AMERICAN
BANKRUPTCY
INSTITUTE

2019 Rocky Mountain Bankruptcy Conference

Consumer Workshop IV

***The Searchers*: Consumer Hot Topics and Case Law Update**

Hon. Kevin R. Anderson, Moderator
U.S. Bankruptcy Court (D. Utah); Salt Lake City

Alane A. Becket
Becket & Lee, LLP; Malvern, Pa.

Theodore J. Hartl
Ballard Spahr LLP; Denver

Mark S. Middlemas
Lundberg & Associates, PC; Salt Lake City

Hon. Cathleen D. Parker
U.S. Bankruptcy Court (D. Wyo.); Cheyenne

"THE SEARCHERS"

(SEARCHING OUT THE HOTTEST CONSUMER TOPICS IN BANKRUPTCY)
Friday, Jan. 25, 2019 from 3:30 to 4:45 (75 min.)

I. THE STING – CAN DEBTORS' COUNSEL USE A BIFURCATED FEE AGREEMENT TO BE PAID POST-PETITION IN CONSUMER CHAPTER 7 CASES?

The current status of the law generally holds that unless a debtor can pay the full Chapter 7 retainer up front, the balance will be discharged in the bankruptcy. However, few debtors can afford to pay up front attorney's fees. As a result, debtors are either proceeding in Chapter 7 without the benefit of counsel, or counsel have come up with various business models to avoid the discharge of their fees. Neither of these are good for the bankruptcy system.

A recent promotion by BK Billing[1] is pushing the bifurcation-of-services model. Under this model, the debtor pays a small fee up front for a bare-bones filing and then has the option to (1) proceed *pro se*, (2) hire another attorney, or (3) enter into a post-petition contract with the filing attorney. The legal theory is that the post-petition contract for post-petition bankruptcy services is non-dischargeable.

BK Billing has added another level to this model by offering to factor the attorney's fees and take over collection responsibilities. Under this option, debtor's counsel receives a discounted portion of the disclosed fee in exchange for the debtor signing up for automated, electronic payments to BK Billing. This factoring approach has resulting in court's sanctioning the attorney for ethical and disclosure violations. Courts are also troubled when counsel charges the debtor more to compensate for the reduced factoring payment received from BK Billing.

The following cases explain some of the pitfalls and possibilities in using the bifurcated services model so a debtor can make post-petition payments for post-petition legal representation.

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[1] A video explaining the BK Billing bifurcation-of-services model can be found at *https://www.youtube.com/watch?v=EoULM7J6rv8*

1. Cases Suggesting Bifurcated Fee Agreements May Be Appropriate.

Bethea v. Robert J. Adams & Assocs., 352 F.3d 1125, 1128 (7th Cir. 2003) (pre-BAPCPA, suggesting that bifurcation of services model might be possible); *Walton v. Clark & Washington, P.C.*, 469 B.R. 383 (Bankr. M.D. Fla. 2012) (endorses specific bifurcation of services model and provides guidance on how to do it); *In re Slabbinck*, 482 B.R. 576, 584 (Bankr. E.D. Mich. 2012) (same); *In re Waldo*, 417 B.R. 854, 895-96 (Bank. E.D. Tenn. 2009) (rejected counsel's use of post-dated checks, but endorsed bifurcation of services with appropriate processes); *In re Lawson*, 437 B.R. 609 (Bankr. E.D. Tenn. 2010) (same); *In re Griffin*, 313 B.R. 757, 769-70 (Bankr. N.D. Ill. 2004) (in *dicta*, endorses bifurcation model and provides some guidance); *In re Abdel-Hak*, No. 12-46329-MBM, 2012 Bankr. LEXIS 5393, 2012 WL 5874317, at *7 (Bankr. E.D. Mich. Nov. 16, 2012) (same).

2. Attorney Sanctioned for Using Bifurcated Fee Agreement.

In *In re Wright*, 2018 Bankr. LEXIS 2663, 2018 WL 4211570 (Bankr. N.D. Okla. Sept. 4, 2018), Debtors' counsel heard presentation at NACBA conference about BK Billing that provided a business model for collecting fees in consumer Chapter 7 cases. BK Billing provided forms, contracts, and proposed processes to facilitate the bifurcation of pre and post-petition services.

> The Pre-Petition Services. The attorney would only require a minimal, upfront fee ($250) for filing a bare-bones petition. Debtors were then given the option to hire the attorney to perform the services required for the debtor to receive a discharge ($1,400); hire other counsel; or proceed pro se. Not surprisingly, most debtors went with the first option.
>
> Post-Petition Services. If the debtor agreed to the post-petition services, the attorney had the debtors sign a post-petition contract. This contract informed the debtor that the post-petition attorney's fees were non-dischargeable and that the attorney would be selling the contract to BK Billing.
>
> BK Billing Factoring. Upon execution of the post-petition contract, the attorney would sell the contract to BK Billing for a discount of 25% to 30%, meaning the attorney would immediately receive from BK Billing 70% to 75% of the agreed fee. BK Billing would then employ various means to ensure collection of the attorney fee, such as setting up automatic electronic payments. If the debtor missed payments, BK Billing would proceed with the usual collection tactics, but sell of the contract was without recourse to the attorney.
>
> None of these elements of the BK Billing business model were disclosed in the Rule 2016 statement of compensation.

The bankruptcy court noted some unusual practices by the attorney and set one case for a hearing. For the first time, the court learned about the BK Billing business model. Later, the court held a hearing on the attorney's other Chapter 7 consumer cases.

The court ultimately found the following problems with the BK Billing business model as employed by the attorney.

1. Under § 329 and Bankruptcy Rule 2017, debtor's counsel must disclose all aspects of the fee arrangement, including any splitting of the fee with BK Billing.

2. The court found the attorney had violated his duty of candor to the court. The judge was especially troubled by the fact that when the attorney used BK Billing, clients were charged a fee that was 25% to 30% higher than clients who paid cash up front.

3. The court was also bothered that most of the fees were shifted to the post-petition contract so as to be nondischargeable. This was viewed as a possible fraudulent manipulation of fees to avoid their discharge

4. The court also questioned whether debtors were receiving adequate representation through the filing of a bare-bones petition.

5. The court found the attorney's practice of receiving a retainer while filing a motion to pay the filing fee in installments was a violation of § 526(a)(2) and Rule 1006.

6. While some cases have approved in general the concept of bifurcating pre and post-petition fees in Chapter 7 cases (see above), the court found such practices to be fraught with legal and ethical pitfalls. The court discouraged counsel from employing this strategy until the court had specifically addressed it in a properly raised motion.

Consequently, the court invalidated the BK Billing contracts so that it could not collect additional funds from debtors. The court also ordered the attorney to disgorge all fees he had received from BK Billing (the court noted it did not have jurisdiction over BK Billing).

3. Reasonableness of Attorney Fee Questioned Using BK Billing Model.

In *In re Ndon*, 2018 Bankr. LEXIS 3610 (Bankr. Del. Nov. 8, 2018), debtor's counsel followed the BK Billing model by filing the Chapter 7 petition for no money down and then giving the debtor the three options to (1) proceed *pro se*, (2) hire new counsel, or (3) retain existing counsel. The debtor retained existing counsel, who charged the client $2,832 and sold the receivable to BK Billing for a 25% discount. The debtor then signed an agreement with BK Billing for the automatic withdrawal of $236 per month until the fee was paid in full.

The UST raised objected to the reasonableness of the fee because counsel's average fee was $1,765. It also argued that the 25% difference between the fee charged and the amount counsel received from BK Billing was essentially an "exorbitant" interest rate the debtor paid for financing the post-petition attorney fee. Finally, the UST asserted that the nondischargeable, post-petition fee arrangement deprived the debtor of a fresh start.

The bankruptcy court "punted" on the UST's secondary arguments and focused instead on the reasonableness of the fee. Based on the additional services provided by counsel, the court found that the debtor had been overcharged $320 and required that amount to be disgorged.

