MS, for Appellant.

Heather S. Deaton, Abigail Marshall Marbury, Mississippi Dept. of Revenue, Legal Div., Jackson, MS, for Appellee.

[666 F.3d 925]

Appeal from the United States District Court for the Southern District of Mississippi.

Before KING, JOLLY, and WIENER, Circuit Judges.

#### **KING, Circuit Judge:**

Linda Trenett McCoy filed for bankruptcy on September 25, 2007, and was granted a discharge by the bankruptcy court pursuant to 11 U.S.C. § 727. McCoy then filed an adversary proceeding in the bankruptcy court against the Mississippi State Tax Commission on December 3, 2008, seeking a declaration that two years of her pre-petition state income tax debts were subject to that discharge. On motion by the Commission, the bankruptcy court dismissed McCoy's complaint. The bankruptcy court reasoned that because McCoy had failed to timely file her Mississippi income tax returns, her tax filings were not "returns" for the purposes of discharge under the Bankruptcy Code, which requires the filing of a "return" for the discharge of income tax debts. The district court affirmed the judgment of the bankruptcy court. McCoy timely appealed. We AFFIRM.

#### I. FACTUAL AND PROCEDURAL BACKGROUND

On September 25, 2007, Linda Trenett McCoy ("McCoy") filed a voluntary Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Southern District of Mississippi. McCoy's discharge was



McCoy v. Mississippi State Tax Comm'n, 666 F.3d 924 (5th Cir. 2012)

granted by the bankruptcy court, pursuant to 11 U.S.C. § 727, on January 23, 2008. On December 3, 2008, McCoy returned to the bankruptcy court to commence a post-discharge adversary proceeding against the Mississippi State Tax Commission ("MSTC"), ¹ seeking a declaration that her debt to the State of Mississippi ("Mississippi"), resulting from pre-petition income tax obligations for the 1998 and 1999 tax years, had been discharged in bankruptcy.²

MSTC moved to dismiss McCoy's complaint, arguing that because the state income returns filed by McCoy for the 1998 and 1999 tax years were filed late, they did not qualify as "returns" under the definition provided in 11 U.S.C. § 523(a)(\*),³ a provision added to the Bankruptcy Code as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), 119 Stat. 23, Pub.L. 109–8 (Apr. 20, 2005).⁴ MSTC further argued that because the late-filed returns did not qualify as "returns" for discharge purposes, McCoy's income tax debts to Mississippi cannot be discharged in bankruptcy. See 11 U.S.C. § 523(a)(1)(B)(i) ("A discharge under section 727 ... of this title does not discharge an individual debtor from any debt ... for a tax ... with respect to which a return, or equivalent

[666 F.3d 926]

report or notice, if required ... was not filed or given...."). McCoy countered by arguing MSTC's reading of the statute was incorrect and that the definition of "return" in § 523(a) should be governed by the test outlined in the pre-BAPCPA case of *United States v. Hindenlang (In re Hindenlang)*, 164 F.3d 1029, 1033 (6th Cir.1999), *cert. denied*, 528 U.S. 810, 120 S.Ct. 41, 145 L.Ed.2d 37 (1999).

The bankruptcy court agreed with MSTC's interpretation of § 523(a)(\*), concluding that because McCoy's filings did not comport with Mississippi's timeliness requirements, they were not "returns" for discharge purposes. Accordingly, the bankruptcy court held that McCoy had failed to properly state a cause of action and dismissed her claim on August 31, 2009. McCoy appealed the bankruptcy court's decision to the district court, which rejected McCoy's appeal and affirmed the bankruptcy court's decision. McCoy now appeals the dismissal of her case, arguing that we should adopt the *Hindenlang* test for determining whether filings constitute returns for discharge purposes, that the documents she filed constitute returns under this test, and that her tax debts to Mississippi should be declared discharged.

