

# Second City Improvisational Debates

**Brian L. Shaw, Moderator**

*Shaw, Fishman Glantz & Towbin LLC*

Resolved: Credit counseling received on the petition date, though after the time of the filing, satisfies the requirements of § 109(h)(1).

**Pro: Hon. Robert D. Martin**

*U.S. Bankruptcy Court (W.D. Wis.); Madison*

**Con: Hon. Eugene R. Wedoff**

*U.S. Bankruptcy Court (N.D. Ill.); Chicago*

Resolved: Student loans should be dischargeable in bankruptcy.

**Pro: William J. Factor**

*The Law Office of William J. Factor, Ltd.; Northbrook, Ill.*

**Con: Monette W. Cope**

*Weltman, Weinberg & Reis Co., LPA; Chicago*

Resolved: "Fee jumping" in chapter 13 cases is legal and ethical.

**Pro: Nicholas R. Perino**

*Swanson & Desai, LLC; Chicago*

**Con: Justin R. Storer**

*Lakelaw; Chicago*



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United States Court of Appeals, Seventh Circuit.  
Marilyn O. MARSHALL, Trustee-Appellant,  
v.  
Charles WALKER, Debtor-Appellee.  
No. 14-1241.  
June 30, 2014.

Direct Appeal from the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division, Bankruptcy Case No. 13-42168, The Honorable Timothy A. Barnes

Brief and Short Appendix of Trustee-Appellant Marilyn O. Marshall

Lauren L. Tobiason, Office of the Chapter 13 Trustee, Marilyn O. Marshall, 224 S. Michigan Ave., Suite 800, Chicago, IL 60604, (312) 431-1300, for trustee-appellant.

\* \* \*

***STATEMENT OF THE ISSUE***

I. Whether an individual is eligible to be a debtor under 11 U.S.C. § 109(h)(1) (“*section 109(h)(1)*”) when the required credit counseling is obtained by the individual, after the voluntary petition is filed with the court, but on the same day.

***STATEMENT OF THE CASE***

The relevant facts in this case are not in dispute. On October 29, 2013, Charles Walker (“*Appellee*”) filed a petition for relief under Chapter 13 of the Bankruptcy Code *pro se*, which was file stamped at 10:06 AM CDT. As part of his petition, Appellee filed Official Bankruptcy Form 1 titled “Exhibit D” (Appx. 1.) which includes a certified statement, made under penalty of perjury, that he had received a briefing from an approved credit counseling agency “[w]ithin the 180 days before the filing of [his] bankruptcy case,” and that he had a certificate from the agency. The form also directed him to attach a copy of the certificate to the petition, but he did not do so.

On November 1, 2013, Appellee filed a Certificate of Credit Counseling (Appx. 3.) indicating that he had received a briefing from an approved credit counseling agency on October 29, 2013, at 5:16 PM MDT (6:16 PM CDT), approximately eight hours after the filing of his bankruptcy case. The Trustee took the position that the credit counseling was untimely and thus dismissal of the case was appropriate pursuant to 11 U.S.C. §§ 1307 and 109(h) 11 U.S.C. § 109(h) (“*section 109(h)*”). At hearing on the Trustee's Motion to Dismiss, the Bankruptcy Court expressed concerns regarding the wording of section 109(h)(1). Although the Appellee failed to appear at the hearing, given that the Appellee is *pro se*, the Court determined it would investigate the issues raised in the Trustee's Motion to Dismiss. On December 9, 2013, the Court issued a Memorandum Opinion (Appx. 6.) along with the order denying the Trustee's Motion to Dismiss. In the Memorandum Opinion, the Bankruptcy Court

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stated:

The language of section 109(h)(1) is expressed in plain terms. The 180-day period of a debtor to receive credit counseling includes the date of filing of the petition. No finer distinction is included in the statute, and thus, the court is bound to apply the clear and unambiguous language of the statute pursuant to its terms. As the Debtor in this case obtained his credit counseling on the date of the filing of his bankruptcy petition, that credit counseling - though taken after the filing of the petition - satisfies the express terms of section 109(h)(1). As such, the Debtor is entitled to be a debtor on these grounds and the Trustee's motion is not well taken.

*In re Walker*, 502 B.R. at 328.

The Appellee's bankruptcy case was subsequently dismissed on April 21, 2014 for failure to pay the Bankruptcy Court's filing fees (Appx. 65.). The Appellee has refused court-appointed counsel and has chosen to proceed *pro se* (Appx 46.).

### **SUMMARY OF ARGUMENT**

The Bankruptcy Court erred in denying the Trustee's Motion to Dismiss and allowing an individual to qualify as a debtor under section 109(h)(1) when his credit counseling was obtained on the same day as his Chapter 13 petition was filed, but after his petition was filed with the Bankruptcy Court. The Bankruptcy Court's interpretation of the phrase "date of filing of the petition" in section 109(h)(1) to mean the entire day on which the case is filed is not supported by the plain language of the Bankruptcy Code. Under the plain language of section 109(h)(1), in order to be eligible to file a bankruptcy case, an individual must receive credit counseling before the time of filing of the bankruptcy petition. Therefore, unless any of the enumerated exceptions in 11 U.S.C. § 109(h)(2)-(4) apply, credit counseling taken after the time of filing of the petition does not satisfy the express terms of section 109(h)(1). Alternatively, should this Court find the language of section 109(h)(1) to be ambiguous, the legislative history supports the Trustee's interpretation of the phrase "date of filing of the petition" in section 109(h)(1) to be synonymous with the moment of filing the petition. Accordingly, an individual qualifies as a debtor under section 109(h)(1) so long as he or she completes the required credit counseling at any time in the 180-day period prior to the moment of filing the petition. This interpretation is consistent both with the plain language of the Bankruptcy Code and the legislative history of the statute.

### ARGUMENT

The Bankruptcy Court erred in finding that the Appellee is entitled to be a debtor under section 109(h)(1) when the Appellee obtained the required credit counseling on the same date as the date upon which his voluntary petition was filed, but after the petition had been filed with the Bankruptcy Court. The Bankruptcy Court also erred in its interpretation of the plain language of section 109(h)(1). The Bankruptcy Court further erred when it denied the Trustee's Motion to Dismiss and allowed the Debtor to proceed with his bankruptcy case.

**\*7 I. The Plain Language of Section 109(h)(1) Requires an Individual to Receive Credit Counseling Before the Time of Filing of the Bankruptcy Petition in Order to be Eligible to File a Bankruptcy Case.**

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Section 109 of the Bankruptcy Code,<sup>[FN2]</sup> captioned “Who may be a debtor,” defines “the eligibility to become a debtor” and its “purpose is to set forth pre-conditions to filing a case, *i.e.* conditions that must be met in order for a case to be commenced.” *In re Walker*, 502 B.R. at 327. Section 109(h)(1) provides, in pertinent part:

FN2. “[Eligibility to be a debtor under a particular chapter of the Bankruptcy Code is not the equivalent of a jurisdictional question.” *In re Lane*, No. 12-10718-M, 2012 WL 1865448 at \*5 (Bankr. N.D. Okla. May 22, 2012) (citation omitted). While not a bar to filing a voluntary petition under 11 U.S.C. § 301(a), a court may properly dismiss a case at a later date where a debtor is found to be ineligible under section 109 of the Bankruptcy Code. *Hamilton Creek Met. Dist. v. Bondholders Colorado Bondshares (In re Hamilton Creek Met. Dist)* 143 F.3d 1381, 1385 n.2. (10th Cir. 1998).

Subject to paragraphs (2) and (3), and notwithstanding any other provision of this section other than paragraph (4) of this subsection, *an individual may not be a debtor under this title unless such individual has*, during the 180-day period ending on the *date of filing of the petition* by such individual, *received* from an approved nonprofit budget and credit counseling agency . . . an individual or group briefing . . . that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.

11 U.S.C. § 109(h)(1) (emphasis added).

The “interpretation of the Bankruptcy Code starts ‘where all such inquiries must begin: with the language of the statute itself.’ ” *Ransom v. FIA Card Servs., N.A.*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 716, 723-24 (2011) (quoting *U. S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026 (1989)). When a statute’s language is plain, the sole function of the court is to enforce it according to its terms, except where doing so would lead to absurd results. *Lamie v. U.S. Trustee*, 540 U.S. 526, 533, 124 S. Ct. 1023 (2004). “Section 109( h) states that if an individual does not receive a credit counseling briefing during the 180-day period, the individual ‘ may not be a debtor.’ If a person must qualify as a ‘ debtor’ to file a case, then someone who has not yet received a credit counseling briefing - and so may not be debtor - cannot properly file.” *In re Arkuszewski*, 507 B.R. 242, 245 ( Bankr. N.D. Ill. 2014) (Wedoff, E.) (citing *In re Jackson*, No. 12-77990, 2012 WL 7679562, at \*2 (Bankr. N.D. Ga. December 13, 2012)). According to section 109(h)(1), “ ‘an individual may not be a debtor’ unless he ‘has . . . received’ credit counseling.” *Id.* Both *In re Jackson* and *In re Arkuszewski* “concluded from this language that to be eligible to file a bankruptcy case an individual must receive a credit counseling briefing before the time of filing . . . and in the absence of any conflicting indications, [they] must be followed.” *Arkuszewski*, (citing *Lamie v. U.S. Trustee*, 540 U.S. at 634).

Section 109(h) “requires debtors to receive credit counseling before they can be eligible for bankruptcy relief so that they will make an informed choice about bankruptcy, its alternatives, and consequences.” H.R. Rep. No. 109-31, pt. 1, at 2 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 89. “The legislation’s credit counseling provisions are intended to give consumers in financial distress an opportunity to learn about the consequences of bankruptcy - such as the potentially devastating effect it can have on their credit rating - before they decide to file for bankruptcy relief.” *In re Cole*, 47 B.R. 70, 76 (Bankr. E.D. Tenn. 2006) (quoting H.R. Rep. No. 109-31, pt. 1, at 18 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 104).

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As enacted in 2005, section 109(h)(1) provided that, with certain exceptions, an individual could not be a debtor under any chapter of the Bankruptcy Code unless he or she had received credit counseling “during the 180-day period *preceding* the date of filing of the petition . . .” 11 U.S.C. § 109(h)(1) (emphasis added). As stated in *In re Arkuszewski*,

Like the current version, the original one provided that an individual may not be a debtor unless the individual “has received” a credit counseling briefing during a 180-day period. But rather than stating that this period ended on the date of filing, the original version treated 180 days as the “period preceding” the date of filing. This language obviously requires that the briefing to be received before the bankruptcy filing - and the legislative history of the provision confirms as much.