Importantly, the court noted:

> This case raises the question of how the bankruptcy bar should seek to accommodate that segment of the debtor population who are in such extremis that they cannot afford to pay a lawyer to assist them prior to the need to file the voluntary petition. There is no doubt that debtors who are represented by counsel fare better than those who are not.

However, because the issue of the BK Billing factoring model was not before the court, it expressed no opinion.

II. DUDE, WHERE'S MY CAR? – "STAY MEANS STAY, NOT GO. "

1. *WD Equipment v. Cowen (In re Cowen)*, 849 F.3d 943 (10th Cir. Feb. 27, 2017)

Using arguably unscrupulous means, the creditor repossessed the debtor's trucks. The debtor filed under Chapter 13 and demanded their return. The creditor refused, and the debtor sought sanctions for violating the stay, but not before the debtor lost his job for lack of transportation. The bankruptcy court sided with the debtor and imposed actual and punitive sanctions against the creditor.

On appeal, the Tenth Circuit focused on the text of § 362(a)(3) regarding "any act" to obtain possession of or exercise control over property of the estate. It then ruled that § 362(a) "stays entities from doing something to obtain possession of or to exercise control over the estate's property. It does not cover 'the act of passively holding onto an asset.'" In other words, "Stay means stay, not go." Thus, the Tenth Circuit adopted the minority rule that "only affirmative acts to gain possession of, or to exercise control over, property of the estate violate § 362(a)(3)."

Cowen notes that the turnover requirements of § 542 do not cross reference to § 362. It then goes on to suggest that the turnover provisions of § 542 are not "self-executing;" thus, a debtor may need to bring a turnover motion to recover the collateral.

Cowen created a split between the Tenth and DC Circuit and the Second, Seventh, Eighth, Ninth and Eleventh Circuits, which hold that § 542 requires the immediate turnover of a repossessed vehicle, and that failure to do so is a violation of § 362.

2. ***Davis v. Tyson Prepared Foods Inc. (In re Garcia)*, 740 Fed. Appx. 163 (10th Cir. Oct. 17, 2018)**

This case involved the automatic, post-petition attachment of a statutory lien after a bankruptcy filing. Judge Nugent reluctantly followed *Cowen* but certified the case for an immediate appeal to the Tenth Circuit, but this was for naught. The Tenth Circuit held that only an *en banc* panel could reverse *Cowen*, and thus it remains binding precedent.

However, a petition for cert. will likely be filed in this case to address the split in Circuit rulings on this issue.

3. ***Denby-Peterson v. Nu2u Auto World*, 2018 U.S. Dist. LEXIS 187686, 2018 WL 5729907 (D. N.J. Nov 1, 2018)**

The logic of *Cowen* was adopted by a New Jersey District Court out of the Third Circuit. The court added some gloss to *Cowen* by holding that the creditor could retain possession of the car until the debtor provided proof of insurance.

III. Gone With The Wind? – Upon the Second Bankruptcy Filing Within a Year, Does Termination of the 30-Day Stay Apply as to Property of the Estate?

BAPCPA appeared to apply a “three strikes and you’re out” rule to serial filers. Specifically, if the debtor had a case pending within a year of the second filing, there is only a 30-day stay; and if two cases were pending within a year of the third filing, there is no automatic stay (§ 362(c)(3) and (4)). A majority of cases have held that the termination of the 30-day stay was only as to the debtor and property of the debtor, but not as to property of the estate (see *Jumpp v. Chase Home Fin., LLC (In re Jumpp)*, 356 B.R. 789 (B.A.P. 1st Cir. 2006) and its progeny). The practical effect of these cases is that the termination of the 30-day stay is of little consequence to a debtor, or its implication is sufficiently vague that creditors in such cases nonetheless frequently seek an order granting relief from stay.

1. ***Smith v. Maine Bureau of Revenue Servs.* 2018 U.S. App. LEXIS 34967 (1st Cir. Dec. 12, 2018)**

In *Smith v. Maine Bureau of Revenue Servs.*, 590 B.R. 1 (D. Ma. 2018), the bankruptcy court analyzed the majority positions but found them to be inconsistent with the intent of Congress to make it more difficult for serial filers to forestall a creditor’s legitimate collection actions.

The First Circuit just affirmed *Smith*, finding that "§ 362(c)(3)(A) terminates the entire stay thirty days after the filing of a second petition." The court applied the following analysis in reaching this conclusion:

> We first evaluate the parties' textual arguments and, finding that they do not resolve the issue, next consider the statutory context and congressional purpose. We ultimately decide that MRS's reading is the only one compatible with the text, seen in light of its context and purpose.[2]

Over the past year, other cases have followed the reasoning in *Smith* to find that the termination 30-day stay results in complete relief from the automatic stay.

2. ***In re Wade*, 592 B.R. 672 (Bankr. N.D. Ill. 2018)**

In the Northern District of Illinois, Judge Hunt in *In re Wade* issued a thorough and thoughtful opinion that likewise analyzed the statutory language and the various interpretations and concurred with the following analysis in Smith:

> *[S]ection 362(c)(3)(A)* terminates the stay under *subsection (a)*. In general, the stay under *subsection (a)* halts three kinds of acts: those directed against the debtor personally, *11 U.S.C. § 362(a)(1)*, *(2)*, *(6)*; those directed against property of the estate, *11 U.S.C. § 362(a)(2)*, *(3)*, *(4)*; and those directed against property of the debtor, *11 U.S.C. § 362(a)(5)*. A reference to the entirety of 'the stay under *subsection (a)*' would seem to extend to all types of acts covered by the stay. Likewise, a termination of the 'stay under *subsection (a)*' would seem to leave no part of the stay in place.[3]

3. ***In re Goodrich*, 587 B.R. 829 (Bankr. D. Ver. 2018)**

In the District of Vermont, Judge Brown reexamined a prior decision following the majority position. She started with an interesting analysis of changes in Supreme Court jurisprudence regarding the statutory interpretation of the Bankruptcy Code. After reviewing the majority and minority positions, with a focus on effectuating the policy issues intended to be addressed by BAPCPA, Judge Brown ruled:

> The Minority Approach meaningfully implements a deterrent to repeat filings by terminating the stay as to all creditors. It prudently balances a potent, across-the-board limitation on the stay when a debtor files a case within one year of having had another bankruptcy case dismissed, on the one hand, with the opportunity for

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[2] *Id*. at *3.

[3] *Id*. at 667 citing to *Smith*, 573 B.R. at 302.

individuals who file in good faith to retain the full impact of the stay even if their life circumstances led them to need a second bite at the bankruptcy apple.

4. **Other Cases Holding That Expiration of 30-Day Stay Results in a Complete Termination of the Stay.**

Other cases making similar findings are as follows: *In re Reswick*, 446 B.R. 362 (B.A.P. 9th Cir. 2011); *In re Bender*, 562 B.R. 578 (ED. N.Y. 2016); *In re Furlong*, 426 B.R. 303 (Bankr. C.D. Ill. 2010); *In re Daniel*, 404 B.R. 318 (Bankr. N.D. Ill. 2009); *In re Curry*, 362 B.R. 394 (Bankr. N.D. Ill. 2007).

ABI Rocky Mountain 2019

The Hottest Issues in Student Loans

Forgotten Faces of Student Loan Default

- Higher-than-average default rates
  - African American borrowers
  - Students who are parents
  - Low-income students
  - Students who do not complete college.
- Five groups of students that debt disproportionately burdens and typical analyses neglect
  - Veterans, first-generation college students
  - Students without a high school diploma,
  - Students with disabilities, and
  - Underrepresented minorities.

https://www.americanprogress.org/issues/education-postsecondary/news/2018/10/16/459394/forgotten-faces-student-loan-default/

A Brief History Of Student Loan Dischargeability

- 1976: Discharge of student loans in bankruptcy prohibited for first 5 years of repayment unless debtor could establish undue hardship.
- 1990: Discharge exception extended to 7 years.
- 1998: Federally guaranteed student loans could not be discharged at all absent showing of undue hardship.
- 2005: Discharge exception extended to all qualified education loans.