#### II. DISCUSSION

#### A. Standard of Review



McCoy v. Mississippi State Tax Comm'n, 666 F.3d 924 (5th Cir. 2012)

"We review a district court's affirmance of a bankruptcy court decision by applying the same standard of review to the bankruptcy court decision that the district court applied." *Barner v. Saxon Mortg. Servs., Inc. (In re Barner)*, 597 F.3d 651, 653 (5th Cir.2010) (internal quotation marks and citation omitted). We review factual findings for clear error and conclusions of law de novo. *Id.* 

The pleading standards for a Rule 12(b)(6) motion to dismiss are derived from Rule 8 of the Federal Rules of Civil Procedure, which provides, in relevant part, that a pleading stating a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2).5 "The ultimate question in a Rule 12(b)(6) motion is whether the complaint states a valid claim when all well-pleaded facts are assumed true and are viewed in the light most favorable to the plaintiff." Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC, 594 F.3d 383, 387 (5th Cir.2010) (citing In re Katrina Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir.2007)). The complaint must state "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Our task, then, is to determine whether the plaintiff has stated a legally cognizable claim that is plausible, not to evaluate the plaintiff's likelihood of success. Lone Star Fund, 594 F.3d at 387 (citing Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009)). In other words, we look to see whether McCoy's pleadings, including her legal arguments, plausibly state a claim that her tax debt should be discharged pursuant to § 523(a).

#### B. Section 523(a) of the Bankruptcy Code

Section 727 of the Bankruptcy Code permits the discharge of debts in Chapter 7 bankruptcies, but contains several exceptions, including those outlined in § 523. *See* 11 U.S.C. § 727(b) ("Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for

[666 F.3d 927]

relief under this chapter ..."). In relevant part, § 523 provides that:

- (a) A discharge under section 727 ... of this title does not discharge an individual debtor from any debt—
  - (1) for a tax or a customs duty-



McCoy v. Mississippi State Tax Comm'n, 666 F.3d 924 (5th Cir. 2012)

- (A) of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;
- (B) with respect to which a return, or equivalent report or notice, if required—
  - (i) was not filed or given ....

11 U.S.C. § 523(a)(1)(B)(i) (emphasis added).

Until the passage of BAPCPA, the term "return" was not defined for § 523(a) purposes and so courts relied on a four-part test outlined in Hindenlang, 164 F.3d at 1033.6 This test, based on the holdings of the Supreme Court cases of Zellerbach Paper Co. v. Helvering, 293 U.S. 172, 55 S.Ct. 127, 79 L.Ed. 264 (1934), and Germantown Trust Co. v. Commissioner, 309 U.S. 304, 60 S.Ct. 566, 84 L.Ed. 770 (1940), was adopted by other courts of appeals. See In re Payne, 431 F.3d 1055, 1057 (7th Cir.2005); Moroney v. United States (In re Moroney), 352 F.3d 902, 905 (4th Cir.2003); United States v. Hatton (In re Hatton), 220 F.3d 1057, 1060-61 (9th Cir.2000). These cases held that a late-filed tax return that required the government to assess the tax without the tax payer's assistance would not be treated as a "return" for § 523 purposes. Payne, 431 F.3d at 1058; Moroney, 352 F.3d at 906; Hatton, 220 F.3d at 1061; Hindenlang, 164 F.3d at 1035. These cases, however, dealt with federal income taxes, and the court in *Hindenlang* specifically explained that its holding "d[id] not address the issue of the definition of return for purposes of § 523(a)(1)(B) when a taxpayer seeks to discharge state, municipal, or other tax liability." Hindenlang, 164 F.3d at 1033 n. 4.

In 2005, Congress passed BAPCPA to address several problems with the Bankruptcy Code. *See* H.R. Rep. No. 109–31 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 90–92 (explaining that BAPCPA was motivated by four factors: the "recent escalation of consumer bankruptcy filings," the "significant losses ... associated with bankruptcy filings," the fact that the "bankruptcy system has loopholes and incentives that allow and—sometimes—even encourage opportunistic personal filings and abuse," and "the fact that some bankruptcy debtors are able to repay a significant portion of their debts"). As part of its package of amendments, BAPCPA added a new hanging paragraph to § 523(a) which defined the term "return" for discharge purposes:

For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared



#### 2022 ALEXANDER L. PASKAY MEMORIAL BANKRUPTCY SEMINAR

McCoy v. Mississippi State Tax Comm'n, 666 F.3d 924 (5th Cir. 2012)

pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to

[666 F.3d 928]

section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

11 U.S.C. § 523(a)(\*) (emphasis added). In the instant appeal, the Mississippi tax code provides the "applicable nonbankruptcy law (including applicable filing requirements)" for the case at issue. It provides, in relevant part:

Returns of individuals, estates, trusts and partnerships shall be filed on or before the fifteenth day of the fourth month following the close of the fiscal year; or if the return is filed on the basis of a calendar year, it shall be filed on or before April 15th of each year.