507 B.R. at 247.

The Bankruptcy Technical Corrections Act of 2010, Pub.L. 111-327, 124 Stat. 3557 (Dec. 22, 2010), amended section 109(h)(1) to remove the word “preceding” and add the phrase “ending on,” so that it now reads, “during the 180-day period *ending on* the date of filing of the petition . . .” 11 U.S.C. § 109(h)(1) (emphasis added). Prior to the 2010 amendment to section 109(h)(1), a split had arisen among bankruptcy courts regarding the original wording of the statute and when the “180-day period preceding the date of filing of the petition” terminated. Two lines of cases developed, with some courts interpreting “date of filing” to mean “calendar day of filing.” *In re Lane*, 2012 WL 1865448 at \*3; *see also In re Francisco*, 390 B.R. 700, 702-04 (10th Cir. BAP 2008) (collecting and discussing the conflicting pre-2010 amendment decisions). “Under these decisions, credit counseling had to be obtained no later than the day preceding the calendar day on which the petition was filed. In other words, credit counseling taken on the same day as the petition date, even if taken before the petition was filed, was considered too late under the statute.” *In re Lane*, 2012 WL 1865448 at \*3; *see also, e.g., In re Gossett*, 369 B.R. 361, 370 (Bankr. N.D. Ill. 2007); *In re Cole*, 347 B.R. at 74; *In re Murphy*, 342 B.R. 671, 673 (Bankr. D.D.C. 2006).

Other courts interpreted the “date of filing” to mean the moment of filing, and adopted the rationale that a bright line marking the moment of filing was needed to divide certain pre-and post-petition events, including the time during which a debtor must meet the credit counseling requirement. *See, e.g., In re Francisco*, 390 B.R. at 704-05; *In re Barbaran*, 365 B.R. 333, 334 (Bankr. D.D.C. 2007); *In re Moore*, 359 B.R. 665, 672 (Bankr. E.D. Tenn. 2006); *In re Warren*, 339 B.R. 475, 480 (Bankr. E.D. Ark. 2006). These decisions found that credit counseling was compliant under the original section 109(h)(1) if it was taken any time in the 180-day period prior to the moment of filing the petition, even if that occurred on the same calendar day as the petition date. “None of the [pre-2010 amendment] decisions, however, suggested that section 109(h)(1) allowed the credit counseling briefing to be obtained after a case was filed.” *In re Arkuszewski*, 507 B.R. at 247.

The current version of section 109(h)(1) “clearly rejected the line of authority suggesting that the credit counseling deadline is the day before filing” and allows credit counseling to be received on the same day as the filing. *In re Jackson*, 2012 WL 7679562, at \*1. “But as a technical correction, the new version can not properly be interpreted as reversing the original requirement that the credit counseling briefing be received before the bankruptcy case is filed.” *In re Arkuszewski*, 507 B.R. at 247 (citing *Brown v. Thompson*, 374 F.3d 253, 259 (4th Cir. 2004). Moreover, “[t]he statute contains no indication that the change to 109(h)(1) was anything other than a technical amendment to clarify that, as held by the better reasoned decisions, the required prepetition credit counseling could be received up

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until the moment of filing of the bankruptcy petition, and need not be received prior to the calendar day on which the petition was filed.” *In re Soohyun Koo*, No. 12-0012, 2012 WL 692578, at \*1 (Bankr. D.D.C. Mar. 2, 2012). Therefore, to interpret “date” in section 109(h)(1) as allowing an individual until midnight on the calendar date of filing his petition to complete credit counseling “fails to comport with the statute’s text, context, or purpose.” *Ransom v. FIA Card Services, N.A.*, 131 S.Ct. at 726. “Courts properly assume, *absent sufficient indication to the contrary*, that Congress intends the words in its enactments to carry ‘their ordinary, contemporary, common meaning’.” *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 388, 113 S.Ct. 1489 (1993) (quoting *Perrin v. U. S.*, 444 U.S. 37, 42, 100 S.Ct. 311 (1979)) (emphasis added). While the term “date” is ordinarily defined as a 24-hour time period or a full calendar day, “[i]t seems clear from other language in 109(h)(1) that the credit counseling must occur pre-petition and is a pre-condition for an individual to qualify as a debtor eligible for bankruptcy protection.” *In re Jackson*, 2012 WL 7679562, at \*2.

Courts must also give meaning to every clause and word of a statute. *Negonsott v. Samuels*, 507 U.S. 99, 106, 113 S.Ct. 1119 (1993). A statute should be read as a whole and what may at first appear to be the plain meaning when a portion of the statute is read in isolation may appear otherwise when the provision is read in the context of the entire statute. *See Corley v. U.S.*, 556 U.S. 303, 314-15, 129 S.Ct. 1558 (2009) (noting “one of the most basic interpretative canons, that 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.”) (internal citations and quotations omitted). Finally, the ordinary meaning of statutory language is conclusive except in cases where the a literal interpretation produces a result demonstrably at odds with the intentions of its drafters. *Doyle v. Time Warner Cable*, 66 F.3d 867, 676 (7th Cir. 1995), *cert. denied* 516 U.S. 1141 (1996). “Because the legislature is presumed to act with sensible and reasonable purpose, a statute should, if at all possible, be read ‘so as to avoid an unjust or absurd conclusion.’” *In re Graupner*, 537 F.3d 1295, 1302 (11th Cir. 2008) (quoting *U.S. v. Ballinger*, 395 F.3d 1218, 1237 (11th Cir. 2005)).

The term “date” cannot be interpreted within the plain meaning of section 101(h)(1) to allow a debtor to complete credit counseling after the filing of the bankruptcy petition without rendering the eligibility requirements of section 109(h)(1) superfluous. *See Ransom v. FIA Card Servs., N.A.*, 131 S.Ct. at 724 (interpreting 11 U.S.C. § 1325(b)(2) as requiring a threshold determination of eligibility in order to ensure that each word in the statute carries meaning). When considered as a whole, the text, context, and purpose of section 109(h), including the language in section 109(h)(1), clearly and unambiguously requires that unless one of enumerated exceptions in paragraphs (2)-(4) of section 109(h) applies, to qualify as a debtor in bankruptcy, an individual must complete credit counseling before the filing of the bankruptcy petition.

### *A. The Bankruptcy Court erred in its analysis of the tense of the verb “has received” in section 109(h)(1).*

The Bankruptcy Court found that because “has received” in section 109(h)(1) is in the present perfect tense, an individual who began receiving a credit counseling briefing before filing the bankruptcy case and is still receiving it at the time of the filing may become a “debtor.” *In re Walker*, 502 B.R. 329-30 (citing R. Huddleston & G.K. Pullum, *The Cambridge Grammar of the English Language* 143 (2002)). However, “[a]s used in section 109(h)(1), . . . the present perfect tense does not indicate continuing activity. Rather, the tense is used in a phrase or sentence to set out an action, completed in the past, that has a present effect.” *In re Arkuszewski*, 507 B.R. at 247. The tense in section 109(h)(1) is not the present perfect, but what the Cambridge Grammar refers to as “resultative perfect.” *Id.* (citing R. Huddleston & G.K. Pullum, *The Cambridge Grammar of the English Language* (2002)).

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Therefore, when read in the “resultative perfect” tense “[ e]ligibility begins when the past action - receipt of a credit counseling briefing - has been completed. Only a person who “has received” a credit counseling briefing is eligible to be a debtor; a person who is only in the process of receiving the briefing is not eligible.” *Id.*

*B. The Bankruptcy Court's interpretation of section 101(h)(1) contradicts the term “debtor” as set forth in section 101(13) of the Bankruptcy Code.*

Under the Bankruptcy Court's interpretation of section 101(h)(1), a non-debtor may file a bankruptcy case and then become an eligible “debtor” afterward, a process that is referred to in *In re Arkuszewski* as the “might-become debtor.” *In re Arkuszewski*, 507 B.R. at 246. However, 11 U.S.C. § 101(13) and other sections of the Bankruptcy Code do not allow for filing by a “might-become debtor” because “a person filing a bankruptcy is a ‘ debtor’ from the time of filing.” *Id.* As explained in *In re Arkuszewski*:

Section 101( 13) of the Code defines the term “debtor” as a “person or municipality concerning which a case under this title has been commenced.” If this definition is inserted into § 109( h)( 1) in place of the word “debtor,” the statute reads “an individual may not be a person concerning [ whom] a case under this title has been commenced unless such individual has . . . received” a credit counseling briefing. Put more directly, if an individual is not able to be a “debtor,” the individual cannot be the subject of a bankruptcy case.

507 B.R. at 246.

In addition, under the Bankruptcy Code, the definition of property of the estate includes “all legal or equitable interests of the *debtor* in property *as of the commencement of the case.*” 11 U.S.C. § 541(a)(1)(emphasis added). The automatic stay also “applies immediately *upon the filing of a bankruptcy petition*, to (among other things), ‘ the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title.’ ” *In re Arkuszewski*, 507 B.R. at 246 n. 2. (citing 11 U.S.C. § 362(a)(3) (emphasis added)).

*C. The Bankruptcy Court's interpretation of section 101(h)(1) contradicts the plain language of the credit counseling exceptions set forth in section 109(h).*

Paragraphs (2), (3), and (4) of section 109(h) set forth exceptions to the credit counseling requirement of paragraph (1) by either waiving the requirement or permitting the requirement to be satisfied after the filing of the petition. Paragraph (2) of section 109(h) provides that the credit counseling requirement does not apply if the debtor resides in a district in which no approved crediting counseling is reasonably available to the debtor. 11 U.S.C § 109(h)(2). Paragraph (3) of Section 109(h) permits a debtor to take the credit counseling course up to a period not to exceed 30 days “*after the debtor files a petition*” or not to exceed a total of 45 days “*after the debtor files a petition*” if the 30-day period is extended for cause, if the debtor submits to the court a certification that: (i) describes exigent circumstances that merit a waiver of the requirement to complete credit counseling within 180 days prior to the debtor's filing of the petition; (ii) states that the debtor requested credit counseling services from an approved credit counseling agency but was unable to obtain the services within 5 days after the debtor made the request; and (iii) is satisfactory to the court. 11 U.S.C. § 109(h)(3) (emphasis added). Paragraph (4) of section 109(h), although not referenced in paragraph (1), provides that the requirements of paragraph (1) shall not apply with respect to a debtor who is unable to complete credit counsel requirements because of incapacity, disability, or active military duty in a

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military combat zone. 11 U.S.C. 109(h)(4).

While the credit counseling exceptions are not applicable to the facts of this case,<sup>[FN3]</sup> the plain language of section 109(h)(3) indicates that credit counseling can only be received “after the debtor files a petition” if the exigent circumstances requirements are met, “further evidencing that the [section] 109(h)(1) requirement, when not excused under the balance of [section] 109(h), is a pre-filing requirement.” *In re Soohyun Koo*, 2012 WL 692578, at \*2. In order to receive a waiver or permission to obtain counseling after filing the petition, an individual must demonstrate the circumstances that merit it. “[Section] 109(h)(3) provides an explicit scheme to follow if a debtor is aware that they have not received credit counseling within the relevant period.” *In re Lane*, 2012 WL 1865448 at \*5. There is no indication in the legislative history or the text of section 109(h) that Congress intended to create an additional exception for individuals who obtain credit counseling after the filing of the petition, on the same day as filing, but without qualifying for a waiver or obtaining permission to obtain post-petition counseling. *See Id.* (“Given that such a detailed scheme is provided by the statute to request a temporary waiver of the credit counseling requirement in appropriate circumstances, it does not make sense that the statute would also create a window for those who are able to scurry and quickly complete the requirement before midnight on the petition date. This is not the kind of practice that the Court wishes to encourage or facilitate.”).

FN3. The Appellee has not alleged any facts or raised any arguments suggesting that any of the exceptions set forth in paragraphs (2), (3), and (4) of section 109(h) apply to this case.