Upon graduation, the typical student has little or no non-exempt property that can be distributed to creditors, but may have substantial future earning potential. Section 523(a)(8) was designed to remove the temptation of recent graduates to use the bankruptcy system as a low-cost method of unencumbering future earnings. Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1306 (10th Cir. 2004)

11 USC 523(a):

(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, incurred by a debtor who is an individual; …

Dischargeability Burdens

- Lender: must establish the existence of the debt and that it is in one of the non-dischargeable categories
- Debtor: A plaintiff seeking to discharge student loan debt under 11 U.S.C. § 523(a)(8) bears the burden of proving the existence of undue hardship.

Undue? Hardship

"The bankruptcy code does not define 'undue hardship,' nor has the Tenth Circuit designated a test for the determination of the term. … [W]we noted that undue hardship is something more than inconvenience or doing without luxuries, stating that 'the discharge of a student loan should be based upon an inability to earn and not simply a reduced standard of living.'"

Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1306 (10th Cir. 2004)

10th Circuit Adopts *Brunner*

- In order to establish undue hardship, the plaintiff must show that
- She cannot maintain a minimal standard of living if forced to repay the loans;
- Additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period; and
- She has made a good faith effort to repay.

Educ. Credit Management Corp. v. Polleys (In re Polleys), 356 F.3d 1302 (10th Cir. 2004).

In adopting this test, however, the Tenth Circuit makes clear that it disdains "overly restrictive" interpretations of the test, and concludes that it should be applied to "further the Bankruptcy Code's goal of providing a 'fresh start' to the honest but unfortunate debtor[.]"

In re Alderete, 308 B.R. 495, 503 (B.A.P. 10th Cir. 2004)

The Debtor Cannot Maintain a Minimum Standard of Living While Repaying the Student Loan Debt

… bankruptcy courts should evaluate the debtor's current financial situation. They should take into consideration whether the debtor has demonstrated any reason why he or she is unable to earn sufficient income to maintain him/herself and dependents while repaying the student loan debt

*In re Alder*ete, 308 B.R. 495, 503 (B.A.P. 10th Cir. 2004)

Additional Circumstances Exist Indicating that this State of Affairs is Likely to Persist for a Significant Portion of the Repayment Period

The second *Brunner* element … properly recognizes that a student loan is "viewed as a mortgage on the debtor's future." *However, in applying this prong, courts need not require a "certainty of hopelessness." Instead, a realistic look must be made into [a] debtor's circumstances and the debtor's ability to provide for adequate shelter, nutrition, health care, and the like. Importantly, "courts should base their estimation of a debtor's prospects on specific articulable facts, not unfounded optimism,"* and the inquiry into future circumstances should be limited to the foreseeable future, at most over the term of the loan.

In re Alderete, 308 B.R. 495, 504 (B.A.P. 10th Cir. 2004)

Good Faith

"…to better advance the Bankruptcy Code's "fresh start" policy, and to provide judges with the discretion to weigh all the relevant considerations, the terms of the test must be applied such that debtors who truly cannot afford to repay their loans may have their loans discharged. Additionally, we think that the good faith portion of the Brunner test should consider whether the debtor is acting in good faith in seeking the discharge, or whether he is intentionally creating his hardship."

Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1309 (10th Cir. 2004)

Good Faith

In *Alderete*, however, the Tenth Circuit held that failure to seriously consider these repayment alternatives is an important factor to consider in the good faith analysis. Following the *Alderete* decision, bankruptcy courts in the Tenth Circuit have acknowledged that a debtor's willingness to consolidate his loan under the William D. Ford Federal District Student Loan Programs Income Contingent Plan ("ICRP") or IBR is an important factor to consider in determining whether a debtor has made a good faith effort to repay a student loan debt. Courts in other jurisdictions have similarly recognized the importance of consideration of alternative loan repayment programs in determining whether a debtor has made a good faith effort to repay. Accordingly, the Court remands for further consideration and clarification the impact of the IBR on the bankruptcy court's good faith analysis.

In re Johnson, No. 15-2631-JAR, 2016 WL 827752, at *6 (D. Kan. Mar. 2, 2016)

Qualified Education Loan (QEL)

- A QEL is any indebtedness incurred solely to pay qualified higher education expenses of the debtor, his or her spouse, or any other who was a dependent of the debtor when the indebtedness was incurred. 26 U.S.C. § 221(d)(1)(A)
- The expenses must be paid or incurred within a reasonable time before or after the incurring of the indebtedness. 26 U.S.C. § 221(d)(1)(B).
- The loan must be attributable to education provided while the recipient was an eligible student. 26 U.S.C. § 221(d)(1)(C). An eligible student is one who carries at least one half of the normal full time academic load for his particular course of study. 26 U.S.C. § 25A(b)(3)(B).
- A qualified education loan may not be owed to a debtor's relative, employer, or under certain employment related contracts (see 26 U.S.C. § 72(p)(5)). 26 U.S.C. § 221(d)(1).

Qualified Education Expenses

- The costs of attendance at an eligible educational institution, less the amounts of certain items including scholarships and allowances. 26 U.S.C. § 221(d)(2).
  - Required hours of instruction
  - Institution must be eligible to participate in "title IV" programs
- Qualifying costs of attendance are itemized in 20 U.S.C. §1087ll. and include the expected costs such as tuition, fees, books, supplies, room and board, and others. The lists of qualifying costs vary according to the student's status, e.g., full-time, half-time, program of study by correspondence or telecommunications, and others.

Educational Benefit

- Private loans confer an educational benefit to the borrower vs. narrow view, private loans are not within the subsection
- Courts divided: no controlling precedent in 10th

In re McDaniel, 590 B.R. 537 (Bankr. D. Colo. 2018)

Payment in Chapter 13

- Student loan repayment as a special circumstance to rebut the presumption of abuse or as a deduction
- Payment as long term debt via 1322(b)(5): *a plan may ... provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due....*
- Separate classification via 1322(b)(1) (The Tenth Circuit has not considered unfair discrimination under § 1322(b)(1).)

Separate Classification

….somewhere between total whim and an Act of God lies the answer to what justification is needed to hew out a particular class of unsecured creditors and distinguish it from other unsecured creditors

In re Orawsky, 387 B.R. 128, 141 (Bankr. E.D. Pa. 2008)

Leser/Wolff Test

- The discrimination has a reasonable basis
- The debtor can carry out a plan without the discrimination
- The discrimination is proposed in good faith
- The degree of discrimination is directly related to the basis or rationale for the discrimination

- Husted: added to *Leser*: "whether the difference between what the creditors discriminated against will receive as the plan is proposed, and the amount they would receive if there were no separate classification"

Bird

1. Whether the discrimination substantially enhances or is necessary to the feasibility of the plan;
2. whether the discrimination reflects chapter 7 liquidation priorities;
3. whether the discrimination is otherwise contemplated by the Code;
4. whether the creditor discriminated against will receive more under the plan than it would in a hypothetical chapter 7 liquidation;
5. if the creditors as a whole will receive more under the plan than in a hypothetical chapter 7 liquidation, will the discrimination encourage the use of chapter 13;
6. will the discrimination reduce the chances that the debtor will be forced to file bankruptcy in the future;
7. does the discrimination enhance an interest of the debtor which is otherwise protected or furthered by the Code; and
8. the extent of the discrimination.

In re Bird, 1994 WL 738644 (Bankr. D. Idaho Dec.23, 1994)

Other tests:

- Baseline test:
  - Equality of distribution.
  - Nonpriority of student loans.
  - Contributions: mandatory v. optional.
  - A fresh start for honest debtors.

In re Bentley, 266 B.R. 229, 237 (B.A.P. 1st Cir. 2001)

- Legitimate interests of the debtor test: discrimination is fair to the extent it rationally furthers an articulated, legitimate interest of the debtor.