Miss.Code Ann. § 27–7–41. Both parties agree that this provision means that McCoy filed her tax returns for the 1998 and 1999 tax years—due on April 15, 1999, and April 15, 2000, respectively—late.

The parties disagree, however, over whether McCoy's failure to comply with Mississippi's filing requirements prevents the filings that she submitted late from being "returns" for bankruptcy discharge purposes. MSTC contends that McCoy's failure to file in the time required under Mississippi's tax law is a failure to satisfy the applicable nonbankruptcy law referenced in § 523(a). This, MSTC argues, means that McCoy's late-filed returns cannot be considered tax returns for bankruptcy discharge purposes under the plain language of the statute.

McCoy disputes this reading of § 523(a)(\*). McCoy first observes that this court has previously held that it is "bound to construe the exceptions contained in § 523 of the Bankruptcy Code narrowly and in favor of the debtor." Boyce v. Greenway (Matter of Greenway), 71 F.3d 1177, 1180 n. 8 (5th Cir.1996) (citing Citizens Bank & Trust Co. v. Case (Matter of Case), 937 F.2d 1014, 1024 (5th Cir.1991)). McCoy then argues that MSTC's reading of § 523(a)(\*) would impermissibly render part of the statute superfluous. See Kawaauhau v. Geiger, 523 U.S. 57, 62, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998) ("[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law."). She observes that a "return" for discharge purposes includes:



McCoy v. Mississippi State Tax Comm'n, 666 F.3d 924 (5th Cir. 2012)

a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

11 U.S.C. § 523(a)(\*). Section 6020(a) returns are those in which a taxpayer who has failed to file his or her returns on time nonetheless discloses all information necessary for the I.R.S. to prepare a substitute return that the taxpayer can then sign and submit. *See* 26 U.S.C. § 6020(a). <sup>7</sup> In contrast, a § 6020(b) return is one in which the taxpayer submits either no information or fraudulent information, and the I.R.S. prepares a substitute return based on the best information it can collect independently. *See* 26 U.S.C. § 6020(b). <sup>8</sup> Because

[666 F.3d 929]

returns submitted under § 6020(b) are, by definition, late and specifically excluded from the definition of returns, McCoy contends that MSTC's interpretation that late filings are not returns under § 523(a)(\*) would render this final portion of § 523(a)(\*) superfluous. To avoid this problem, McCoy urges that we employ the pre-BAPCPA, four-part test delineated in *Hindenlang*, 164 F.3d at 1033, to determine whether her late-filed returns qualify as "returns" for discharge purposes.

We find MSTC's interpretation of  $\S$  523(a)(\*) more convincing. We have previously explained that "the plain language meaning of the [Bankruptcy] Code should rarely be trumped. Although the Code at times is 'awkward, and even ungrammatical ... that does not make it ambiguous.'" *Miller*, 570 F.3d at 638 (quoting *Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004)). The plain language interpretation of  $\S$  523(a)(\*) offered by MSTC comports with this admonition.