In addition, Exhibit D (Appx. 1.), the national form filed with the bankruptcy petition, executed under the penalty of perjury, requires a certification of compliance with section 109(h) by either indicating that the credit counseling was received “within 180 days before the filing of my bankruptcy case,” or the circumstances required for an exemption under 109(h)(2)-(4) have been met. “There is no option for the debtor to state they have not received credit counseling, but plan to do so before midnight on the petition date.” *In re Lane*, 2012 WL 1865448 at \*4. Exhibit D clearly requires an individual to certify, under the penalty of perjury, that the credit counseling was received “before the filing of my bankruptcy case.” It does not make sense to require an individual certify that credit counseling was received before the filing of the case when it is not in fact obtained until after the filing. The result is an illegality, the individual is making a false statement on the form under the penalty of perjury. The Bankruptcy Court's interpretation of section 109(h)(1) is wholly inconsistent with this national form.<sup>[FN4]</sup>

FN4. “It is noteworthy that the 2010 technical correction did not inspire a change in the form content to add an additional option.” *In re Lane*, 2012 WL 1865448, at \*4 n.24.

The Trustee does not dispute that standing alone, the term “date” is commonly defined as “[t]he day when an event happened or will happen . . .” and “day” is also defined as “[a]ny 24-hour period; the time it takes the earth to revolve once on its axis. . . .” Black's Law Dictionary 452-453 (9th ed. 2009). However, in light of the remaining text in section 101(h) along with the other sections of the Bankruptcy Code that address the timing of when an individual becomes a “debtor,” the term “date” must be limited to the period up to the moment of filing the bankruptcy petition. Extending the time period for an individual to receive credit counsel beyond the time of filing produces the absurd result of an individual receiving all the legal and equitable benefits and consequences of being a “debtor” in bankruptcy before completing the required credit counseling and without meeting the exemption

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requirements of sections 109(h)(2)-(4). Measuring eligibility to be a debtor under section 109(h)(1) at the time of filing, however, “draws support from the statute’s context and purpose.” *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. at 720.

### **II. If the Court Determines that “Date of Filing of the Petition” in Section 109(h)(1) is Ambiguous, the Trustee’s Interpretation of the Phrase as Synonymous with the Moment of Filing the Petition is Consistent with Congressional Intent and other Sections of the Bankruptcy Code.**

As discussed *supra*, the Trustee takes the position set forth in *In re Arkuszewski* that eligibility to be a “debtor” under 109(h)(1) is determined at the time of filing the petition under the plain meaning of section 109(h)(1). Therefore, an individual who receives credit counseling after the time of filing of the petition is ineligible to be a “debtor” under section 109(h)(1). However, should this Court determine that eligibility under section 109(h)(1) is not dispositive in this case, then the phrase “date of filing of the petition” should be interpreted in reference to the legislative intent of section 109(h)(1) and the use of the term “date” elsewhere in the Bankruptcy Code.

\*19 If statutory language is ambiguous, then courts are directed to look to legislative history to determine legislative intent. *See Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 239-42, 124 S.Ct. 1741 (2004) (examining related provisions of the Truth in Lending Act to determine whether the statutory provision at issue is ambiguous); *Sebelius v. Cloer*, 659 U.S. \_\_\_, \_\_\_, 133 S.Ct. 1886, 1895 (2013) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S.Ct. 941 (2002)) (In statutory interpretation cases, the Court’s inquiry ceases only where “the statutory language is unambiguous and ‘the statutory scheme is coherent and consistent.’ ”). “[T]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843 (1997) (citation omitted). The context consists not merely of other sentences but also of the real-world situation to which the language pertains. *Matter of Handy Andy Home Improvement Centers, Inc.*, 144 F.3d 1125, 1128 (7th Cir.1998).

“The word ‘date’ is susceptible to more than one definition.” *In re Gossett*, 369 B.R. at 370; *see also In re Barbaran*, 365 B.R. at 334 (“Congress failed to accord the term ‘date’ (in the clause ‘date of filing of the petition’) its usual meaning of calendar day, and instead intended ‘date’ to mean the moment of the filing of the petition.”); *In re Moore*, 359 B.R. at 672 (“Congress sometimes used the phrases ‘preceding the date of filing’ and ‘after the date of filing’ to simply mean before the bankruptcy filing and after the bankruptcy filing.”). In *In re Francisco*, the Bankruptcy Appellate Panel for the Tenth Circuit found the original language of section 109(h)(1) ambiguous “based both on other uses of the term ‘date’ in the Bankruptcy Code and on the fact that the term has been interpreted in two vastly different ways by the courts that have considered the issue.” 390 B.R. at 705. At least two recent bankruptcy cases have applied a similar rationale in finding the amended text of section 109(h)(1) ambiguous. *See In re Jackson*, 2012 WL 7679562, at \*2 (“This new language may have resolved the former split, but it is not unambiguous.”); *In re Lane*, 2012 WL 1865448 at \*4 (“This Court agrees that an ambiguity remains in the language of the statute.”).

After first finding the language ambiguous, these courts then turned to the legislative history of section 109(h)(1) and the use of the term “date” elsewhere in the Bankruptcy code to interpret “date of filing of the petition” to mean the moment of filing of the bankruptcy petition. *See In re Francisco*, 390 B.R. at 704-705 (examining the

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Bankruptcy Code provisions which use the phrase “date of filing of the petition,” such as 11 U.S.C §§ 547(b)(4) (A), 348(f)(1)(A), 549(a)(1), 1325(a), and concluding that this definition “is consistent with the overall critical importance in the bankruptcy context of the precise time at which an individual or entity becomes a debtor); *In re Lane*, 2012 WL 1865448 at \*4 (adopting a bright line rule that the credit counseling requirement must be met prior to the moment of filing the petition); *see also*, *In re Soohyun Koo*, 2012 WL 692578, at \*1 (“ ‘Date of filing of the petition’ in § 109(h)(1) has been interpreted by the majority of courts as referring to the moment of filing of the petition, not the entire calendar day on which the petition was filed.”); *In re Warren*, 339 B.R. at 475, (“In bankruptcy, the exact time of filing is a critical bright line in determining property rights of debtors and creditors. At the moment a petition for relief is filed, the automatic stay goes into effect, affording the debtor an extra measure of protection from the legal maneuvers of his creditors.”).

The clear and reasonable purpose of section 109(h) is for credit counseling to be obtained before the filing of a bankruptcy petition. This ensures that the individual receives the opportunity to make an “informed choice,” a choice that may result in a resolution of pending credit issues without resorting to a bankruptcy filing. H.R. Rep. No. 109-31, pt. 1, at 2 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 89. Admittedly, in most cases this does not occur, and the bankruptcy filing often immediately follows the credit counseling briefing. Contrary to the purpose of the statute, however, the Bankruptcy Court’s reading of section 109(h)(1) allows an individual to receive credit counseling after the time of filing, and entirely eliminates the “informed choice” option intended by Congress in drafting section 109(h)(1). Moreover, “[n]othing in [section] 109(h) or its legislative history suggests that Congress intended the term ‘date’ in [section] 109(h) to refer to a calendar day.” *In re Barbaran*, 365 B.R. at 338. Therefore the term “date” in section 109(h) should be interpreted in light of the use of the term “date” elsewhere in the Bankruptcy Code “otherwise absurd results, contrary to the congressional purpose of the provisions, would ensue.” *Id.* at 335. Absent a clear congressional intent stating otherwise, an individual qualifies as a debtor under section 109(h)(1) so long as he or she completes the required credit counseling at any time in the 180-day period prior to the moment of filing the petition. This ensures a coherent and consistent statutory scheme for determining when credit counseling is compliant with section 109(h)(1).

### CONCLUSION

For the foregoing reasons The Trustee respectfully requests that this Court reverse the decision of the Bankruptcy Court and find that the Appellee is not eligible to be a debtor under section 109(h)(1) of the Bankruptcy Code.

**AMERICAN BANKRUPTCY INSTITUTE**

United States Court of Appeals, Seventh Circuit.  
Marilyn O. MARSHALL, Trustee-Appellant,  
v.  
Charles WALKER, Debtor-Appellee.  
No. 14-1241.  
August 6, 2014.

Direct Appeal from the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division, Bankruptcy Case No. 13-42168, The Honorable Timothy A. Barnes

Brief of Amicus Curiae Candice Korkis in Support of the Decision of the Honorable Timothy A. Barnes in Favor of the Appellee

Candice Korkis, Brandon M. Duncomb, 155 North Wacker Drive, Chicago, Illinois 60606-1720, (312) 407-0700; Amicus Curiae.

\* \* \*

**STATEMENT OF AMICUS CURIAE**

*Amicus Curiae* was appointed by the Court to defend the Bankruptcy Court decision at issue in this appeal, and submits this brief in defense of the decision below, which favored the pro-se debtor, Charles Walker. . . . . *Amicus Curiae* . . . submits that the reasoning adopted by the Bankruptcy Court is consistent with the plain language of the statute: Appellee complied with the credit counseling requirement of section 109(h)(1) of the Bankruptcy Code by completing the requisite credit counseling during the 180-day period ending on the date of the filing of the petition, notwithstanding that the counseling was completed after the petition was filed.

\* \* \*

**II. THE PLAIN LANGUAGE OF SECTION 109(H)(1) OF THE BANKRUPTCY CODE  
ALLOWS A DEBTOR TO COMPLETE THE CREDIT COUNSELING REQUIREMENT  
AT ANY TIME ON THE DATE ON WHICH THE PETITION IS FILED.**

If the Court reaches the merits of this appeal, it should uphold the decision below because Appellee complied with the plain language of the Bankruptcy Code. The Bankruptcy Code requires individuals to complete what is commonly referred to as “credit counseling.” Specifically, section 109(h)(1) provides that credit counseling must be completed by the debtor, with exceptions, within a certain time period:

[A]n individual may not be a debtor under this title unless such individual has, during the 180-day period *ending on the date of filing of the petition* by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.

11 U.S.C. § 109(h)(1) (emphasis added). The plain meaning of “date” supports the Bankruptcy

Court’s decision that Appellee complied with the credit counseling requirement of section 109(h)(1) by completing the counseling on the date of the filing of his bankruptcy petition, but after the petition was filed. *See In re Walker*, 502 B.R. 324, 328 (Bankr. N.D. Ill. 2013); *but see Arkuszewski*, 507 B.R. at 247 (holding that a debtor may receive a credit counseling briefing on the petition date but prior to filing a bankruptcy petition); *In re Soohyun Koo*, No. 12-0012, 2012 WL 692578, at \*1 (Bankr. D.D.C. Mar. 2, 2012) (same).

*A. The Term “Date” as Used in Section 109(h)(1) Refers to a Full Calendar Day.*

When a court is faced with a dispute regarding the meaning of a statute, the inquiry must begin with the language of the statute itself. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). In analyzing the language of the statute, a court must assume that the “ ‘the ordinary meaning of that language accurately expresses the legislative purpose.’ ” *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) (citation omitted); *Perrin v. United States*, 444 U.S. 37, 42 (1979) (“A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”).

Black’s Law Dictionary defines “date” as “[t]he day when an event happened or will happen” and “day” as “[a]ny 24-hour period; the time it takes the earth to revolve once on its axis . . . .” Black’s Law Dictionary 452-53 (9th ed. 2009). In light of the ordinary construction of the word “date,” the plain language of section 109(h)(1) allows a debtor to complete the credit counseling requirement at any time during the calendar day on which the bankruptcy petition is filed. *See 2 Collier on Bankruptcy* ¶109.09[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014) (“Under the language of section 109(h), as amended in 2010, it appears that the credit counseling briefing could occur after the petition is filed, as long as it occurs on the same day.”).