In re Lawson, 93 B.R. 979, 984 (Bankr.N.D.Ill.1988)

- Correlative benefit to the creditor approach: to justify discrimination a debtor is required to place something material on the scales to show correlative benefit to the disfavored creditors.

McCullough v. Brown, 162 B.R. 506, 507 (N.D. Ill. 1993)

Repayment Options and Undue Hardship

- *Brunner* undue hardship test as interpreted by the Tenth Circuit
- In *Alderete*, however, the Tenth Circuit held that failure to seriously consider these repayment alternatives is an important factor to consider in the good faith analysis. Following the *Alderete* decision, bankruptcy courts in the Tenth Circuit have acknowledged that a debtor's willingness to consolidate his loan under the William D. Ford Federal District Student Loan Programs Income Contingent Plan ("ICRP") or IBR is an important factor to consider in determining whether a debtor has made a good faith effort to repay a student loan debt.

Educ. Credit Management Corp. v. Polleys (In re Polleys), 356 F.3d 1302 (10th Cir. 2004).

Loan Payments as "Special Circumstances" to Rebut the Presumption of Abuse: YES

- Student loan debt, which could not be discharged, consolidated or deferred, qualified as 'special circumstance.'
  - The student loans are non-dischargeable
  - Debtors are not eligible for consolidation
  - They are not eligible for deferment of the student loans
  - There is nothing within the Debtors' power to reduce or otherwise avoid the additional expense of the student loans.

In re Templeton, 365 B.R. 213 (Bankr. W.D. Okla. 2007).

Loan Payments as "Special Circumstances" to Rebut the Presumption of Abuse: NO

This Court agrees with the numerous courts which have concluded that whether special circumstances are present is a factual determination made on a case-by-case basis.[43] The circumstances which gave rise to the loan are an important, if not the determinative, factor. Most student loans are incurred in the ordinary course to enhance earning potential or to change to a more desirable field of endeavor. It will be an unusual case where the circumstances of a student loan creates a financial condition which justifies the inclusion of this expense in the means test. It is the nondischargeability of student loans which cause a debtor to be faced with unsatisfactory alternatives, but the flexibility of the special circumstances rebuttal of the presumption of abuse does not have as its purpose the mitigation of economic hardship resulting from nondischargeability. Its purpose is to allow debtors to rebut the presumption of abuse by demonstrating the absence of meaningful ability to repay unsecured debt because of special circumstances which increase expenses above those permitted by the statutory means test.

In re Champagne, 389 B.R. 191, 200 (Bankr. D. Kan. 2008)

ABI Consumer Commission Comments DOE's RFI for evaluating undue hardship

I. Promulgation and Interpretation of Regulations

(a) Bright-line Rules. Creditors should not oppose discharge proceedings where the borrower meets any of a set of the criteria below. These criteria should be set out in federal guidelines that indicate household financial distress and therefore undue hardship:

- Disability-based guidelines
- Poverty based guidelines

(b) Alternative Payment Plans.

ABI Commission Recommendations

II. Best Interpretation of 11 U.S.C. § 523(a)(8):

(a) *Brunner Test.* The three-factor Brunner test should be understood to require the debtor to establish only that

(1) the debtor cannot pay the student loan sought to be discharged according to its standard ten-year contractual schedule while maintaining a reasonable standard of living,

(2) the debtor will not be able to pay the loan in full within its initial contractual payment period (10 years is the standard repayment period) during the balance of the contractual term, while maintaining a reasonable standard of living, and

(3) the debtor has not acted in bad faith in failing to pay the loan prior to the bankruptcy filing.

(b) *Standard of Proof*.

(c) *Appellate Review*.

Borrower Defense to Repayment

- Giving borrowers access to consistent, clear, fair, and transparent processes to file claims;
- Empowering the Secretary to provide debt relief to borrowers without requiring individual applications in instances of widespread misrepresentations;
- Protecting taxpayers by ensuring that financially troubled institutions provide the government with protection against the risks they create and that institutions whose actions lead to discharges of Federal student loans are held responsible;
- Helping students make more informed decisions by requiring proprietary schools with poor loan repayment outcomes to include a plain-language warning in their advertising and promotional materials;
- Ensuring affected borrowers have information about loan discharge when schools close and access to an automated process; and
- Banning schools from inducing students to sign pre-dispute arbitration agreements that waive their rights to go to court and bring class action lawsuits based on borrower defense claims.

Borrower Defense to Repayment

- The final regulations strengthen several provisions in response to public comment on the proposed regulations, including:
  - **Early Implementation of Automatic Closed School Discharge:** The final regulations provide for the automatic discharge of the loans of borrowers whose school closed on or after Nov. 1, 2013 and have not re-enrolled in another Title IV participating institution within three years. The Department intends to designate this provision for early implementation as soon as operationally possible before July 1, 2017, which will allow eligible Corinthian borrowers to benefit from this streamlined process sooner.
  - **Banning All Pre-dispute Arbitration Agreements:** The final regulations strengthen the limitations on pre-dispute arbitration agreements that prevent students from taking institutions to court by permanently banning any pre-dispute arbitration agreements for all Direct Loan borrowers for disputes related to the educational services provided or the making of Direct Loans, regardless of whether such clauses are a condition of enrollment. These provisions not only allow students to choose where to pursue claims against an institution after claims arise, but also prohibit institutions from banning class action lawsuits by students.
  - **Determining Borrower Defense Loan Relief:** The final regulations make clear that the Department will determine in a reasonable and practicable way the appropriate relief for a borrower defense claim, taking into account any educational benefit received.

The Searchers: Consumer Hot Topics and Case Law Update

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2019 Rocky Mountain Bankruptcy Conference

Discharge and Dischargeability Issues

Theodore J. Hartl
Ballard Spahr LLP
Denver, CO
hartlt@ballardspahr.com

I. Are Chapter 13 Payments Directly to Mortgage Holder "Under the Plan" for Discharge Purposes?

* Section 1328 states that the Court "shall" grant the debtor a discharge "as soon as practicable after completion by the debtor of all payments under the plan . . . ." 11 U.S.C. § 1328(a);

* Non-conduit mortgage jurisdictions (i.e. Chapter 13 trustee does not collect regular, post-petition mortgage payments from the debtors) allow debtors to pay post-petition obligations directly to the creditor;

* Cases are split as to whether, upon the debtors' completion of all plan payments to the Chapter 13 trustee, a post-petition default in "direct" creditor payments precludes discharge under Section 1328.

Which Chapter 13 Payments Are “Under the plan”?

In re Gibson, 515 B.R. 15 (Bankr. C.D. Ill. 2018):

Debtors failed to make any post-petition payments directly to 2nd mortgage creditor despite plan provisions requiring direct payments; trustee initially filed a notice under Rule 3002.1(f) of final cure payment, but then moved to dismiss case before discharge, following 2nd mortgage creditor’s response under Rule 3002.1(g) advising of post-petition “direct- pay” defaults.

Court: Section 1328(a) is ambiguous. “Under the plan” intended to be narrower than “provided for by the plan” under same subsection concerning scope of Chapter 13 discharge.

Direct payments are not “payments under the plan” for purposes of Section 1328(a). Denying Chapter 13 debtors a discharge after five years of payments to trustee but default in direct payments is “punishment [that] does not fit the crime.”

In re Bethe, Case No. 11-25388 GMH, 2017 Bankr. LEXIS 2554 (Bankr. E.D. Wis. Sept. 8. 2017):

Debtors defaulted in post-petition mortgage payments that were to be made directly to creditor; trustee nevertheless certified that debtors had completed plan payments and Court entered discharge; trustee filed notice of final cure payment under Rule 3002.1(f); mortgage creditor’s response reflected post-petition defaults and Court *sua sponte* scheduled hearing to consider vacating debtors’ discharge.

Court: Entry of discharge was “a mistake” because debtors had not completed all payments “under the plan” (despite trustee’s certification). Although debtors did not qualify for Chapter 13 discharge given post-petition default in direct payments to mortgage creditor as “payments under the plan,” an order vacating debtors’ discharge under Rule 60(b) was not warranted under “the equities” of the case.

