

CHAPTER 13: THE DISCHARGE

At the end of the long journey through chapter 13, the debtor will reap the reward of the discharge.³⁹⁶ Pursuant to §1328(a):

[A]s soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title[.]

The discharge itself:

- (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section...1328 of this title, whether or not discharge of such debt is waived;
- (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and
- (3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in §541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under §523...or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case

³⁹⁶ Check local practice requirements. A motion for entry of discharge or other documents may need to be filed. *See, e.g.*, Appendix L.

concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.³⁹⁷

A. Getting It

First thing's first: The debtor will not obtain the discharge unless he/she has completed the financial-management course through a provider approved by the U.S. Trustee or Bankruptcy Administrator (Alabama and North Carolina only).³⁹⁸ A debtor will not receive a discharge without completing that course and filing the certificate of completion with the clerk of court.³⁹⁹ In addition, a debtor will not receive a discharge if the debtor received a discharge:

- (1) in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter, or
- (2) in a case filed under chapter 13 of this title during the 2-year period preceding the date of such order.⁴⁰⁰

Courts have held this language to be plain, and have confined their analysis to the language of the section.⁴⁰¹ That said, the debtor is not entitled to receive a discharge if one was received in a case that was *filed* during the four-year period as set forth in §1328(f)(1) or the two-year period as set forth in §1328(f)(2). The measuring point is the time periods between the *filings* of the petitions, not the receipt of the discharges.

As discussed throughout this manual, there is always the risk that things will not go as planned for the chapter 13 debtor. In those cases where a debtor is unable to fully

397 See §524(a), Appendix K.

398 See §§1328(h) and 111.

399 There are limited exceptions to this requirement: Debtors are exempt if they reside “in a district for which the United States Trustee (or the bankruptcy administrator, if any) determines that the approved instructional courses are not adequate to service the additional individuals who would otherwise be required to complete such instructional course.” §1328(g)(2). That determination is subject to review at least annually. §1328(g)(3).

400 §1328(f).

401 See *In re Bateman*, 515 F.3d 272, 277 (4th Cir. Md. 2008), citing *Lamie v. United States Tr.*, 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004) (“Because we conclude that the statutory language is plain, our analysis begins and ends with that language.”). See also *In re Gagne*, 394 B.R. 219 (1st Cir. B.A.P. 2008). In addition, “[t]he overwhelming number of courts that have considered the meaning of §1328(f) has come to the same conclusion as the Fourth Circuit [in *Bateman*].” *Id.* at 227 and cases cited therein.

perform under the confirmed plan due to serious illness or other unforeseen circumstances, a discharge under §1328(a) may be available.⁴⁰² In such a case, rather than conversion or dismissal, a debtor may elect to pursue a hardship discharge. If the plan has been confirmed, and after notice and hearing, the debtor may receive a hardship discharge only if:

- (1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;
- (2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and
- (3) modification of the plan under section 1329 of this title is not practicable.⁴⁰³

The hardship discharge is substantially similar to a chapter 7 discharge.⁴⁰⁴ Section 1328(c) provides that a hardship discharge under §1328(b) will not extend the discharge to debts arising from §1322(b)(5) or under §523(a).

B. The Scope of It

There are exceptions to a chapter 13 debtor's discharge. Restitution or criminal fines that are a part of a debtor's criminal conviction are excepted from the discharge, as well as "restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual."⁴⁰⁵

402 See *In re Bond*, 36 B.R. 49, 51 (Bankr. E.D.N.C. 1984) (allowing hardship discharge in case where debtor died prior to completion of plan); *In re Graham*, 63 B.R. 95, 96 (Bankr. E.D. Pa. 1986) ("If administration of the case under [chapter] 13 continues notwithstanding the death of the debtor, the only feasible resource is the filing of a motion for a hardship discharge."). See also Fed. R. Bankr. P. 1016.

403 See §1328(b) and *In re Griffin*, 352 B.R. 475, 479 (8th Cir. B.A.P. 2006) ("The plain language of this statutory section tells us that a debtor cannot obtain a hardship discharge in Chapter 13 unless the debtor made payments to unsecured creditors in an amount equal to what the unsecured creditors would have received in a Chapter 7 case.").