Appellant erroneously contends that the plain language of section 109(h)(1) provides that an individual must complete the credit counseling requirement prior to filing a bankruptcy petition. (Appellant’s Br. at 5.) Appellant’s reading, however, would require the Court to ignore the words “date of” in the statute. It is the Court’s duty, if possible, to give effect to every word of a statute. *Duncan v. Walker*, 533 U.S. 167, 174 (2001). As such, Appellant’s reading of the statute is not only inconsistent with the plain language, but entirely at odds with it. Moreover, if Congress intended to require that a debtor receive credit counseling before the filing of the petition, it could have easily done so. Congress distinguished between the time of the filing of the petition and the date of filing in numerous sections of the Bankruptcy Code. *See, e.g.*, 11 U.S.C. § 101(46) (“The term ‘repo participant’ means an entity that, *at any time before the filing of the petition*, has an outstanding repurchase agreement with the debtor.” (emphasis added)); *Id.* § 363(h) (“Notwithstanding subsection (f) of this section, the trustee may sell both the estate’s interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, *at the time of the commencement of the case*, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if--” (emphasis added)); *Id.* § 1328(g)(1) (“The court shall not grant a discharge under this section to a debtor unless *after filing a petition* the debtor has completed an instructional course concerning personal financial management described in section 111.” (emphasis added)). “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23 (1983) (alteration in original) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

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In short, Congress could have stated that an individual must receive credit counseling within the 180-day period “ending at the time of the filing of the petition,” “ending at the time of the commencement of the case,” or some other formulation that would have made the filing of the petition the end of the 180-day period. Instead, Congress plainly provided that an individual may complete the credit counseling requirement at any time on the date on which the petition is filed.

### *B. That an Individual’s Eligibility to be a Debtor Is Determined Postpetition Supports the Plain Language of the Statute.*

An individual’s eligibility to be and remain a debtor is determined postpetition. Upon the filing of a chapter 13 petition, an individual becomes a debtor - he or she receives the various protections of the Bankruptcy Code, including the automatic stay, and must comply with his or her obligations thereunder. *In re Gossett*, 369 B.R. 361, 374 (Bankr. N.D. Ill. 2007) (“Until the Court determines that a petitioner is ineligible as a debtor, a case is commenced by the filing of the petition, an estate is created under 11 U.S.C. § 541, and the automatic stay of § 362(a) commences.”). Therefore, an individual who files a petition prior to completing credit counseling is not a “might-become” debtor. *See Arkuszewski*, 507 B.R. at 246. Instead, the person *is* a debtor, so long as that person has received credit counseling by the period prescribed by the Bankruptcy Code. The credit counseling requirement could be satisfied later in the day the petition is filed or, under certain circumstances, as many as 45 days after the petition is filed. *See* 11 U.S.C. § 109(h)(3). In either case, the person remains a debtor during this postpetition period until eligibility is determined in accordance with the Bankruptcy Code.

Appellant seems to argue that the plain language of section 109(h)(1) makes credit counseling a pre-filing condition to being a debtor, such that an individual’s filing of a bankruptcy petition before completing credit counseling renders that person not a debtor. (Appellant’s Br. at 5, 14, 18.) Appellant also seems to concede that, in fact, that interpretation of the statute is not supported by the case law. (Appellant’s Br. at 7, n.2.) The majority of Courts dismiss a bankruptcy case for noncompliance with the credit counseling requirement, as opposed to striking the petition, which would be the more appropriate result if Appellant’s contention was correct. *See Gossett*, 369 B.R. at 373 (“There is no indication that Congress intended to treat § 109(h) ineligibility any different than any other form of ineligibility in § 109; it therefore follows that a filing by a debtor ineligible under § 109(h) commences a case and is not a nullity or void ab initio.”); *see also In re Falcone*, 370 B.R. 462, 467 (Bankr. D. Mass. 2007) (holding that dismissal is the proper remedy for failure to comply with section 109(h)(1)); *In re Jones*, 352 B.R. 813, 826 (Bankr. S.D. Tex. 2006) (same); *In re Seaman*, 340 B.R. 698, 709 (Bankr. E.D.N.Y. 2006) (“[F]ailure to file certain documents, including those required by Section 109(h), may be grounds for dismissal.”). Indeed, the exceptions to the credit counseling requirement enumerated in section 109(h) dictate circumstances where an individual remains a “debtor” after filing a bankruptcy petition but prior to receiving the required credit counseling. Consequently, the plain language of section 109(h)(1) supports a finding that credit counseling may be completed by a debtor at any time on the date of the filing of the petition.

### *C. The Use of the Present Perfect “Has Received” Supports the Plain Language Reading of the Statute.*

Section 109(h)(1) states that an individual is eligible to be a debtor if he or she “has received” the

requisite credit counseling within the period specified. 11 U.S.C. § 109(h)(1). “The present perfect is concerned ‘with a time-span beginning in the past and extending up to now.’” *In re Walker*, 502 B.R. at 329-30 (quoting R. Huddleston & G.K. Pullum, *The Cambridge Grammar Of The English Language* 143 (2002)). Appellant appears to argue that the “now” that ends the period specified in the statute is the filing of the petition, despite the fact that the statute makes the date of the filing, and not the moment of filing, the relevant time period. Appellant further contends that “has received” is in the “resultative perfect” tense, requiring receipt of credit counseling prior to filing a bankruptcy petition. (Appellant’s Br. at 13.) To read the statute as Appellant suggests, however, would require the end of the period to be the filing of the petition--a reading unsupported by the plain language of the statute. Again, such a reading would make the words “date of” superfluous. Instead, “has received” should be read in conjunction with the temporal requirement of section 109(h)(1). The correct interpretation is that eligibility begins when the past action--receipt of a credit counseling briefing--has been completed on the date of filing.

Consequently, the plain language of section 109(h)(1) supports a finding that credit counseling may be completed by a debtor at any time on the date of the filing of the petition. This conclusion is further supported by the postpetition determination of eligibility to be a debtor and the grammar discussed above.<sup>[FN3]</sup>

FN3. Appellant also argues that the Bankruptcy Court’s interpretation of section 109(h)(1) is at odds with the national form used to certify a debtor’s receipt of credit counseling as if the language of the form controls the statute. (Appellant’s Br. at 17.) While the inconsistency is unfortunate, the form must conform to the plain meaning of the statute, not *vice versa*. See *Schwab v. Reilly*, 560 U.S. 770, 779 n.5 (2010) (noting that bankruptcy forms “must be read in light of the Bankruptcy Code provisions that govern . . . , and must yield to those provisions in the event of conflict”).

### **III. IF THE COURT FINDS THAT THE LANGUAGE OF THE STATUTE IS AMBIGUOUS, OUTSIDE CONSIDERATIONS FAVOR THE CONCLUSION THAT “DATE” IN SECTION 109(H)(1) MEANS A FULL CALENDAR DAY.**

As stated herein, the language of section 109(h)(1) is plain and unambiguous and should be enforced according to its terms. If, however, the Court concludes that the language is not clear, “outside considerations can be used in an attempt to glean the legislative intent behind the use of the term.” *Emergency Servs. Billing Corp., Inc. v. Allstate Ins. Co.*, 668 F.3d 459, 465 (7th Cir. 2012). In these situations, the Supreme Court has cautioned that, “[h]owever useful . . . statements of congressional intent may be in resolving ambiguities in the statutory scheme, they are not a license to ignore the plain meaning of a specific statutory provision.” *United States v. Lorenzetti*, 467 U.S. 167, 178 (1984). Here, the legislative history is anything but clear as to whether Congress intended that the credit counseling requirement be completed prior to filing or at any time on the date of filing.

#### *A. The Legislative History of Section 109(h)(1) Is Inconclusive as to Congressional Intent.*

“[W]here a statute’s language is clear, [the Court] look[s] to the legislative history only to determine whether Congress expressed a clear intention to the contrary of the literal application of that language.” *Middleton v. City of Chicago*, 578 F.3d 655, 660 (7th Cir. 2009). As the language of section

109(h)(1) is clear, the Court’s inquiry should stop there. A review of the legislative history does not express a clear intent with respect to the deadline to receive credit counseling, and should not override the plain meaning of the statute.

Appellant affords considerable weight to the legislative history that accompanied the original version of section 109(h)(1), which provided that a debtor’s credit counseling briefing must have been received in the 180-day period “preceding the date of filing of the petition.” 11 U.S.C. § 109(h)(1) (2005) (amended 2010). The original language created a split between courts regarding whether the 180-day period ended on the day before the petition was filed or on the same day as the petition, but before the petition was filed. *See In re Lane*, No. 12-10718-M, 2012 WL 1865448, at \*3 (Bankr. N.D. Okla. May 22, 2012). Section 109(h)(1) was amended pursuant to the Bankruptcy Technical Corrections Act of 2010 (the “2010 Amendment”). Pub. L. No. 111-327, sec. 2(a)(6)(B), 124 Stat. 3557, 3557-58. There is nothing in the history of the 2010 Amendment to suggest that Congress intended the phrase “ending on the date of the filing of the petition” to mean anything other than that an individual may complete the credit counseling requirement at any time on the date of the filing of the petition. To suggest otherwise would be pure conjecture.

Whatever Congress’s intent upon first drafting the credit counseling requirement of section 109(h)(1), such intentions, in light of the 2010 Amendment, should not override the plain language of the statute where, as here, the literal application of the statute does not “produce a result demonstrably at odds with the intentions of its drafters.” *Ron Pair Enters.*, 489 U.S. at 242 (citation omitted) (internal quotation marks omitted).

*B. The Other Provisions of Section 109(h) Do Not Support a Finding that Congress Intended Individuals to Receive Credit Counseling Before Filing.*

Regardless of whether section 109(h)(1) requires a debtor to receive credit counseling prior to filing the petition or at any time on the petition date, section 109(h) contains exceptions to the timing requirement that counsel against interpreting the legislative history to require debtors to receive credit counseling prepetition. For example, section 109(h)(3) provides that section 109(h)(1) shall not apply if a debtor can show that “exigent circumstances” merit a temporary waiver of the credit counseling requirement. 11 U.S.C. § 109(h)(3). “If Congress solely intended debtors to obtain credit counseling so as to make pre-bankruptcy decisions, section 109(h)(3) serves no purpose.” *Walker*, 502 B.R. at 330. The fact that section 109(h)(3) allows for a temporary abatement of the counseling requirement does not reflect a clear intention for the 180-day period of section 109(h)(1) to end at the time of the filing of the petition. In fact, in making such an exception, Congress recognized the value of postpetition credit counseling, and even included a similar requirement in section 1328(g)(1), which requires a debtor to complete a financial management course in order to receive a discharge. 11 U.S.C. § 1328(g)(1).