Endorsing a “holistic” view of Chapter 13 and adopting *In re Caughlin*, 568 B.R. 461 (Bankr. E.D.N.Y. 2017) in concluding that direct payments are, in fact, “under the plan” for purposes of Section 1328(a), and harmonizing Section 1228(a) (which contains additional phrase “other than” with respect to long-term secured debt).

II. Can Debtors Cure Chapter 13 Plan Defaults After 60 Month Commitment Period to Obtain Discharge?

* Section 1322(d) and Section 1325(b)(4) provide for a maximum commitment period of five years for Chapter 13 plans;

* Section 1329 permits modification of confirmed plans to "extend or reduce the time" for plan payments, subject to certain restrictions;

* Cases are split as whether the Court may extend the time for debtors to complete plan payments beyond the initial five year commitment period.

In re Humes, 579 B.R. 557 (Bankr. D. Colo. 2018):

Debtors' Chapter 13 plan required modification if debtor-husband got a job, in order to increase plan payments based on new household income; debtor got a job but failed to modify plan to increase payments; debtors completed all plan payments but trustee moved to dismiss based on increased income; debtors stipulated with trustee to pay additional $17,000 over several months, making them eligible for discharge seven months after the end of sixty-month plan term.

Court: Debtors' stipulation with the trustee could not be approved. No discretion to allow debtors to make plan payments beyond "hard line" five year period.

Five year period commences upon first plan payment due within thirty days of the order for relief (or within thirty days of filing of the plan, if earlier), not upon confirmation. Driven by text of Section 1352(b)(1)(B) and Section 1326(a)(1) and *Christensen v. Black (In re Black)*, 292 B.R. 693 (B.A.P. 10th Cir. 2003) (disapproving of Chapter 13 plans extending beyond five year commitment period).

In re Klaus, 858 F.3d 820 (3d Cir. 2017):

Debtors completed five years of plan payments but were short by $1,123.00; the trustee moved to dismiss and the debtors cured the arrearage in month sixty-one, within sixteen days of the trustee's motion; unsecured creditor joined the trustee's motion and pressed for dismissal; bankruptcy court denied motion to dismiss and district court affirmed.

Court: Affirmed; dismissal not required. Bankruptcy court "plainly" may not confirm or modify a plan that proposes payment term greater than five years. But Sections 1307 and 1328 allow bankruptcy courts to deny a motion to dismiss and issue "completion discharge" where late curative payment is made during "grace period" beyond five year term.

The "non-exhaustive list of factors a bankruptcy court should consider in deciding whether to allow a grace period include: (1) whether the debtor substantially complied with the plan, including the debtor's diligence in making prior payments; (2) the feasibility of completing the plan if permitted, including the length of time needed and amount of arrearage due; (3) whether allowing a cure would prejudice any creditors; (4) whether the debtor's conduct is excusable or culpable, taking into account the cause of the shortfall and the timeliness of notice to the debtor; and (5) the availability and relative equities of other remedies, including conversion and hardship discharge." *Id*. at 832.

III. <u>Once Non-Dischargeable Always Non-Dischargeable</u>?

* Is creditor required to file timely dischargeability complaint under Section 523 in subsequent bankruptcy case where debt was determined to be non-dischargeable in prior case?

* Section 523(b) is limited exception to allow determination of dischargeability for debts arising under Section 523(a)(1) (taxes), (3)(unscheduled claims), or (8) (student loans);

* Are dischargeability determinations always given preclusive effect in subsequent bankruptcy cases?

TIA Corp. v. Bridges (In re Bridges), 583 B.R. 696 (Bankr. W.D. Mich. 2018):

Debtor's prior Chapter 13 case dismissed before discharge entered but bankruptcy court had determined debt to be non-dischargeable; in subsequent Chapter 7 case, creditor filed a further complaint under Section 523(a)(2), (4), and (6) to determine the same dischargeability issues.

Court: Prior dischargeability determination may have preclusive effect in subsequent Chapter 7 case, but the fact that debtor did not obtain Chapter 13 discharge in prior case warranted declaratory judgment of non-dischargeability in subsequent Chapter 7 case.

Chase v. Chase (In re Chase), Adv. No. 8-15-8369-LAS, 2018 Bankr. LEXIS 1291 (Bankr. E.D.N.Y. May 1, 2018):

Domestic support obligation was determined to be non-dischargeable in first Chapter 7 case under Section 523(a)(5); after further proceedings in state court, debtor filed second Chapter 7 case and ex-spouse filed further complaint to determine non-dischargeability of same debt.

Court: Complaint in second Chapter 7 case and claims for non-dischargeability entitled to preclusive (collateral estoppel) effect. Domestic support obligations not within limited exception for re-determination of non-dischargeability under Section 523(b).

IV. Vicarious Liability in Dischargeability Cases

* Although certain debts (e.g. for fraud or embezzlement) may be excepted from discharge if state law imposes vicarious liability on the debtor, debts for willful and malicious injuries typically are not, absent proof of the debtor's intent to injure.

Compare Cocoma v. Nigam (In re Nigam), No. CO-17-044, 2018 Bankr. LEXIS 2391 (B.A.P. 10th Cir. Aug. 9, 2018) (affirming bankruptcy court's judgment dismissing Section 523(a)(6) claims where debtor was not direct participant in co-member's conversion of funds through limited liability company) *with*

Armstrong v. Oslin (In re Oslin), 584 B.R. 363 (Bankr. N.D. Okla. 2018) (dismissing Section 523(a)(6) claims against bar owner based on strict, vicarious liability under state court judgment entered for Oklahoma dram shop violations).

1) **Lien Strip and 522(f) issues (*Cozad* Times at the El Royale)**

a. **In re Taylor,** 899 F.3d 1126 (10th Cir. August 14, 2018)(Abrogating In re: Cozad, 208 B.R. 495 (B.AP. 10th Cir. 1997), the Tenth Circuit held that the court are to interpret "all other liens on the property" in 11 U.S.C. § 522(f)(2)(A)(ii) as referring to to all other liens agaisnt the debtor's actual, proportional interest in the property (i.e. a one-half interest). Judicial liens may be stripped when they impair the homestead exemption to which debtor is otherwise entitled. "All other liens" are proportional to the debtor's interest when calculating the extent of the exemption impairment.)

b. **Burkart v. Grigsby,** 886 F.3d 434 (4th Cir. Mar. 29, 2018)(A senior lien holder was only partially secured, and junior lien holder were considered, by definition, holders of an unsecured claims and subject to being stripped even in the absence of filed proofs of claim. A debtor may strip a lien in a Chapter 13 case regardless of whether a party has filed a proof of claim. The ability of a Chapter 13 debtor to strip off an underwater lien arises from 11 U.S.C. § 1322(b), not 11 U.S.C. § 506(d), which allows for the modification of unsecured creditors' rights. The existence of an unsecured claim is a question of the value of the underlying collateral, not the existence of a security interest. Courts are not limited to valuing only that claims that have been filed and allowed.)

2) **CFPB Periodic Statements and Informational Communications (A Hard Cordray's Night)**

a. **CFPB requirements and communications for informational purposes only. 12 CFR 1026.41 (See Exhibit):** As of 4/19/18 the exclusion for lenders dealing with borrowers in bankruptcy has ended and creditors must send modified periodic statements to borrowers, modified for bankruptcy, including case chapters.

b. **In re: McCarthy,** 421 B.R. 550 (Bankr. D. Colo. 2009)(Not all communications between a debtor and creditor are prohibited by the automatic stay, for instance the sending of informational account statements and notifications will not violate the automatic stay as long as the statements and notifications are not "coercive." The determination as to whether a particular creditor communication violates the automatic stay depends on the type of communication that was sent to the debtor and whether the communication had a purpose other than collection of a debt outside the parameters of the Bankruptcy Code.)

c. **In re: Hardward,** 2011 WL 3799768 (Bankr. D. Utah 2011)(Not all communications from a creditor to debtor are *per se* violations of the automatic stay. The court did not impose sanctions against a secured creditor, which knowingly mailed a letter to the debtor to preserve its deficiency rights under state law and provide the debtor with additional information. The statutorily mandated letter did not harass the debtor nor was it an attempt to collect a debt.)