MSTC's reading also finds support in the post-BAPCPA holdings of the bankruptcy courts, at least in the context of federal income tax returns. *Cannon v. United States (In re Cannon)*, 451 B.R. 204, 206 (Bankr.N.D.Ga.2011) ("The cases that have addressed the impact of the undesignated paragraph added by BAPCPA to define 'return' [in § 523(a)] have concluded that a late return can never qualify as a return unless it is filed under § 6020(a) safe harbor provision.... The reasoning in those cases is persuasive.") (citations omitted); *Links v. United States (In re Links*), Nos. 08–3178, 07–31728, 2009 WL 2966162, at \*5 (Bankr.N.D.Ohio Aug. 21, 2009) ("The definition of 'return' under § 523(a) ... necessarily encompasses the filing deadlines for submitting returns contained in the Internal Revenue Code so that a late filed return cannot qualify as a return



McCoy v. Mississippi State Tax Comm'n, 666 F.3d 924 (5th Cir. 2012)

for purposes of a dischargeability determination."); Creekmore v. Internal Revenue Serv. (In re Creekmore), 401 B.R. 748, 751 (Bankr.N.D.Miss.2008) ("The definition of 'return' in amended § 523(a) apparently means that a late filed income tax return, unless it was filed pursuant to § 6020(a) of the Internal Revenue Code, can never qualify as a return for dischargeability purposes because it does not comply with the 'applicable filing requirements' set forth in the Internal Revenue Code."); cf. Pansier v. Wisc. Dep't of Revenue, No. 10-C-0550, 2010 WL 4025884, at \*5 (E.D.Wis. Oct. 14, 2010) (observing that § 523(a)(\*) strengthens the Seventh Circuit's pre-BAPCPA position that a late-filed, post-assessment tax return cannot qualify as a return for discharge purposes). In the view of these courts, BAPCPA amended § 523(a) to provide an unambiguous definition of "return," obviating the need to return to the pre-BAPCPA Hindenlang test. While these cases dealt with federal taxes, their reading of the plain language of the statute applies equally well to state taxes. See 11 U.S.C. § 523(a)(\*) ("[T]he term 'return' means a return that satisfies the requirements of applicable [state or federal] nonbankruptcy law (including applicable filing requirements).")

In contrast, the *Hindenlang* test was specifically conceived of and applied in the

[666 F.3d 930]

context of federal taxation alone. As we noted above, the *Hindenlang* court itself "d[id] not address the issue of the definition of return for purposes of § 523(a)(1)(B) when a taxpayer seeks to discharge state, municipal, or other tax liability." *Hindenlang*, 164 F.3d at 1033 n. 4. Moreover, none of the other courts of appeals cases relying on this pre-BAPCPA test applied it in the context of discharging *state* taxes. *See*, *e.g.*, *Payne*, 431 F.3d at 1057; *Hatton*, 220 F.3d at 1060–61. We see no need to extend the reach of this test when a plain language reading of § 523(a)(\*) gives a clear definition of "return" for both state and federal taxes.

We also find no support for McCoy's position in any post-BAPCPA court of appeals decisions. Most of the courts of appeals which have addressed what qualifies as a return for bankruptcy discharge purposes did so prior to BAPCPA and so have not construed the language of § 523(a)(\*). See, e.g., Colsen v. United States (In re Colsen), 446 F.3d 836, 839 (8th Cir.2006) (noting § 523(a)(\*) but not addressing it because the bankruptcy petition was filed before BAPCPA's effective date). The sole exception is *In re Ciotti*, 638 F.3d 276 (4th Cir.2011). In that case, the Fourth Circuit considered whether a state form reporting federal tax adjustments required to be filed under Maryland law was sufficiently similar to a return to qualify as an "equivalent report or notice" under § 523(a)(1)(B). *Id.* at 278. The court



McCoy v. Mississippi State Tax Comm'n, 666 F.3d 924 (5th Cir. 2012)

quoted both the language of § 523(a)(\*), as well as the *Hindenlang* test, in concluding that this form was indeed a return for bankruptcy discharge purposes. *Id.* at 280–81. But in so holding, the *Ciotti* court said little about the meaning of § 523(a)(\*). Moreover, the issue in *Ciotti*—whether the attributes of a particular form make it similar to a return—is different from the issue in the case before us—whether a return that fails to comply with the applicable state filing requirements is a return. Accordingly, *Ciotti* provides little guidance for the case at hand and does not bolster McCoy's argument.