*C. The Effects of Dismissal and the Importance of the Availability of Bankruptcy Protection Favors Allowing the Completion of Credit Counseling at any Time on the Petition Date.*

The Bankruptcy Code is construed “ ‘liberally in favor of the debtor and strictly against the creditor.’ ” *Village of San Jose v. McWilliams*, 284 F.3d 785, 790 (7th Cir. 2002) (quoting *Gullickson v. Brown (In re Brown)*, 108 F.3d 1290, 1292 (10th Cir. 1997)). *Amicus Curiae* understands Appellant’s position and the Trustee’s need for certainty in determining a debtor’s eligibility. However,

dismissals on this basis have significant consequences for individual debtors that are neither required by the statute nor further the purpose of bankruptcy relief—to permit a debtor to “start afresh.” *McWilliams*, 284 F.3d at 790. Stay relief is limited upon refiling within one year after dismissal. *See* 11 U.S.C. § 362(c)(3)(A). In addition, individuals are forced to pay filing fees again, which are likely a substantial burden for a person already facing economic difficulties. *See In re Francisco*, 390 B.R. 700, 706 (10th Cir. B.A.P. 2008) (Cornish, J., specially concurring). Since the language of section 109(h)(1) is clear, congressional intent does not contravene this language, and the general strictures of the Bankruptcy Code favor a debtor’s ability to receive effective relief, this Court should enforce section 109(h)(1) according to its terms. Appellee received credit counseling on the date of the filing of the petition, and was, therefore, in compliance with section 109(h)(1).

### **CONCLUSION**

For the foregoing reasons, *Amicus Curiae* urges this Court to conclude that the appeal is moot or, in the alternative, affirm that Appellee was eligible to be a debtor under section 109(h)(1) of the Bankruptcy Code.

**AMERICAN BANKRUPTCY INSTITUTE**

**STUDENT LOAN NONDISCHARGEABILITY**

**By Monette W. Cope**

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**523(a)(8): THE STATUTE & ITS HISTORY, POLICY**

**A. THE STATUTE**

523(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-

(8) -unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for--

(A) (i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986 [26 USCS § 221(d)(1)], incurred by a debtor who is an individual;

**B. HISTORY OF THE STATUTORY LANGUAGE**

(pre 1978) Prior to 1978 education loans were completely dischargeable in bankruptcy.

(1978) The Bankruptcy Reform Act of 1978 (P.L. 95-598 (1978), which generally became effective on October 1, 1979:

“to a governmental unit, or a nonprofit institution of higher education, for an educational loan, unless

A. such loan first became due before five years before the date of the filing of the petition; or

B. excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents; “

(1979) Bankruptcy Act amendment, P.L. 96-56 (1979), effective October 1, 1979:

“for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution of higher education, unless

A. such loan first became due before five years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or

B. excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents; “

(1984) Bankruptcy Amendments and Federal Judgeship Act of 1984, P.L. 98-353 (1984), effective July 10, 1984:

“for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution, unless

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- A. such loan first became due before five years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or
- B. excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents; "

(1990) Crime Control Act of 1990, P.L. 101-647 (1990), effective May 28, 1991:

"for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend unless --

- A. such loan, benefit, scholarship, or stipend overpayment first became due more than 7 years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or
- B. excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents; "

(1998) Higher Education Amendments of 1998 (P.L. 105-244), effective October 1, 1998:

"for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents"

(2005) Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, P.L. 109-8, effective October 17, 2005:

"unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for --

- A. i. an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or
  - ii. an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
- C. any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual"

### C. CASE LAW ON LEGISLATIVE HISTORY AND POLICY

1. The primary purpose of bankruptcy discharge is to provide debtors with a fresh start. *O'Hearn v. Educ. Credit Mgmt. Corp. (In re O'Hearn)*, 339 F.3d 559 (7th Cir. 2003). Congress has decided, however, that some public policy considerations override the need to provide the debtor with a fresh start, and it has excluded certain debts from discharge. Unpaid student loans are among those debts excluded from discharge. The student loan exception is codified in the Bankruptcy Code at 11 U.S.C. § 523: (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--

\*\*\*

(8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a

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governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend . . . 11 U.S.C. § 523(a)(8).

The current version of § 523(a)(8) is significantly broader than the exception originally enacted. In 1978, Representative Alan Ertel sponsored the amendment creating the original § 523(a)(8). He stated in debate that “the purpose of this particular amendment is to keep our student loan programs intact.” 124 Cong. Rec. H1791 (daily ed. Feb. 1, 1978). Representative Ertel noted that by allowing dischargeability of student loans “we are penalizing students who are coming along through the system.” *Id.* at H1792. Legislators debating the merits of the exception from discharge similarly discussed concerns with the funding of the student loan program. *Id.* at H1792-98. As enacted, the original exception covered debt “to a governmental unit, or a nonprofit institution of higher education, for an educational loan” unless the loan became due more than five years before the date on which the petition was filed. Pub. L. No. 95-598, § 523(a)(8), 92 Stat. 2549, 2591, 11 U.S.C. § 523(a)(8) (1978).

Despite this original focus on student loan programs, Congress has consistently expanded § 523(a)(8). The legislative developments are thoroughly explored in *Johnson v. Missouri Baptist College (In re Johnson)*, 218 B.R. 449, 453-54 (BAP 8th Cir. 1998), and are also discussed in *Renshaw*, 222 F.3d at 87-88. In brief, Congress has expanded § 523(a)(8) in the following ways: In 1979, Congress effectively equalized the treatment of loans administered by for-profit educational institutions and non-profit educational institutions by amending the language of the provision; under the original version, only loans administered by non-profit educational institutions were covered. See Bankruptcy Act-- Student Loan Debts, Pub. L. No. 96-56, § 3(1), 93 Stat. 387 (1979). Also, deferment periods were excluded from the calculation of the repayment period. See *id.* § 3(2). In 1984, Congress amended the language to include educational loans from “nonprofit institutions” rather than only “nonprofit institutions of higher education.” See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 454(a)(2), 98 Stat. 333, 375-76. In 1990, Congress expanded the exception to cover educational benefit overpayments and funds received as educational benefits, scholarships, or stipends, see Federal Debt Collection Procedures Act of 1990, Pub. L. No. 101-647, § 3621(1), 104 Stat. 4933, 4964-65, and increased the period of non-dischargeability from five to seven years, see *id.* § 3621(2), 104 Stat. at 4965. It also applied § 523(a)(8) to Chapter 13 cases. See Student Loan Default Prevention Initiative Act of 1990, Pub. L. No. 101-508, § 3007(b), 104 Stat. 1388, 1388-28. Thus, although concern for the federally guaranteed loan programs provided the original impetus for § 523(a)(8), the exception has consistently expanded to cover other educational debts. With this legislative history in mind, we turn to the merits of this appeal.

*In re Chambers*, 348 F.3d 650, 653-654 (7th Cir. Ill. 2003)

2. The legislative history of the 11 U.S.C. 523 (a)(8) teaches us that the exclusion of educational loans from the discharge provisions was designed to remedy an abuse by students who, immediately upon graduation, filed petition for bankruptcy and obtained a discharge of their educational loans. This was due to the fact that unlike commercial transactions where credit is extended based on the debtor’s collateral, income, and credit rating, student loans are generally unsecured and based solely upon the belief that the

student-debtor will have sufficient income to service the debt following graduation. See H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 466-75 reprinted in 1978 U.S. Code Cong. & Admin. News 5787.

The essence of section 439A was re-codified in section 523(a)(8), which accordingly covered only higher educational loans “to a governmental unit, or a nonprofit institution of higher education.” *In re Pilcher*, 149 B.R. 595, 598 (B.A.P. 9th Cir. 1993)(citing to Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523(a)(8), 92 Stat. 2549 (1978)). In 1979, the section was amended to expand the coverage to include educational loans “made, insured, or guaranteed by a governmental unit, or part by a governmental unit or nonprofit institution of [\*897] higher learning.” *Id.* (citing to Pub.L. 96-56, § 3(1), 93 Stat. 387 (1979)); *In re Renshaw*, 222 F.3d 82, 87 (2nd Cir. 1999) (the 1979 amendments avoided the disparities in the treatment of loans from different sources and broadened the coverage of the section).

Of particular importance to this case, in 1984, Congress expanded the section again to any nonprofit institution. *Renshaw*, 222 F.3d at 87-88. The next amendment occurred in 1990 to expand the exception to cover certain educational benefit overpayments, as well as obligations to repay funds received as educational benefits, scholarships, or stipends. *Pilcher*, 149 B.R. at 598 (citing to Crime Control Act of 1990, Pub.L. No. 101-647, Stat. 4865 (1990)). Finally, in 1998, Congress left “undue hardship” as the only avenue for the discharge of a student loan. *Cox*, 338 F.3d at 1243. Congress, with each amendment to section 523(a)(8), limited the discharge of such loans, consistently making it more difficult to discharge such loans. *Id.*

*Rodriguez v. Educ. Res. Inst., Inc. (In re Rodriguez)*, 319 B.R. 894, 896-897 (Bankr. M.D. Fla. 2005)

3. That statute was modified as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”). In its amended form that statute was restyled. The amendments also expanded the definition of student loans under section 523(a)(8) to include “qualified education loan[s], as defined in section 221(d)(1) of the Internal Revenue Code of 1986[.]” 11 U.S.C. § 523(a)(8)(B) (West Supp. 2008).

*London-Marable v. Sterling*, 2008 U.S. Dist. LEXIS 106452 (D. Ariz. July 9, 2008)

**D. 523(A)(8) IS SELF-EXECUTING AND THE BURDEN IS ON DEBTOR TO FILE AN ADVERSARY REQUESTING DISCHARGE OF STUDENT LOANS**

1. Student loan debts are presumptively nondischargeable in bankruptcy proceedings. 11 U.S.C. § 523(a)(8). Debtors can overcome this presumption by making an affirmative showing that excepting the student loan debt from discharge would impose an undue hardship on the debtor or the debtor’s dependents. *Id.* The Bankruptcy Rules require the debtor to file an “adversary proceeding” against the holder of the student loan debt to make such a showing. FED. R. BKRTCY. P. 4007(d), 7001(6); *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 124 S. Ct. 1905, 1913, 158 L. Ed. 2d 764 (2004).  
*In re Hanson*, 397 F.3d 482, 484 (7th Cir. Wis. 2005)
2. [T]he statute plainly states that a discharge of the debtor “does not discharge an individual debtor from . . . an educational loan” except when the loan has been due more than

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five years or if repayment of the loan would present an undue hardship upon the debtor. The court finds that this language permits the student loan creditor to seek collection of the debt without having to first file a complaint to determine dischargeability in the bankruptcy court, at least in a case such as the present one in which the debtor has already acknowledged that he has no defenses to the loan. Congress has already created a presumption that student loan debts are not dischargeable. It has placed the burden of challenging that presumption on the debtor.

*Buford v. Higher Education Assistance Foundation*, 85 B.R. 579, 582 (D. Kan. 1988)

3. Under section 523(a)(8), an educational loan is not dischargeable in bankruptcy unless it became due five years before the filing of the petition or unless it would impose undue hardship on the debtor. The legislative history of section 523(a)(8) indicates that the statute was meant to be self-executing so that the creditor would not be required to file a complaint to determine the dischargeability of a student loan.

*United States v. Wood*, 925 F.2d 1580, 1582-1583 (7th Cir. Wis. 1991).  
(Cites omitted).

4. Congress created a presumption that student loans are nondischargeable, and, therefore, the burden of challenging that presumption falls on the debtor.