404 *In re Grice*, 319 B.R. 141, 145 (Bankr. E.D. Mich. 2004) ("[I]n essence, a hardship discharge is the equivalent of a chapter 7 discharge.")

405 §1328(a)(3) and (4).

Additional exceptions to discharge are found in §523(a), which include certain taxes,⁴⁰⁶ debts incurred by fraud⁴⁰⁷ including fraud or defalcation while acting in a fiduciary capacity,⁴⁰⁸ debts incurred by embezzlement or larceny,⁴⁰⁹ debts not listed or properly scheduled,⁴¹⁰ domestic-support obligations,⁴¹¹ willful or malicious injury to another entity or to the property of another entity,⁴¹² student loans⁴¹³ and debts arising from the “death or personal injury caused by the debtor’s operation of a motor vehicle, vessel, or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance.”⁴¹⁴

Finally, long-term debts that have been provided for in the plan pursuant to §1322(b)(5) are excepted from discharge. Creditors seeking to challenge the discharge of a debt are required to file the objection to dischargeability by the deadline unless extended by the court.⁴¹⁵

In addition, the court may not grant the debtor a discharge unless the court, after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge, finds that there is no reasonable cause to believe that:

(1) section 522(q)(1) may be applicable to the debtor;⁴¹⁶ and

406 §§523(a)(1)(B) and (C) and 507(a)(8)(C).

407 §523(a)(2).

408 §523(a)(4).

409 *Id.*

410 §523(a)(3).

411 §523(a)(5).

412 §523(a)(6).

413 §523(a)(8).

414 §523(a)(9).

415 A debtor may not obtain an undue hardship of student loans through a “discharge by declaration” provision in the chapter 13 plan. Adversary proceedings are the proper procedural tool to obtain a hardship discharge of student loans. *See, e.g., In re Mersmann*, 505 F.3d 1033 (10th Cir. 2007). *But see Espinosa v. United Student Aid Funds Inc.*, 553 F.3d 1193, 1205 (9th Cir. 2008) (“Our long-standing circuit law holds that student loan debts can be discharged by way of a Chapter 13 plan if the creditor does not object, after receiving notice of the proposed plan...and that such notice if not constitutionally inadequate.” [citations omitted]).

416 §522(q)(1):

As a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of an interest in property described in subparagraphs

(A), (B), (C), and (D) of subsection (p)(1) which exceeds in the aggregate \$136,875 if—

(A) the court determines, after notice and a hearing, that the debtor has been convicted of a felony (as defined in section 3156 of title 18), which under the circumstances, demonstrates that the filing of the case was an abuse of the provisions of this title; or

(B) the debtor owes a debt arising from—

(i) any violation of the Federal securities laws (as defined in section 3(a)

(47) of the Securities Exchange Act of 1934), any State securities laws,

(2) there is pending any proceeding in which the debtor may be found guilty of a felony described in section 522(q)(1)(A) or liability for a debtor of the kind described in section 522(q)(1)(B).⁴¹⁷

C. Keeping It

A chapter 13 debtor may lose the discharge if it was procured by fraud and the party seeking the discharge did not know of the fraud until after the discharge was granted.⁴¹⁸

A party in interest has only one year after the discharge is entered to seek revocation:

Parties in interest are those who have a stake in the outcome of the bankruptcy case. They generally fall within four major, relatively well-defined groups—debtors, creditors, equity security holders, and court fiduciaries.⁴¹⁹

Section 1328(e) cannot be read to provide a party with no stake in the outcome of the bankruptcy case with standing to seek revocation. Further, the section cannot be read to give a party in interest an opportunity to raise an issue that should have been raised prior to seeking revocation.