McCoy tries to counter the absence of precedent for her argument by referring to a notice issued by the I.R.S.'s chief counsel taking the position that reading § 523(a) to "create[] the rule that no late-filed return could qualify as a return" would result in a superfluous reading of § 523(a)(\*), since all § 6020(b) returns are "always prepared after the due date." I.R.S. Chief Couns. Notice No. CC-2010-016 at 2 (Sept. 2, 2010). The notice also asserts that such a reading would contradict a "special rule for interpreting the Bankruptcy Code" laid out by the Supreme Court: "'[T]his Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-code practice that is not the subject of at least some discussion in the legislative history.'" *Id.* (quoting *Dewsnup v. Timm*, 502 U.S. 410, 419, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992)). The I.R.S. notice concludes that "[§] 523(a) in its totality does not create the rule that every late-

[666 F.3d 931]

filed return is not a return for dischargeability purposes." *Id.* at 3.

Even leaving aside that the I.R.S. notice is focused on federal and not state taxes, both of the concerns it raises are misplaced in this case. First, the second sentence of § 523(a)(\*) is not superfluous if plainly read as an explanation of what kinds of tax filings qualify as "returns." Section 523(a)(\*) defines a return for discharge purposes as a "return the satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements)." 11 U.S.C. § 523(a)(\*). Since filings under § 6020 of the Internal Revenue Code are not returns that satisfy "applicable filing requirements," this second sentence simply explains that returns filed pursuant to § 6020(a) do qualify as returns for discharge purposes, while those filed pursuant to § 6020(b) do not. In other words, this second sentence in § 523(a)(\*) carves out a narrow exception to the definition of "return" for § 6020(a) returns, while explaining that § 6020(b) returns, in contrast, do not qualify as returns for discharge purposes. Such a reading



McCoy v. Mississippi State Tax Comm'n, 666 F.3d 924 (5th Cir. 2012)

conforms with the plain language of the text and leaves no portion of § 523(a)(\*) superfluous.<sup>10</sup>

Second, there is no indication that such a reading represents a "major change" from pre-BAPCPA policies. As the bankruptcy court in this case explained, "[u]nder § 6020(a) of the [Internal Revenue Code], the Secretary may prepare a 'substitute' return based on information voluntarily provided by the taxpayer. In contrast, § 6020(b) of the [Internal Revenue Code] comes into play when there is little or no cooperation from the taxpayer." McCoy v. Miss. State Tax Comm'n (In re McCoy), No. 07-02998-EE, 2009 WL 2835258, at \*7 (Bankr.S.D.Miss. Aug. 31, 2009) (emphasis added).<sup>11</sup> In passing § 523(a), Congress made clear that "[i]n general, tax claims which are nondischargeable, despite a lack of priority, are those to whose staleness the debtor contributed by some wrong-doing or serious fault...." S. Rep. No. 95-989 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5800. Congress, when later drafting § 523(a)(\*) to differentiate between § 6020(a) and § 6020(b) returns, likely wanted to reward taxpayers who cooperated with the I.R.S. See H.R. Rep. No. 109-31 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 92 (explaining that BAPCPA was passed, in part, to address the problem of the "bankruptcy system ha[ving] loopholes and incentives that allow and-sometimes-even encourage opportunistic personal filings and abuse"). All this is consonant with the pre-BAPCPA test's emphasis " 'that where a fiduciary, in good faith, makes what it deems the appropriate return, which discloses all of the data from which the tax ... can be computed,' a proper return has been filed." Hindenlang, 164 F.3d at 1033 (quoting

[666 F.3d 932]

Germantown Trust Co., 309 U.S. at 309, 60 S.Ct. 566). We see no "major change" from pre-BAPCPA practices by reading § 523(a)(\*) to generally exclude late state tax returns from the definition of return for bankruptcy discharge purposes, while differentiating between § 6020(a) and § 6020(b) returns.

In light of all these considerations, we adopt the reading of § 523(a)(\*) suggested by MSTC and the bankruptcy courts: Unless it is filed under a "safe harbor" provision similar to § 6020(a), a state income tax return that is filed late under the applicable nonbankruptcy state law is not a "return" for bankruptcy discharge purposes under § 523(a). McCoy's 1998 and 1999 returns did not comply with the filing requirements of applicable Mississippi tax law and were, therefore, not "returns" for discharge purposes. Accordingly, McCoy is not entitled to discharge her tax liabilities to Mississippi for the tax years of 1998 and 1999 and has failed to properly state a claim for relief.