*Clark v. United States Dep't of Educ. (In re Clark)*, 341 B.R. 238, 248 (Bankr. N.D. Ill. 2006), *citing United States v. Wood*, 925 F.2d 1580, 1583 (7th Cir. 1991).

### CASE LAW ON UNDUE HARDSHIP

To prove a case of undue hardship, a debtor must satisfy all three prongs of *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395, 396 (2d Cir. N.Y. 1987), adopted by the Seventh Circuit in *In re Roberson*, 999 F.2d 1132 (7th Cir. 1993):

- (1) that the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for herself and her dependents if forced to repay the loans;
- (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
- (3) that the debtor has made good faith efforts to repay the loans.

**HYPOTHETICAL # 1**

Janice is fifty-three years old and lives with her seventy-five year-old mother in a rural community. She is healthy and has an Associate of Arts degree in Business Accounting, a paralegal certificate and a B.A. in Legal Studies. She had high grades in college. She obtained her last degree in 2000 and filed her adversary seeking discharge of her student loans in 2012.

Her student loan debt is \$25,000. She did pay some of it with a divorce settlement, but this is the remaining balance with interest.

She has not been in the work force for twenty-six years, but has spent 10 years searching for work, and has not been able to find anything. There are few jobs in her area. She and her mother together receive governmental assistance of a few hundred dollars per month.

Because her loans are governmental loans, she is eligible for an Income-Based Repayment plan which would allow her to pay \$0 per month based on her current income, but she refused to apply for the program.

Applying the three prongs of *Brunner*, should Janice's student loans be discharged?

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### HYPOTHETICAL # 2

Wendy graduated in April 2011 with a B.S. in Clinical Laboratory Sciences. She also has an Associates Degree as a Medical Assistant. She filed for bankruptcy in September of 2011 and then filed an adversary seeking discharge of her student loans in April of 2014. At that time, she had been working in her field for two years.

She is employed by the state and has medical, dental and vision insurance. She also has a profit-sharing plan and is purchasing an annuity for retirement. Her income is about \$40,000 per year. She has \$478,000 in student loans from both governmental and private lenders.

She owns a 2014 Toyota Camry outright and so has no car payments. She purchased this car in March of 2014, just before filing the adversary proceeding. There is no evidence in her financial accounts as to how she was able to afford this.

A review of her expenses show she spends \$187 per month on hair, nails, tanning, make-up and drugstore purchases. She spends \$460 per month at various retail establishments for clothing and attire. Her expenses also reveal gas station and convenience store purchases of \$195 per month and E-cig purchases of \$50 per month. She has an \$11,000 balance on a credit card and makes a \$250 payment towards that each month. Her cell phone is \$215 per month. She spends \$230 for food and \$150 at Walmart. Her rent is \$450 and utilities are \$150.

She made spotty student loan payments over a few years that averaged about \$208 per month. She claims she will never make more than she is making now, and will never be able to pay off her student loans, and so is entitled to a hardship discharge.

Does Wendy qualify for a hardship discharge under the three prongs of *Brunner*?

**“Fee Jumping” in Chapter 13 Cases:  
Too Risky For Your Clients, Bad Practice for You**

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**1) How to calculate the total amount due on a debt that is accruing interest:**

We’re dealing with people and money, and so we should at least be able to talk about how money works, before we start talking about what we want to do with it.

This is how to calculate the total amount that will be paid on an interest-bearing debt. We can start here:

$$A = P \frac{r(1+r)^n}{(1+r)^n - 1}$$

In which

A = the monthly payment due

P = the principle balance owed

r = the interest rate per month

*If 20.00% APR, then .2/12 = D = .01666667*

*If 17.99% APR, then .1799/12 = D = .01499166*

and

n = number of months remaining

Daniel has a car. It has a principal balance, at this second, of \$9,500.00. The contract rate of interest is 15.50%; and he has 36 more payments to go.

So then, .155/12 = .01291677 = r.

Let’s start with the messy part.

$$\frac{(.01291677)(1.01291677)^{36}}{(1.01291677)^{36} - 1}$$

$$= \frac{.02050262}{.58728683}$$

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$$= \frac{.02050262}{.58728683}$$

$$= .03491074$$

So:

$$9500 \times .03491074 = \$331.65$$

\$331.65 is his total monthly payment on the car!

So to figure out the total figure that would be paid, if things just happened normally, it's easy: Multiply A and n.

$$\$331.65 \times 36 = \$11,939.40.$$

If Daniel were to not file for bankruptcy, his total of payments would be \$11,939.40, but we would've, in that event, never met him.

The car was purchased more than 910 days ago, and it's worth \$9,500.00. He chooses to file 13, pay the car through the plan at *Till*, but not to cram down the claim. If Daniel were to pay \$9,500 in equal monthly installments, commencing the first month of the plan, at 5.25% APR through a 60-month chapter 13 plan, he would pay them \$180.37 per month, and a total of \$10,822.01.

Now say Daniel converts to chapter 7 two years after the case was filed, after the Trustee disburses his 23<sup>rd</sup> regular payment. He hopes to retain the car. During the pendency of the case, Daniel would've paid the creditor, through his Trustee, \$4,148.51.

Under 11 U.S.C. § 348(f)(1)(C)(i), the claim of any creditor holding security as of the date of filing the petition shall continue to be secured by that security unless the full amount of such claim determined under applicable nonbankruptcy law has been paid in full as of the date of conversion, notwithstanding any valuation or determination of the amount of an allowed secured claim made for the purposes of the case under chapter 13. So, if Daniel wants to keep the car, the money paid to the car creditor stays paid, of course, but it's going to take quite a shot to get Daniel "current" again on the car note.

We can start by doing things the simple way.  $\$331.65 \times 24 = \$7,959.60$ . That much would've come due under the contract during the 24 months of the case and so, subtracting the amount paid by the Trustee, at a minimum, Daniel had better have a plan to pay the creditor \$3,811.09 right quick, if he wants to retain the vehicle.

That's a very tiny bit too simple, but not so much that it's worth dragging us through a ton more math.

**2) How to calculate the amount due on a debt during the payment period on the debt, while payments are being made [never mind, skip the trouble, just use a website]:**

The first formula fails to account for the recapitalization of interest caused by the short-payments during the pendency of the bankruptcy. Interest would've been accruing all the while, and Daniel would've been paying something (albeit not the contract rate) all the while.

We can move the formula around to solve for P, and then figure out how much his actual balance due would be, but that's like half a dozen pages of bells and whistles. Let's just go to the best website I've found for this sort of thing.

➤ <http://www.pine-grove.com/online-calculators/remaining-balance-calculator.htm>

Regarding which the "Loan Amount" is the nonbankruptcy principal balance \$9,500.00, "Annual Interest Rate" is the nonbankruptcy interest rate of 15.5%, the "Remaining Balance @ Period" is 24 because that's the number of months the case lasted, the "Periodic Payment" is \$180.37, and the "Balance after Payment #" is zero, because that's what we want to solve for, and then hit the "Calc" button on the bottom of the screen.

Skipping the pyrotechnics: Interest having accumulated at the contract rate while the Trustee payments were paid, Daniel's balance on the note, after 24 months in his case, is \$7,889.69. To be current, that has to get moved down to \$3,979.80.

Daniel is behind on his car in the amount of \$3,909.89. He paid \$4,148.51 to the creditor through his Trustee, only to get a mere \$1,610.31 ahead on the payments, and he's going to need to scrape together \$3,909.89 more if he wants to be nominally "current" on the vehicle, the chapter 13 no longer succeeding.

So there's that. Sad.

**3) Why people file for chapter 13, and how many chapter 13s fail, and where I'm going with all this:**

Katherine Porter's recent study found that 88.8% of homeowners and 56.9% of automobile owners said that in filing chapter 13, keeping those things was a very important goal. (Katherine Porter, "The Pretend Solution: An Empirical Study of Bankruptcy Outcomes," 90 *Tex.L.Rev.* 103, 134 (Nov. 2011).

I acknowledge, at the outset, that there's no one-size-fits-all question for what makes a "failure" of a chapter 13 bankruptcy. Should a conversion to chapter 7 count? What about a voluntary dismissal after paying off certain priority debts or secured arrearages? (*See, generally*, Gordon Bermant, "What is 'Success' in Chapter 13? Why Should We Care?" 23-*Sept. Am. Bankr. Inst. J.* 20 (Sept. 2004).)

But recent scholarship indicates that approximately two-thirds of chapter 13 cases end in dismissal or conversion. (Katherine M. Porter, "Overview of Presentation Assessing the Success and Failure of Chapter 13 Bankruptcy," ABI/UMKC 30<sup>th</sup> Annual Midwestern Bankruptcy Institute & Consumer Form, Oct. 1, 2010.) The most recent analysis done was in the August, 2014 ABI Journal: From Fiscal Year 2007 to 2013, omitting a small number of hard-to-classify cases like reopened cases, transferred cases, and those cases ending in hardship discharge, 2,264,505 cases that had been opened in that time were "completed" – that is, funds were disbursed and cases were closed in that window. Of them, 52.1% were dismissed, 12.1% were converted, and only 35.8% of payment plans were actually completed. (Ed Flynn, "Chapter 13 Case Outcomes by State," 33-*Aug. Am. Bankr. Inst. J.* 40-41, 76-78 (Aug 2014).)

Unless Daniel has exempt savings or a loved one he can hit up for cash, realistically, he's now without an automobile. (One supposes Daniel could also refinance the car, but the odds are roughly the same as Daniel's flying to work on a magic carpet.)

Below, I'll do a review of the cases that generated the caselaw that says that "fee jumping" is permissible. Sometimes things work out fine, but when a case goes wrong, it goes really, really wrong. That's the way it is in any bankruptcy, of course, but it's more acute in cases like these.

And when a case goes right, the attorney would've gotten paid in full anyway.

A debtor's attorney shouldn't minimize their clients' chances of retaining stuff. Protecting collateral seems to be one of the few things, on measure, that chapter 13 actually does well. Don't screw it up.

**4) The argument: Payments to secured creditors, in the greatest amount possible, should and must commence immediately upon the effective date of the plan:**

I've already started the normative argument. We, as debtors' attorneys, would be benefitting our clients by frontloading payments to secured creditors, to the greatest degree possible, to maximize the likelihood that collateral at issue can be retained by our clients, in light of the fact that most chapter 13 cases don't complete.

But we've seen, repeatedly, that there are mechanisms used, in chapter 13 plans, to reduce the figure shot to the secured creditor, especially in the outset of the case. Here in the Northern District of Illinois, there might be a special provision in section G of the plan, something along the lines of:

*The claim of [creditor] shall be paid \$[tiny figure] adequate protection for the first [number of] months of the plan; thereafter the claim shall be paid \$[much higher figure] per month.*

or

*Debtor's attorney's fees shall be paid at \$[whatever] per month, at E2 priority.*

We've taken to calling this fee-jumping. The second example makes clear why. With the stepping-around of the monthly payment that's taking place, the extra money goes to the debtor's lawyer's fees. I've already made the case that we shouldn't do it because our clients like their stuff and we (hopefully) like our clients.

You can daydream up exceptions. If there's a bunch of priority debt other than the attorneys' fees, say. Why not try to pay the priority tax debt, or domestic support obligation, at the expense of a secured claim? Your client may be able to discharge the obligation on a car note in a chapter 7, if the 13 goes south. Your client would be stuck with the domestic support arrearage. Wouldn't it be prudent to maximize payments to the creditor not dischargeable under any chapter?