3) **Creditor Sanctions (Three the Hard Way and One Flew Over the Cuckoo's Nest)**

a. **In re: Ogden,** 2016 WL 1077355 (D. Colo., March 18, 2016)(The district court awarded sanctions against creditor who mailed a loan modification solicitation letter than included boiler plate language regarding foreclosure of the debtor's property and that failed to acknowledge the debtor's bankruptcy or confirmed plan. The loan servicer refused to cooperate with the debtors or to acknowledge and correct inaccurate accounting until the court finally found ill-will and awarded sanctions.)

b. **In re: Milliman,** 2018 WL 1475937 (Bankr. D. KS, March 23, 2018)(The court began the opinion: "It's not that hard. All a home loan creditor needs to file a proof of claim is an amount due, a payment record, copies of the relevant writings, an escrow account report current at the date of the petition, and a reliable calculation of the arrearages that may be due...of course people make mistakes, but when they do, it shouldn't be that hard to correct them." Court imposed sanctions against secured creditor who filed an inaccurate proof of claim and then failed to respond to, or correct, the issues in a timely and meaningful manner.)

c. **In re: Soriano,** 587 B.R. 371 (Bankr. D. OK, June 18, 2018)(The automatic stay is meant to afford debtors "breathing room" free from creditor harassment, and uncommunicated internal record keeping, including the unilateral imposition of fees and costs, do not violate the stay, but may present a question of fact for purposes of summary judgment and to determine what if any communicated information violated the stay.)

d. **In re: Cushman,** 2018 WL 3222636 (Bankr. D. Maine, June 29, 2018)(Court declined to use inherent powers to sanction creditor who had an employee sign a proof of claim that the employee did not prepare or review, and which did not comply with either Fed. R. Bankr. P. 9011 or 3001.)

4) Effect of Chapter 7 Discharge on Mortgage (Lien on Me)

a. **In re: Schueller,** 303 F. Supp. 3d 1171 (Bankr. D. N.M. March 28, 2018) (Court denied sanctions against mortgage creditor that continued to automatically withdraw payments from debtor's account after debtor received Chapter 7 discharge. Mortgage creditor retained a lien against the property and had a right to continue to withdraw payments pursuant to debtor's prior voluntary payment arrangement, and its actions did not constitute an attempt to collect a discharged debt against the debtor personally.)

5) 11 U.S.C. § 362(d)(4) (The Man Who Knew Too Little)

a. **In re: Vazquez**, 580 B.R. 526 (Bankr. C.D. Cal. 2017)(The provisions under 11 U.S.C. § 362(d)(4) are applicable even where a debtor is unaware of the scheme to hinder, delay or defraud a creditor, but the filing of the bankruptcy and unauthorized transfer of interest was still part of a scheme.)

6) Standing and Statute of Limitations on Non-Judicial Foreclosures (Note of the Living Dead)

a. **Sterling Fiduc. LLC v. JP Morgan Chase, NA,** 402 P.3d 130 (Utah Ct. App. August 3, 2017)(Gaps in the chain of mortgage assignments did not impair creditor's standing where creditor was in possession of the original note.)

b. **Koyle v. Sand Canyon Corp.,** 683 Fed. Appx. 715 (10th Cir. 2017) (The 10th Circuit affirmed the district court's ruling that the statute of limitations was not a bar to enforcement of the a secured mortgage debt where the debtor acknowledged the debt in a prior "agreed order" and where the lender unilaterally decelerated and accelerated the note within the six-year applicable statute of limitations period.)

c. **Paggen v. Bank of America, N.A.,** 2018 WL 4075881 (D. Colo. August 27, 2018) (A lender may unilaterally decelerate by withdrawal and abandonment of prior

notices of election and demand for sale, and the applicable statute of limitations runs from the date of the new notice.)

d. **Lewis v. Caliber,** 2018 WL 485967 (D. Utah January 18, 2018)(A lender is within its rights to decelerate the debt by cancellation of its notice of default, and the statute of limitations will begin to run again upon the acceleration of the debt by a new notice.)

e. **Moreno v. U.S. Bank,** (D. Colo. Aug. 10, 2018)(The court denied the debtor's motion to declare her mortgage debt time-barred under the applicable statute of limitations. The court ruled that judicial estoppel precluded court from granting the debtor's motion because she had acknowledged the debt and her intent to pay the debt in prior Chapter 13 plans and could not now argue that the debt was unenforceable.)

f. **King v. Select Portfolio Servicing, Inc.**, 2018 WL 3239486 (5th Cir. July 2, 2018) (A lender may unilaterally abandon prior notices of default. Abandonment of prior notices stops the running of the statute of limitations, and can be accomplished either expressly through formal notice to the borrower or implicitly through conduct inconsistent "...with a claim to the right." Formal cancellation was not required where the lender filed notices in 2008, 2010, 2012, and 2014 and each notice restarted the statute of limitations period in which to complete a foreclosure.)

7) National Plan Compliance (Indiana Jones and the Case that Didn't Get Confirmed Because The Debtor Tried to Modify the National Plan Form)

a. **In re: Parkman**, 2018 WL 4091804 (Bankr S.D. Miss., August 13, 2018)(Court denied confirmation because debtor refused to use Mississippi form plan, patterned after national plan, and abused the "non-standard" provisions section of the form plan by including seven provisions that attempted to substitute the debtor's plan in place of the form plan.)

Code of Federal Regulations
Title 12. Banks and Banking
Chapter X. Bureau of Consumer Financial Protection (Refs & Annos)
Part 1026. Truth in Lending (Regulation Z) (Refs & Annos)
Subpart E. Special Rules for Certain Home Mortgage Transactions (Refs & Annos)

12 C.F.R. § 1026.41

§ 1026.41 Periodic statements for residential mortgage loans.

Effective: April 19, 2018
Currentness

(a) In general—

(1) Scope. This section applies to a closed-end consumer credit transaction secured by a dwelling, unless an exemption in paragraph (e) of this section applies. A closed-end consumer credit transaction secured by a dwelling is referred to as a mortgage loan for purposes of this section.

(2) Periodic statements. A servicer of a transaction subject to this section shall provide the consumer, for each billing cycle, a periodic statement meeting the requirements of paragraphs (b), (c), and (d) of this section. If a mortgage loan has a billing cycle shorter than a period of 31 days (for example, a bi-weekly billing cycle), a periodic statement covering an entire month may be used. For the purposes of this section, servicer includes the creditor, assignee, or servicer, as applicable. A creditor or assignee that does not currently own the mortgage loan or the mortgage servicing rights is not subject to the requirement in this section to provide a periodic statement.

(b) Timing of the periodic statement. The periodic statement must be delivered or placed in the mail within a reasonably prompt time after the payment due date or the end of any courtesy period provided for the previous billing cycle.

(c) Form of the periodic statement. The servicer must make the disclosures required by this section clearly and conspicuously in writing, or electronically if the consumer agrees, and in a form that the consumer may keep. Sample forms for periodic statements are provided in appendix H–30. Proper use of these forms complies with the requirements of this paragraph (c) and the layout requirements in paragraph (d) of this section.

(d) Content and layout of the periodic statement. The periodic statement required by this section shall include:

(1) Amount due. Grouped together in close proximity to each other and located at the top of the first page of the statement:

(i) The payment due date;

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(ii) The amount of any late payment fee, and the date on which that fee will be imposed if payment has not been received; and

(iii) The amount due, shown more prominently than other disclosures on the page and, if the transaction has multiple payment options, the amount due under each of the payment options.

(2) Explanation of amount due. The following items, grouped together in close proximity to each other and located on the first page of the statement:

(i) The monthly payment amount, including a breakdown showing how much, if any, will be applied to principal, interest, and escrow and, if a mortgage loan has multiple payment options, a breakdown of each of the payment options along with information on whether the principal balance will increase, decrease, or stay the same for each option listed;

(ii) The total sum of any fees or charges imposed since the last statement; and

(iii) Any payment amount past due.