McCoy v. Mississippi State Tax Comm'n, 666 F.3d 924 (5th Cir. 2012)

#### III. CONCLUSION

For all of the foregoing reasons, we AFFIRM the Opinion and Order of the district court affirming the judgment of the bankruptcy court.

\_\_\_\_\_

#### Notes:

- LMSTC is currently known as the Mississippi Department of Revenue.
- <sup>2</sup>—McCoy amended her initial complaint three times. In her third and final amended complaint, McCoy sought a declaration that included tax years 1993 through 2000. McCoy and MSTC subsequently entered into an Agreed Order of Dismissal which dismissed the complaint as to the 1993, 1994, 1995, 1996, 1997, and 2000 tax years. Consequently, only McCoy's liabilities for the 1998 and 1999 tax years are at issue in this appeal.
- <sup>3</sup>-We use an asterisk to cite to this unnumbered hanging paragraph, something we have done in other cases. *See, e.g., In re Miller*, 570 F.3d 633, 637 n. 5 (5th Cir.2009).
- 4-MSTC also raised a sovereign immunity defense that was rejected by the bankruptcy court and is not at issue in this appeal.
- 5-Rule 12(b) of the Federal Rules of Civil Procedure is made applicable to bankruptcy cases by Rule 7012 of the Federal Rules of Bankruptcy Procedure.

#### 6. The test is:

In order for a document to qualify as a return [under § 523]: (1) it must purport to be a return; (2) it must be executed under penalty of perjury; (3) it must contain sufficient data to allow calculation of tax; and (4) it must represent an honest and reasonable attempt to satisfy the requirements of the tax law.

*Hindenlang*, 164 F.3d at 1033 (internal quotation marks and citation omitted).

Z-Section 6020(a) of the Internal Revenue Code provides:

If any person shall fail to make a return required by this title or by regulations prescribed thereunder, but shall consent to disclose all information necessary for the preparation thereof, then, and in that case, the



#### 2022 ALEXANDER L. PASKAY MEMORIAL BANKRUPTCY SEMINAR

McCoy v. Mississippi State Tax Comm'n, 666 F.3d 924 (5th Cir. 2012)

Secretary may prepare such return, which, being signed by such person, may be received by the Secretary as the return of such person.

26 U.S.C. § 6020(a).

- 8. Section 6020(b) of the Internal Revenue Code provides:
- (1) **Authority of Secretary to execute return.**—If any person fails to make any return required by any internal revenue law or regulation made thereunder at the time prescribed therefor, or makes, willfully or otherwise, a false or fraudulent return, the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.
- (2) **Status of returns.**—Any return so made and subscribed by the Secretary shall be prima facie good and sufficient for all legal purposes.

26 U.S.C. § 6020(b).

9. The House Report accompanying BAPCPA explains that § 523(a)(\*) was intended

to provide that a return prepared pursuant to section 6020(a) of the Internal Revenue Code, or similar State or local law, constitutes filing a return (and the debt can be discharged), but that a return filed on behalf of a taxpayer pursuant to section 6020(b) of the Internal Revenue Code, or similar State or local law, does not constitute filing a return (and the debt cannot be discharged).

- H.R. Rep. No. 109-31 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 167.
- 10. We also note that McCoy does not claim that her returns were "prepared pursuant to [§ ] 6020(a) ... or similar State or local law...." 11 U.S.C. § 523(a)(\*) (emphasis added). McCoy does not point to any Mississippi tax provision analogous to § 6020(a), under which her filings might qualify as returns. Consequently, she cannot rely on this "safe harbor" provision.
  - 11. As one notable treatise has explained,

[T]he dischargeability of a debtor's tax liability based upon returns prepared by the Internal Revenue Service depends upon the process which resulted in the filing of the return. If the debtor can show that a tax return, report or notice, filed after the IRS filed a substitute return and assessed the tax, served a useful tax purpose, the tax debt should be dischargeable under section 523(a)(1)(B)(i).