Great thinking! Creative! But really now. This is a mechanism that lawyers use, every single time except in that example, to get themselves paid.

And the better legal argument is that it isn't possible anyway.

There are three options for plan confirmation, *vis-à-vis* secured claimants. Under 11 U.S.C. § 1325(a)(5), the court shall confirm a plan if, with respect to each allowed secured claim provided for by the plan –

(A) the holder of such claim has accepted the plan;

(B) (i) the plan provides that –

(I) the holder of such claim retain the lien securing such claim until the earlier of –

(aa) the payment of the underlying debt determined under nonbankruptcy law; or

(bb) discharge under section 1328; and

(II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and

(iii) if—

(I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and

(II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan; or

(C) the debtor surrenders the property securing such claim to such holder;

We can pretty much skip over §§ 1325(a)(5)(A) and (C), though whether non-objection is the same as acceptance for purposes of subsection (A) is an interesting question in its own right. (To take one example, *In re Flynn*, 402 B.R. 437 (1<sup>st</sup> Cir. BAP (Mass.) 2009) held, however, that with good notice and service, failure to object does create a presumption of acceptance.)

What's clear is that subsection (B) provides a three-prong analysis, which analysis can be triggered in the event of a creditor's objection.

The § 1325(a)(5)(B)(i) criteria recaptitulate the glancing comment I made about conversion earlier. The holder of a secured claim will retain its lien until the earlier of full payment in light of state law, or the entry of discharge.

Section 1325(a)(5)(B)(ii) just provides, in law talk, that the secured creditor who objects must be paid the amount to which it is entitled, in light of § 506's determination of secured status for claims.

But § 1325(a)(5)(B)(iii) is where the action is. If the payments made on the objecting creditor's secured claim are to be distributed in monthly payments, they have to be in "equal monthly amounts," and that figure has to provide adequate protection to the creditor.

And § 1325(a)(5)(B)(iii)(I) and § 1325(a)(5)(B)(iii)(II) have one little overlap. Because the code uses the term "such payments" in both sections, it means the same thing both times. "Such payments" coming directly after the "periodic payments [to be made to the creditor by the Trustee]" obviously refers to those periodic payments, and so those payments must be in equal monthly amounts *and* they must adequately protect the creditor.

Furthermore, consider the utility of the word "such" in subpart § 1325(a)(5)(B)(iii)(II). If that didn't reference the "periodic payments" of § 1325(a)(5)(B)(iii)(I), then the word "such" would be utterly useless. (Not that Congress was 100%-awake when drafting the Code post-2005, but we've got to do the best we can.)

And so, read in light of § 1325(a)(5)(B)(iii)(II), the "equal monthly amounts" mandate of § 1325(a)(5)(B)(iii)(I) applies to all regularly-recurring post-confirmation payments on an allowed secured claim, which must additionally provide adequate protection. *See In re Denton*, 370 B.R. 441, 445-446 (Bankr. S.D.Ga. 2007), *In re Kirk*, 465 B.R. 300 (Bankr. N.D.Ala. 2012), *In re Williams*, 385 B.R. 468 (Bankr. S.D.Ga. 2008).

Monthly amounts wouldn't be equal if they were merely adequately protecting the secured creditor and then jumping sky high after the attorney is paid.

5) Case[law] Update:

I'm arguing, to be fair, the minority view. Most Judges who have considered the matter disagree with that analysis.

But so what? A debtor's attorney is still, by choice, from self-interest, increasing his clients' long-term risk by shorting the secured creditor.

The fact that many of these cases have worked out, in the long run, of course, has no bearing on fee jumping being a good practice. These are all, by their nature, cases that got confirmed in which the Debtors were represented by counsel, so yes, they'll skew towards a greater-than-standard success rate.

The below are an itemization of, as best as I could find, every case that discussed the question of when "equal monthly payments" must begin to creditors holding claims secured by personal property – when that case generated caselaw suggesting that "fee jumping" was permissible. *DeSardi*, especially, is widely cited for that proposition and for other reasons, including a succinct explanation of hanging paragraph.

Most of these cases went well; I include them in the interest of completeness, not because they go to show my point. As I said before, however, when they failed, things lit up quickly.

In alphabetical order:

- *In re Butler*, 403 B.R. 5 (Bankr. W.D.Ark. 2009)

UNDERLYING FACTS:

Harry and Clara Butler (W.D.Ark. 08-b-73338) thought it would be nice to provide a \$1,000.00 "kicker fee" to their attorney upon confirmation of their plan, by way of their payments of \$185.00 per month to the chapter 13 Trustee. This would have the effect of terminating, for more or less seven months, *all payments* to – you guessed it – Ford Motor Credit, for a 2004 Ford Taurus.

HOLDING:

What they wanted to do wasn't feasible because they can't grind adequate protection down to zero during the term of the plan, before the claim is satisfied in full. But, for purposes of this discussion, "The requirement to pay administrative fees – either in full before or concurrent with payments to creditors – when read in conjunction with the requirement to make adequate protection payments within 30 days of filing, dictate[s] that equal monthly payments may not necessarily occur until some time after confirmation." *Id.* at 16.

AND THEN:

They ended up not playing with their new toy. In amending their plan, they increased the plan payment to \$280.00 per month, and classified Ford Motor Company (perhaps the plan meant *Credit?*) as follows: "Shall be entitled to a pre-confirmation adequate protection payment of \$116.00. Upon confirmation the adequate protection payment of \$116.00 shall continue until Debtors' counsel has been paid \$1,000.00, and the creditor shall receive the regular monthly payment of \$116.00." (They, happily, completed their payments and got their discharge.)

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➤ *In re Chavez*, 2008 WL 624566 (Bankr.S.D. Tex. 2008)

### UNDERLYING FACTS:

Daniel Chavez (S.D. Tex. 07-36007) filed for chapter 13 and proposed to pay, as relevant here, adequate protection payments to DaimlerChrysler for his 2002 Dodge 1500 for the first three months of the plan, followed by “equal monthly installments” paid at “pro rata” payments through month forty-eight.

### HOLDING:

[Honestly, this is just a slip opinion and the Court just cites to *DeSardi* and *Hill* for the proposition that this treatment *is* permissible. *Chavez* at \*4. There’s another case cited too, *In re Blevins*, 2006 WL 2724153 (Bankr. E.D.Cal. 2006) that ends up in a lot of these opinions, but that’s not strictly appropriate to the matter at hand because it turns to real property, and so isn’t actually germane in light of § 1325(a)(5)(B)(iii)(II)’s specific reference to personal property.]

### AND THEN:

The case was filed on September 2, 2007; a motion to dismiss for nonpayment was filed on September 10, 2010, and the case was dismissed on November 4, 2010. , and the case was dismissed on August 13, 2008. In that period, according to the Trustee’s final report, the asserted claim of \$6,941.30 was paid by the Trustee, with \$505.68 interest. Mr. Chavez has not refiled.

➤ *In re DeSardi*, 340 B.R. 790 (Bankr. S.D. Tex. 2006)

### UNDERLYING FACTS:

Eric G. Desardi (S.D. Tex. case number 05-b-95075) wanted to pay a \$11,432.95 claim of DaimlerChrysler for a 2002 Dodge Ram 2500, with payments starting at \$290.23 in the sixth month;

Wilma LaBove (S.D. Tex. case number 05-b-95052) wanted to start payments to Nuwell, on a 2003 Ford Explorer, with a principal amount of claim of \$21,883.17, in the fifth month of the plan, and

Robert Anthony O’Neil (S.D. Tex. case number 05-b-95121) wanted to start payments to Centrix Financial, for a 2004 Chevrolet Impala in the seventh month of the plan. He also had some furniture he hopefully liked very much, but (if the Southern District of Texas is like the Northern District of Illinois) which probably won’t get repo’d because creditors wouldn’t do that.

### HOLDING:

“[A]dequate protection payments have priority over payments awarded to debtors’ counsel under § 330 of the Bankruptcy Code. Payments in excess of required adequate protection do not have priority... Equal payments neither need to commence in the first month nor continue until the last month of a chapter 13 plan.” *Id.* at 794.

### AND THEN:

DeSardi: The original claim, and underlying debt, was \$11,432.95. The case was filed Halloween, 2005, and was dismissed on April 3, 2007. The chapter 13 trustee had paid DaimlerChrysler \$3,515.82, per the Trustee’s final report and account. When DeSardi refiled on April 10, 2007 (S.D. Tex. case number 07-b-32498) DaimlerChrysler’s proof of claim suggested that they were owed \$9,960.30 for the same automobile, and so DeSardi had paid \$3,515.82 to move the principal balance by \$1,472.65. This presumes, of course, that he didn’t pay them anything in his

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week outside of bankruptcy. Mr. DeSardi's second confirmed plan provided, by the bye, that payments to Daimler Chrysler would start in month one.)

LaBove: Got her discharge! Yay!

O'Neil: His case was filed on November 1, 2005, and was dismissed for nonpayment on July 10, 2007, but unlike DeSardi, he apparently never refiled and so we can't see how this played out later for him. Centrix' proof of claim indicates that his APR was 17.98%. On a total debt of \$24,846.00, the Trustee paid Centrix \$6,030.94 during the pendency of the case (the "fixed monthly payment" was merely signaled as "pro rata" so without access to the Trustee's website, I can't figure out exactly how much was paid when). His case was filed November 1, 2005, and dismissed July 10, 2007; so say it had been going for 20 months. Twenty months of accumulated interest later, O'Neil would have owed \$27,422.03. Applying the payments received from the Trustee, he would owe something in the vicinity of \$21,391.09, and so would've paid \$6,030.94 to clear \$3,494.91 in principal on the debt.

➤ *In re Erwin*, 376 B.R. 897 (Bankr. C.D.Ill. 2007)

### UNDERLYING FACTS:

Kenneth and Melissa Erwin (C.D.Ill. case number 07-b-80143) financed a 2004 Chevrolet Venture, and four months later filed chapter 13; they proposed a payment of \$875.00 per month for 60 months, with the monthly payment on the car signaled merely as "Prorata." Americredit, the creditor at issue, wanted a fixed monthly payment.

### HOLDING:

"[T]he equal payment provision [...] does not require a trustee's monthly payments to secured creditors to be perfectly equal in amount. Trustees may continue to pay debtors' attorneys fees on an accelerated basis despite the resulting increase in secured creditor payments once the attorney is fully paid." *Id.* at 899.

### AND THEN:

Everything went pretty great. The Debtors got their discharge and Americredit got all its money.

➤ *In re Hill*, 397 B.R. 259 (Bankr. M.D.N.C. 2007)

### UNDERLYING FACTS:

Robert Hill (M.D.N.C. 06-b-80502), through his attorney, filed a chapter 13 plan with an attendant confirmation order reciting that "Ford Motor credit shall receive adequate protection payments of \$206.00 per month until such time as Debtor's attorney's fees are paid in full. Upon the completion of payments for attorney's fees, Ford Motor Credit shall begin receiving equal monthly installments of \$510.14 per month or such other amount as may be determined by the Trustee."