(3) Past Payment Breakdown. The following items, grouped together in close proximity to each other and located on the first page of the statement:

(i) The total of all payments received since the last statement, including a breakdown showing the amount, if any, that was applied to principal, interest, escrow, fees and charges, and the amount, if any, sent to any suspense or unapplied funds account; and

(ii) The total of all payments received since the beginning of the current calendar year, including a breakdown of that total showing the amount, if any, that was applied to principal, interest, escrow, fees and charges, and the amount, if any, currently held in any suspense or unapplied funds account.

(4) Transaction activity. A list of all the transaction activity that occurred since the last statement. For purposes of this paragraph (d)(4), transaction activity means any activity that causes a credit or debit to the amount currently due. This list must include the date of the transaction, a brief description of the transaction, and the amount of the transaction for each activity on the list.

(5) Partial payment information. If a statement reflects a partial payment that was placed in a suspense or unapplied funds account, information explaining what must be done for the funds to be applied. The information must be on the front page of the statement or, alternatively, may be included on a separate page enclosed with the periodic statement or in a separate letter.

(6) Contact information. A toll-free telephone number and, if applicable, an electronic mailing address that may be used by the consumer to obtain information about the consumer's account, located on the front page of the statement.

(7) Account information. The following information:

(i) The amount of the outstanding principal balance;

(ii) The current interest rate in effect for the mortgage loan;

(iii) The date after which the interest rate may next change;

(iv) The existence of any prepayment penalty, as defined in § 1026.32(b)(6)(i), that may be charged;

(v) The Web site to access either the Bureau list or the HUD list of homeownership counselors and counseling organizations and the HUD toll-free telephone number to access contact information for homeownership counselors or counseling organizations; and

(8) Delinquency information. If the consumer is more than 45 days delinquent, the following items, grouped together in close proximity to each other and located on the first page of the statement or, alternatively, on a separate page enclosed with the periodic statement or in a separate letter:

(i) The length of the consumer's delinquency;

(ii) A notification of possible risks, such as foreclosure, and expenses, that may be incurred if the delinquency is not cured;

(iii) An account history showing, for the previous six months or the period since the last time the account was current, whichever is shorter, the amount remaining past due from each billing cycle or, if any such payment was fully paid, the date on which it was credited as fully paid;

(iv) A notice indicating any loss mitigation program to which the consumer has agreed, if applicable;

(v) A notice of whether the servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, if applicable;

(vi) The total payment amount needed to bring the account current; and

(vii) A reference to the homeownership counselor information disclosed pursuant to paragraph (d)(7)(v) of this section.

(e) Exemptions—

(1) Reverse mortgages. Reverse mortgage transactions, as defined by § 1026.33(a), are exempt from the requirements of this section.

(2) Timeshare plans. Transactions secured by consumers' interests in timeshare plans, as defined by 11 U.S.C. 101(53D), are exempt from the requirements of this section.

(3) Coupon books. The requirements of paragraph (a) of this section do not apply to fixed-rate loans if the servicer:

(i) Provides the consumer with a coupon book that includes on each coupon the information listed in paragraph (d)(1) of this section;

(ii) Provides the consumer with a coupon book that includes anywhere in the coupon book:

(A) The account information listed in paragraph (d)(7) of this section;

(B) The contact information for the servicer, listed in paragraph (d)(6) of this section; and

(C) Information on how the consumer can obtain the information listed in paragraph (e)(3)(iii) of this section;

(iii) Makes available upon request to the consumer by telephone, in writing, in person, or electronically, if the consumer consents, the information listed in paragraph (d)(2) through (5) of this section; and

(iv) Provides the consumer the information listed in paragraph (d)(8) of this section in writing, for any billing cycle during which the consumer is more than 45 days delinquent.

(4) Small servicers—

(i) Exemption. A creditor, assignee, or servicer is exempt from the requirements of this section for mortgage loans serviced by a small servicer.

(ii) Small servicer defined. A small servicer is a servicer that:

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(A) Services, together with any affiliates, 5,000 or fewer mortgage loans, for all of which the servicer (or an affiliate) is the creditor or assignee;

(B) Is a Housing Finance Agency, as defined in 24 CFR 266.5; or

(C) Is a nonprofit entity that services 5,000 or fewer mortgage loans, including any mortgage loans serviced on behalf of associated nonprofit entities, for all of which the servicer or an associated nonprofit entity is the creditor. For purposes of this paragraph (e)(4)(ii)(C), the following definitions apply:

(1) The term "nonprofit entity" means an entity having a tax exemption ruling or determination letter from the Internal Revenue Service under section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3); 26 CFR 1.501(c)(3)–1), and;

(2) The term "associated nonprofit entities" means nonprofit entities that by agreement operate using a common name, trademark, or servicemark to further and support a common charitable mission or purpose.

(iii) Small servicer determination. In determining whether a servicer satisfies paragraph (e)(4)(ii)(A) of this section, the servicer is evaluated based on the mortgage loans serviced by the servicer and any affiliates as of January 1 and for the remainder of the calendar year. In determining whether a servicer satisfies paragraph (e)(4)(ii)(C) of this section, the servicer is evaluated based on the mortgage loans serviced by the servicer as of January 1 and for the remainder of the calendar year. A servicer that ceases to qualify as a small servicer will have six months from the time it ceases to qualify or until the next January 1, whichever is later, to comply with any requirements from which the servicer is no longer exempt as a small servicer. The following mortgage loans are not considered in determining whether a servicer qualifies as a small servicer:

(A) Mortgage loans voluntarily serviced by the servicer for a non-affiliate of the servicer and for which the servicer does not receive any compensation or fees.

(B) Reverse mortgage transactions.

(C) Mortgage loans secured by consumers' interests in timeshare plans.

(D) Transactions serviced by the servicer for a seller financer that meets all of the criteria identified in § 1026.36(a)(5).

(5) Certain consumers in bankruptcy—

(i) Exemption. Except as provided in paragraph (e)(5)(ii) of this section, a servicer is exempt from the requirements of this section with regard to a mortgage loan if:

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(A) Any consumer on the mortgage loan is a debtor in bankruptcy under title 11 of the United States Code or has discharged personal liability for the mortgage loan pursuant to 11 U.S.C. 727, 1141, 1228, or 1328; and

(B) With regard to any consumer on the mortgage loan:

(1) The consumer requests in writing that the servicer cease providing a periodic statement or coupon book;

(2) The consumer's bankruptcy plan provides that the consumer will surrender the dwelling securing the mortgage loan, provides for the avoidance of the lien securing the mortgage loan, or otherwise does not provide for, as applicable, the payment of pre-bankruptcy arrearage or the maintenance of payments due under the mortgage loan;

(3) A court enters an order in the bankruptcy case providing for the avoidance of the lien securing the mortgage loan, lifting the automatic stay pursuant to 11 U.S.C. 362 with regard to the dwelling securing the mortgage loan, or requiring the servicer to cease providing a periodic statement or coupon book; or

(4) The consumer files with the court overseeing the bankruptcy case a statement of intention pursuant to 11 U.S.C. 521(a) identifying an intent to surrender the dwelling securing the mortgage loan and a consumer has not made any partial or periodic payment on the mortgage loan after the commencement of the consumer's bankruptcy case.

(ii) Reaffirmation or consumer request to receive statement or coupon book. A servicer ceases to qualify for an exemption pursuant to paragraph (e)(5)(i) of this section with respect to a mortgage loan if the consumer reaffirms personal liability for the loan or any consumer on the loan requests in writing that the servicer provide a periodic statement or coupon book, unless a court enters an order in the bankruptcy case requiring the servicer to cease providing a periodic statement or coupon book.