McCoy v. Mississippi State Tax Comm'n, 666 F.3d 924 (5th Cir. 2012)

4 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy ¶ 523.07[3][a], at 37 (16th ed.2011).



## **Faculty**

Cynthia E. Lewis, CPA is an attorney with Lewis & Monroe, PLLC in Orlando, Fla., whose practice centers around consumer bankruptcy. She represents both individuals and businesses in chapter 7 liquidations, chapter 13 reorganizations and complex chapter 11s. She also represents creditors and chapter 7 trustees, and She is Board Certified in Consumer Bankruptcy Law. Ms. Lewis previously directed the administration of various Orlando law firms. Most recently, she served nine years as the Orlando Office Administrator for a national law firm. Ms. Lewis is a member of the Florida Bar and the South Carolina bar. She is certified to appear in the U.S. District Court for the Middle District of Florida and the Eleventh Circuit Court of Appeals. Ms. Lewis graduated from the Florida Agricultural & Mechanical University College of Law in Orlando in 2007 and *cum laude* from Florida Southern College.

**Michael C. Markham** is a partner with Johnson Pope Bokor Ruppel & Burns, LLP in Tampa, St. Petersburg and Clearwater, Fla., where his practice focuses on chapter 11 cases. For nearly 35 years, he has represented virtually every type of constituent in chapter 11 cases, including debtors, trustees, committees, purchasers and creditors of all kinds. Mr. Markham was lead counsel to the chapter 11 trustee in the *Brasota Mortgage Co.* chapter 11 case in Tampa, lead counsel to the receiver in the *Transcontinental Airlines/Lou Pearlman* receivership case in Orlando, Fla., and counsel to the chapter 11 trustee in the *PenAir* case in Anchorage, Alaska. Mr. Markham regularly speaks and writes on bankruptcy topics and has been recognized in *The Best Lawyers in America* since 2008. He received both his B.S. *summa cum laude* and his J.D. with honors from Florida State University.

Charles G. Moore is a sole practitioner with Charles G. Moore Attorney at Law in St. Petersburg, Fla., where represents consumer debtors in chapter 7 and 13 bankruptcy cases. He has been practicing law in excess of 31 years and has handled well over 2,700 bankruptcy cases. Mr. Moore is an active member of ABI, the National Association of Consumer Bankruptcy Attorneys, the Tampa Bay Bankruptcy Bar Association and the National Association of Chapter Thirteen Trustees. He served as NACBA's Florida Chair from 2011-18. Previously, Mr. Moore was a criminal prosecuting attorney with the Sixth Judicial Circuit of the State of Florida. He received his B.S. in business administration in 1987 from the University of Florida and his J.D. in 1991 from Stetson University College of Law.

Hon. Grace E. Robson is a U.S. Bankruptcy Judge for the Middle District of Florida in Orlando. She previously was a partner with Markowitz Ringel Trusty & Hartog, P.A. Judge Robson is a Board-Certified bankruptcy attorney with more than 20 years of experience representing corporate debtors, trade and institutional creditors, trustees, receivers and creditors' committees. Prior to taking the bench, she practiced corporate reorganization and bankruptcy, debtor-creditor relations and bankruptcy litigation. Judge Robson has been involved in all facets of reorganization-related representations, including pre-filing consultation, filing complex corporate bankruptcy cases, post-bankruptcy financing, asset purchase agreements as well as "routine" matters. She is an active member of ABA, currently serving as a co-chair of the Secured Creditors Subcommittee of the Business Law Section, Business Bankruptcy Committee (and previously served as a co-chair of the *Pro Bono* Services Subcommittee). Prior to relocating to the Middle District of Florida, she served on the board of directors

of the Bankruptcy Bar Association for the Southern District of Florida and was the Broward Chair of the *Pro Bono* Committee, the Broward Chair of the CARE Program Committee and chair of the Wellness Committee. Judge Robson received her B.A. *cum laude* from the State University of New York at Albany in 1994 and her J.D. from the Benjamin N. Cardozo School of Law in 1997.