### HOLDING:

"[P]arsing Section 1325(a)(5)(B)(iii)(II) demonstrates that the phrase "during the period of the plan" modifies "adequate protection," not "such payments." The language of the statute simply cannot be read to dictate any specific time for the equal monthly payments to begin. Thus, when the collateral in question is personal property, equal monthly payments need not begin immediately after confirmation. Once they do begin, they must continue until the creditor is paid in full or the debtor

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receives a discharge at the end of the plan. *DeSardi*, 340 B.R. at 805 (citing 8 *Collier on Bankruptcy* ¶ 1325.06[3][b][ii][A], p. 1325–39 (15th ed. Rev'd 2006)). The plan may provide for the creditor to be fully paid before the end of the plan. At that time, the creditor no longer has a claim or a lien, and the equal monthly payments may cease. *Id.* at 268-69, *some citations omitted*.

### AND THEN:

Confirmation on that exact plan was denied for other reasons, but a subsequent plan sailed through. Once again, things went fine for the Debtor, and he got his discharge.

➤ *In re Marks*, 394 B.R. 198 (Bankr. N.D.Ill. 2008)

### UNDERLYING FACTS:

Kimberly Marks (N.D. Ill case number 08-b-06743) wanted to pay, through her Trustee, \$100.00 per month adequate protection to Marquette Consumer Finance, and step that up to \$375.00 per month in the 9<sup>th</sup>-or-so month of the plan. Her amended plan provided that the Trustee would pay \$200.00 per month, stepping up to \$530.00 in the 13<sup>th</sup> month. Her next amended plan studded those provisions, and her amended plan thereafter kicked adequate protection to \$225.00 per month, with payments stepping up to \$530.00. Anyway, all that was on a 2005 Hyundai Accent for which everyone basically agreed that the value was about \$8,367.45.

### HOLDING:

“Requiring Marquette to receive its claim value payment beginning with the first payment and throughout the duration of the plan conflicts with the provision of the Code requiring priority treatment of administrative expenses. Further, the dangers of abuse that precipitated the amendments to § 1325 are not inherent under this interpretation of the statute. Since Marquette is receiving adequate protection payments in the amount of depreciation while the administrative claims are covered, it will not be left holding the bag for any loss in value of the collateral if the plan should later fail or become converted to a chapter 7 case. Marquette is not injured by the plan so long as it is receiving these monthly payments equal to the collateral's depreciation. [...] Therefore, Marquette's objection relating to it receiving equal periodic payments under the Debtor's plan is overruled. There is no requirement in § 1326 that the plan payments to the creditor start in month one. Such cannot be contemplated since payment of priority payments under §§ 1326(b), 507(a)(2), and 503(b) of attorney's fees and trustee's fees will necessarily reduce the creditors' take in the initial stage of the plan as they have to be paid 'before or at the time of each payment to creditors.' 11 U.S.C. § 1326(b).” *Id.* at 204-205.

### AND THEN:

A bunch of stuff happened. The note at issue accrued interest at 18.49%, and her case was dismissed on a creditor's motion, on the grounds of nonpayment, on January 26, 2009. Her Trustee had paid \$2,025.00 adequate protection to Marquette.

Marquette, meantime, amended their proof of claim to include \$3,623.75 for attorneys' fees and costs incurred postpetition. \$3,742.70 was refunded to the Debtor by her Trustee.

And so, thereafter, Ms. Marks refiled. Her new case number was 09-b-03041.

Marquette made a thing out of her stay extension motion, and it proceeded to an evidentiary hearing. As of this writing, the transcript is on the docket at item number 38, and will cost \$4.00 to read. She was going to pay Marquette \$125.00 per month adequate protection this time around. The good faith showing is, of course, a high burden for any debtor to meet when there's an objecting creditor, but the following colloquy (*Transcript*, page 22), at the stay extension hearing, didn't help:

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*Q: Mrs. Marks, did your attorneys explain to you what adequate protection means?*

*A: No.*

*Q: Did they explain to you how much you had to provide to Marquette Consumer Finance?*

*A: They told me how much would go.*

Furthermore, Ms. Marks was called to defend the \$125.00 per month adequate protection to Marquette and, as the Court opined, as it was denying her stay extension: “[S]he couldn’t really supply any compelling testimony for the rationale for a markedly lower adequate protection offer in favor of [Marquette] in this case.” (*Transcript*, page 37.)

And so, in May of 2013, Ms. Marks converted her case to one under chapter 7; her schedule of post-petition debts indicated that she still owed Marquette a secured claim of \$6,572, an unsecured claim of \$4,045, and her statement of intention that she wanted to surrender the 2005 Hyundai Accent.

➤ *In re Scott*, 2012 WL 1999437 (Bankr. S.D.Tex. 2012)

### UNDERLYING FACTS:

Maria Scott (S.D. Tex. 12-b-31614) wanted to pay for a 2006 Dodge Charger secured by Woodlands Financial. Her plan provided specifically that her law firm would get periodic payments from months 1 through 9, until paid in full. From months 1 through 53, on the other hand, Woodlands would get paid their claim “Pro-Rata,” sharing their recovery with homeowner’s association fees, mortgage arrearages,

### HOLDING:

“[I]n order to determine whether this Plan meets § 1325(a)(5)(B)(iii)(I)’s requirement of “equal monthly payments,” one must perform a mathematical calculation to determine whether the proposed monthly plan payment allows for equal monthly payments of Woodlands’ claim over the Plan’s term. [...] While stating a specific amount in the Plan might have avoided the filing of an objection by Woodlands, the Debtor was well within the confines of §§ 1322 and 1325 by proceeding along her chosen route.” *Id.* at \*2.

### AND THEN:

Then nothing. The plan is confirmed, things are going along their way.

**“Fee Jumping” in Chapter 13 Cases:  
The Majority Says Permissible...Nobody Says Unethical**

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1. The majority position in case law sides with “fee jumping” as permissible.
  
2. The Bankruptcy Code Does Not Specify When Equal Monthly Payments Begin
  - a. 11 U.S.C. § 1325(a)(5)(B)(iii)(I): The Plan must equal monthly amounts
  - b. 11 U.S.C. § 1325(a)(5)(B)(iii)(II): The payments must be sufficient to provide adequate protection during the period of the plan.
  - c. Cases examining this line of reasoning:
    - i. *In re DeSardi*, 340 B.R. 790 (Bankr.S.D.Tex.2006)
    - ii. *In re Butler*, 403 B.R. 5 (Bankr.W.D.Ark.2009)
    - iii. *In re Hill*, 397 B.R. 259 (Bankr.M.D.N.C.2007)
    - iv. *In re Erwin*, 376 B.R. 897 (Bankr.C.D.Ill.2007)
    - v. *In re Marks*, 394 B.R. 198 (Bankr.N.D.Ill.2008)
  
3. Adequate Protection Payments & Superpriority under § 507(b)
  - a. BAPCPA amended § 1326 to prevent potential abuse in cases (Plan filed providing very little or no pmt to motor vehicle secured creditor & the creditors would wait long periods of time while the collateral was used with no compensation to account for depreciation).
    - i. *In re Marks*, *In re Desardi*
  - b. Calculating adequate protection varies – but Courts agree, once a method determined in a case, the creditor must receive payment of adequate protection.
  - c. Section 507(b) ensures adequate protection payments will be paid as a priority over administrative expense claims under § 507(a)(2).
    - i. *Desardi* explained clearly:

1. If paying the administrative priority claim of § 507(a)(2) prevented adequate protection disbursement, the plan would run afoul of § 507(b).
  2. Upon payment of adequate protection, payment of administrative priority claims could begin.
4. § 1326(b)(1) Gives Priority to Claims Arising Under § 507(a)(2) Over Payments To Creditors
  - a. Debtor's attorney' fees allowed under § 503(b) as administrative expenses are given priority over most claims through § 507(a)(2) – excepting domestic support obligations and trustee's administrative expenses.
  - b. Section 1326(b)(1) directs that unpaid § 507(a)(2) claims shall be paid “Before or at the time of each payment to creditors under the plan...”
  - c. When reading the Code, § 507(b) would be unnecessary if a creditor were entitled to equal monthly payments in an amount exceeding adequate protection post-confirmation.
  - d. *Desardi*:
    - i. Giving a secured creditor's periodic, equal monthly payments preference above the priority granted its § 507(a)(2) adequate protection disbursements by § 507(b) would assure their payment ahead of other § 507(a)(2) claims.
    - ii. As such, paying any funds in satisfactions of those claims beyond the adequate protection would directly contradict the plain language of § 1326(b)(1).
    - iii. The fact that § 1326(b)(1) remained unchanged by the sweeping amendments of BAPCPA implies this result was fully intended by Congress.
  - e. *In re Harris*, 304 B.R. 751 (Barnk.E.D.Mich.2004).
5. The real question: Is it ethical?
  - a. Of the ethical cannons relating to fees – none prohibit this.

- i. Rule 1.5: Fees
  - 1. The fees and expenses must be reasonable.
  - 2. The scope of representation and rate of the fee must be communicated to the client. While there is no ethical mandate for a writing, bankruptcy has built in mandates of fee disclosure.
    - a. §329 and Rule 2016
  - 3. Local Rules or Standing Orders may require more than just fee disclosure.
    - a. General Order 11-2 (Northern District of Illinois)
- b. Additional cannons that could tangentially relate
  - i. Rule 1.4 Communication:
    - 1. Rule 1.4(a)(2): Reasonably consult with the client about the means by which the client's objectives are to be accomplished.
    - 2. Rule 1.4(b): Explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
  - ii. Rule 1.7 Conflict of Interest:
    - 1. Rule 1.7(a)(2): Personal interest of the lawyer
      - a. Example: Allowing the lawyer's desire to be paid faster to put the client in a case that disadvantageous
        - i. Unfeasible simply due to the fact the attorney wants paid faster;
        - ii. Jeopardizes the client's ability accomplish their goals simply because attorney fees are to be paid faster.
        - iii. Reasonable rent/mortgage payments become impossible to make due to attorney attempting to accelerate fees.
      - b. Although this scenario is **EXTREMELY UNLIKELY**, it is worth noting.

6. The next question: Is it fair to your client?
  - a. Vehicles go into a case only if it makes sense.
    - i. Cramming principal and/or interest
    - ii. Present or impending default
    - iii. Reduce the total monthly output for the household
  - b. What if the case fails?
    - i. Attorneys don't prepare cases with the intent of them failing. Debtors don't file cases intending to fail.
    - ii. Most common reasons for a case failing: decrease income or increase in expenses
      1. There are plenty of options available to debtors when the case fails, once in a case, an auto is almost certainly never going to be near current due to the mostly absurd contractual terms.
      2. Sometimes, people will end up losing their vehicle.
      3. Increase in expenses
    - iii. Rare reason a case fails: debtor willfully chooses not to comply with the plan.
  - c. The benefits to a client by placing the vehicle in the plan, almost always outweigh the potential risk associated with case failure and eventual loss of the collateral.
  - d. Because they are income based, every single case has the potential to fail – **this does not mean a debtor's attorney should assume the risk and take less fees than they are entitled to receive.**
  - e. Bankruptcy is a second chance when things have gone wrong, sometimes horribly, for people. There are plenty of legal aid services available to the truly impoverished debtor that simply cannot afford to fund a Chapter 13 that includes attorney fees.
  - f. Preventing Priority Payment to Attorneys may close the doors to the court for those in most need (rare but worth noting).