In *In re Rodrigues*, the moving party was a creditor whose untimely proof of claim was disallowed. The moving party did not appeal the bankruptcy court's order. Among the reasons for seeking the revocation of discharge was the allegation that the debtor claimed an impermissible exemption.⁴²⁰ The property in question, as well as the exemption, were disclosed in the bankruptcy schedules and statements. In addition, the moving party did not object to confirmation nor object to a motion compromising the

or any regulation or order issued under Federal securities laws or State securities laws;

(ii) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under section 12 or 15(d) of the Securities Exchange Act of 1934 or under section 6 of the Securities Act of 1933;

(iii) any civil remedy under section 1964 of title 18; or

(iv) any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding 5 years.

⁴¹⁷ §1328(h).

⁴¹⁸ §1328(e).

⁴¹⁹ *In re Rodrigues*, 370 B.R. 467, 475 (Bankr. D. Mass. 2007), citing William C. Hillman & Margaret M. Crouch, *Bankruptcy Deskbook*, §1.4 at 1-10 (4th Ed. 2005 & Supp.).

⁴²⁰ *In re Rodrigues*, 370 B.R. 467 at 477 (Bankr. D. Mass. 2007).

claim.⁴²¹ In essence, the moving party was seeking revocation based on issues that could have and should have been raised while the case was pending.

An essential element in seeking revocation of discharge is proving that the moving party was not aware of the issues giving rise to the action until *after* the discharge order entered, *and* filing the request within one year. Failing that, a moving party may not obtain an order revoking the chapter 13 discharge.⁴²²

D. Enforcing It

Despite the efforts of counsel, and the successful completion of the chapter 13 plan, parties may surface long after the case has closed trying to enforce an obligation that is discharged, or perhaps they are not technically “enforcing” their rights, but rather are reporting to third parties that a debt is still enforceable against the debtor. Any party that attempts to circumvent the discharge order risks violating the discharge injunction and may face sanctions from the court. Since the effects and benefits of the discharge will be diluted if it is not enforced, the debtor and counsel must be vigilant in enforcing it.

1. Prepare the Case Well

Perhaps the most important foundation for enforcing the discharge is established at the beginning of the case. A debtor should not expect a creditor or claimholder who is not aware of the bankruptcy case to be aware of the discharge (or for that matter, be subject to it). Indeed, there is a plethora of case law that supports the proposition that creditors who do not receive proper notice of a chapter 13 case are not subject to the discharge order.⁴²³ Thus, ensuring that all parties receive notice of the bankruptcy filing and plan will go a long way toward avoiding problems that could arise years down the road.

2. Educate Your Debtor

The debtor should maintain copies of all bankruptcy filings and should, at least once per year, examine his or her credit report to ensure that debts are being reported accu-

421 *Id.*, citing *Taylor v. Freeland & Kronz*, 503 U.S. 638, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992).

422 *See, e.g., In re Dastejerdi*, 2001 WL 1168178 *3 (Bankr. E.D. Va. 2001).

423 *See, e.g., Ellett v. Stanislaus*, 506 F.3d 774 (9th Cir. 2007), in which tax debt was not considered discharged because the creditor was not aware of the identity of the debtor. “Here, due to [the debtor’s] negligence in listing an erroneous [social security number] on his bankruptcy petition and §341(a) notice, proper notice was not provided to the [tax authority]. Consequently, [the debtor’s] Chapter 13 plan did not ‘provide for’ the [authority’s] taxes. The [tax authority] should not be punished because [the debtor] failed to provide proper notice including his correct [social security number].”

rately. The debtor should promptly notify parties that a discharge has been entered and provide documentation to enable them to comply. Additionally, it is advisable that the debtor retain copies of any and all correspondence related to these matters. Finally, the debtor should promptly notify counsel if notice is received from any party attempting to enforce a claim that has been discharged.

Many times, what appears to be a violation of the discharge may be, in fact, an innocent act or omission. In those cases, it may be appropriate for the debtor or counsel to send a cease-and-desist notice along with a copy of the discharge before bringing the party to court. In those cases where there appears to be an actual violation of the discharge injunction, it may be appropriate for the debtor or counsel to promptly bring an action against the party. This would be especially true in the case where the party seeking to enforce a dischargeable claim was an active participant in the bankruptcy case, such as a party who unsuccessfully challenged confirmation or dischargeability.