(iii) Exclusive address. A servicer may establish an address that a consumer must use to submit a written request under paragraph (e)(5)(i)(B)(1) or (e)(5)(ii) of this section, provided that the servicer notifies the consumer of the address in a manner that is reasonably designed to inform the consumer of the address. If a servicer designates a specific address for requests under paragraph (e)(5)(i)(B)(1) or (e)(5)(ii) of this section, the servicer shall designate the same address for purposes of both paragraphs (e)(5)(i)(B)(1) and (e)(5)(ii) of this section.

(iv) Timing of compliance following transition—

(A) Triggering events for transitioning to modified and unmodified periodic statements. A servicer transitions to providing a periodic statement or coupon book with the modifications set forth in paragraph (f) of this section or to providing a periodic statement or coupon book without such modifications when one of the following three events occurs:

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(1) A mortgage loan becomes subject to the requirements of paragraph (f) of this section;

(2) A mortgage loan ceases to be subject to the requirements of paragraph (f) of this section; or

(3) A servicer ceases to qualify for an exemption pursuant to paragraph (e)(5)(i) of this section with respect to a mortgage loan.

(B) Single-statement exemption. As of the date on which one of the events listed in paragraph (e)(5)(iv)(A) of this section occurs, a servicer is exempt from the requirements of this section with respect to the next periodic statement or coupon book that would otherwise be required but thereafter must provide modified or unmodified periodic statements or coupon books that comply with the requirements of this section.

(6) Charged-off loans.

(i) A servicer is exempt from the requirements of this section for a mortgage loan if the servicer:

(A) Has charged off the loan in accordance with loan-loss provisions and will not charge any additional fees or interest on the account; and

(B) Provides, within 30 days of charge-off or the most recent periodic statement, a periodic statement, clearly and conspicuously labeled "Suspension of Statements & Notice of Charge Off—Retain This Copy for Your Records." The periodic statement must clearly and conspicuously explain that, as applicable, the mortgage loan has been charged off and the servicer will not charge any additional fees or interest on the account; the servicer will no longer provide the consumer a periodic statement for each billing cycle; the lien on the property remains in place and the consumer remains liable for the mortgage loan obligation and any obligations arising from or related to the property, which may include property taxes; the consumer may be required to pay the balance on the account in the future, for example, upon sale of the property; the balance on the account is not being canceled or forgiven; and the loan may be purchased, assigned, or transferred.

(ii) Resuming compliance.

(A) If a servicer fails at any time to treat a mortgage loan that is exempt under paragraph (e)(6)(i) of this section as charged off or charges any additional fees or interest on the account, the obligation to provide a periodic statement pursuant to this section resumes.

(B) Prohibition on retroactive fees. A servicer may not retroactively assess fees or interest on the account for the period of time during which the exemption in paragraph (e)(6)(i) of this section applied.

(f) Modified periodic statements and coupon books for certain consumers in bankruptcy. While any consumer on a mortgage loan is a debtor in bankruptcy under title 11 of the United States Code, or if such consumer has discharged

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personal liability for the mortgage loan pursuant to 11 U.S.C. 727, 1141, 1228, or 1328, the requirements of this section are subject to the following modifications with regard to that mortgage loan:

(1) Requirements not applicable. The periodic statement may omit the information set forth in paragraphs (d)(1)(ii) and (d)(8)(i), (ii), and (v) of this section. The requirement in paragraph (d)(1)(iii) of this section that the amount due must be shown more prominently than other disclosures on the page shall not apply.

(2) Bankruptcy notices. The periodic statement must include the following:

(i) A statement identifying the consumer's status as a debtor in bankruptcy or the discharged status of the mortgage loan; and

(ii) A statement that the periodic statement is for informational purposes only.

(3) Chapter 12 and chapter 13 consumers. In addition to any other provisions of this paragraph (f) that may apply, with regard to a mortgage loan for which any consumer with primary liability is a debtor in a chapter 12 or chapter 13 bankruptcy case, the requirements of this section are subject to the following modifications:

(i) Requirements not applicable. In addition to omitting the information set forth in paragraph (f)(1) of this section, the periodic statement may also omit the information set forth in paragraphs (d)(8)(iii), (iv), (vi), and (vii) of this section.

(ii) Amount due. The amount due information set forth in paragraph (d)(1) of this section may be limited to the date and amount of the post-petition payments due and any post-petition fees and charges imposed by the servicer.

(iii) Explanation of amount due. The explanation of amount due information set forth in paragraph (d)(2) of this section may be limited to:

(A) The monthly post-petition payment amount, including a breakdown showing how much, if any, will be applied to principal, interest, and escrow;

(B) The total sum of any post-petition fees or charges imposed since the last statement; and

(C) Any post-petition payment amount past due.

(iv) Transaction activity. The transaction activity information set forth in paragraph (d)(4) of this section must include all payments the servicer has received since the last statement, including all post-petition and pre-petition payments and payments of post-petition fees and charges, and all post-petition fees and charges the servicer has imposed since the last statement. The brief description of the activity need not identify the source of any payments.

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(v) Pre-petition arrearage. If applicable, a servicer must disclose, grouped in close proximity to each other and located on the first page of the statement or, alternatively, on a separate page enclosed with the periodic statement or in a separate letter:

(A) The total of all pre-petition payments received since the last statement;

(B) The total of all pre-petition payments received since the beginning of the consumer's bankruptcy case; and

(C) The current balance of the consumer's pre-petition arrearage.

(vi) Additional disclosures. The periodic statement must include, as applicable:

(A) A statement that the amount due includes only post-petition payments and does not include other payments that may be due under the terms of the consumer's bankruptcy plan;

(B) If the consumer's bankruptcy plan requires the consumer to make the post-petition mortgage payments directly to a bankruptcy trustee, a statement that the consumer should send the payment to the trustee and not to the servicer;

(C) A statement that the information disclosed on the periodic statement may not include payments the consumer has made to the trustee and may not be consistent with the trustee's records;

(D) A statement that encourages the consumer to contact the consumer's attorney or the trustee with questions regarding the application of payments; and

(E) If the consumer is more than 45 days delinquent on post-petition payments, a statement that the servicer has not received all the payments that became due since the consumer filed for bankruptcy.

(4) Multiple obligors. If this paragraph (f) applies in connection with a mortgage loan with more than one primary obligor, the servicer may provide the modified statement to any or all of the primary obligors, even if a primary obligor to whom the servicer provides the modified statement is not a debtor in bankruptcy.

(5) Coupon books. A servicer that provides a coupon book instead of a periodic statement under paragraph (e)(3) of this section must include in the coupon book the disclosures set forth in paragraphs (f)(2) and (f)(3)(vi) of this section, as applicable. The servicer may include these disclosures anywhere in the coupon book provided to the consumer or on a separate page enclosed with the coupon book. The servicer must make available upon request to the consumer by telephone, in writing, in person, or electronically, if the consumer consents, the information listed in paragraph (f)(3)(v) of this section, as applicable. The modifications set forth in paragraphs (f)(1) and (f)(3)(i) through (iv) and (vi) of this section apply to a coupon book and other information a servicer provides to the consumer under paragraph (e)(3) of this section.

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(g) Successor in interest. If, upon confirmation, a servicer provides a confirmed successor in interest who is not liable on the mortgage loan obligation with a written notice and acknowledgment form in accordance with Regulation X, § 1024.32(c)(1) of this chapter, the servicer is not required to provide to the confirmed successor in interest any written disclosure required by this section unless and until the confirmed successor in interest either assumes the mortgage loan obligation under State law or has provided the servicer an executed acknowledgment in accordance with Regulation X, § 1024.32(c)(1)(iv) of this chapter, that the confirmed successor in interest has not revoked.

Credits

[78 FR 11007, Feb. 14, 2013; 78 FR 44718, July 24, 2013; 78 FR 63005, Oct. 23, 2013; 78 FR 69753, Nov. 21, 2013; 79 FR 65322, Nov. 3, 2014; 81 FR 72388, Oct. 19, 2016; 83 FR 10559, March 12, 2018]

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Current through Nov. 30, 2018; 83 FR 61570.

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