LIVING MORTGAGE AND INTEREST FREE?: THE UNWARRANTED DISCHARGE FOR DEBTORS WHO FAIL TO MAKE DIRECT POST-PETITION MORTGAGE PAYMENTS

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I. INTRODUCTION

The United States Bankruptcy Code (hereinafter "Code") was enacted to enable individuals who are either disinclined or incapable of accounting for well-founded debts, held by creditors, to repay and satisfy any remaining delinquencies.[1] The Code, subject to certain limitations,[2] bestows upon a consumer debtor the discretion to either voluntarily seek relief pursuant to chapter 7 or chapter 13,[3] the latter of which enables consumer debtors to remain in custody of their home throughout the duration of their respective plan.[4]

Of these incentives, one of the most notable is the augmented fortification from home mortgage foreclosure shield that chapter 13 provides.[5] The prominence of this protection is enhanced when a

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[1] *See* Mark E. Roszkowski, *Good Faith and Chapter 13 Plans Providing for Debts Nondischargeable Under Chapter 7 of the Bankruptcy Code: A Proposal to Assure Rehabilitation, Not Liquidation*, 46 BUS. LAW. 67, 68, 69 (1990) ("[Bankruptcy law] is designed to . . . to relieve an *honest* debtor from overburdensome financial obligations and give him a 'fresh start,' free of claims of former creditors.") (emphasis added).

[2] *See* 11 U.S.C. § 109(b), (e) (2012).

[3] *See* Scott F. Norberg, *Consumer Bankruptcy's New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13*, 7 AM. BANKR. INST. L. REV. 415, 420 (1999); Roszkowski, *supra* note 1, at 71 (debtors may choose between reorganization or liquidation).

[4] *See* Norberg, *supra* note 3, at 424 ("By far, the most important of these incentives are the chapter 13 cramdown provisions which allow debtors to cure and reinstate home mortgages."); *see also* 11 U.S.C. § 1322(b)(5) (2012) (codifying a debtor's right to cure any and all defaults while maintaining those payments throughout the life of the plan).

[5] *See* Lex A. Coleman, *Individual Consumer "Chapter 20" Cases After* Johnson*: An Introduction to Nonbusiness Serial Filings Under Chapter 7 and Chapter 13 of the Bankruptcy Code*, 9 BANKR. DEV. J. 357, 368 (1992) ("The debtor may temporarily or permanently interrupt

debtor faces a looming threat of foreclosure.[6] Characteristically, where a debtor is no longer current on their mortgage, thus giving rise to a delinquency,

> the mortgagee typically accelerates payments and declares the entire outstanding balance due. If the debtor is unable to pay the accelerated amount on demand, generally the mortgagee exercises its state law right to foreclose on the encumbered property, either by initiating judicial foreclosure proceedings or through a private contractual power of sale.[7]

Accordingly, when complications arise, the Code, as detailed *supra*, permits an individual to "fil[e] a chapter 13 petition . . . cur[ing] prepetition default[s] by paying off arrearages and reinstating the contractual payments as part of a chapter 13 repayment plan."[8] Consequently, chapter 13 allows a debtor to "retain[] possession of all property of the estate,"[9] markedly, one's principal residence.[10] The protections afforded to consumer debtors—as per the Code—allows one to attain the eventual target of a chapter 13 case, that is, receiving a discharge.[11]

An alternative incentive, ultimately enticing individuals to seek chapter 13 relief—as opposed to chapter 7—is the verity that a "chapter 13 discharge under section 1328(a) is broader than the discharge under section 727."[12] Section 1328(a) provides, in pertinent part, "as soon as practicable after completion by the debtor of all payments under the plan . . . the court shall grant the debtor a discharge of all debts provided for by the plan."[13] Hence, following completion of a debtor's chapter 13 plan, all prepetition debts—with

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this foreclosure process . . . by filing a . . . chapter 13 petition under the Bankruptcy Code."); Joe Lee, *Chapter 13 nee Chapter XIII*, 53 AM. BANKR. L.J. 303, 308 (1979) ("The filing of the petition operates to stay the commencement or continuation of judicial, administrative and other proceedings against the debtor individually, and also stays any act to obtain possession of property of the estate or to enforce a lien upon property of the estate."); *see also* 11 U.S.C. § 362(a) (2012) (codifying a debtor's ability to stay any pending actions subsequent to filing a petition).

[6] *See* Coleman, *supra* note 5, at 371.

[7] *Id.* at 368.

[8] *Id.* at 369–70.

[9] Roszkowski, *supra* note 1, at 73.

[10] Coleman, *supra* note 5, at 368.

[11] *See* Mary K. Viegelahn, *Trustee Talk, a Catch 22: The Dilemma of Direct Payments to Creditors and Its Potential Impact on Discharge*, 36-6 ABIJ 30, 77 (2017).

[12] Coleman, *supra* note 5, at 368.

[13] 11 U.S.C. § 1328(a) (2012).

the exception of certain non-dischargeable debts—are discharged.[14] More often than not, consumer debtors who take this approach end up paying cents on the dollar with respect to their total unsecured debt,[15] which is why we must not overlook the other side of the equation, that being the creditors.

Unsecured creditors favor chapter 13, for very rarely do they ever collect in chapter 7 cases.[16] Notwithstanding the benefits afforded to consumer debtors and the fundamental purposes attached therewith, the Code is also in place "to provide for equitable treatment of creditors who are competing for the debtor's limited assets."[17] Thus, while plan confirmation does not hinge on the debtor accounting for a particular percentage of their total unsecured debt, there is a hypothetical threshold that must be met.[18]

Apart from the more objective criteria, the underlying requirement necessary in almost every bankruptcy petition is good faith.[19] Considering that—in the Second Circuit alone—there were 9,144 non-business filings under chapter 13 during a twelve month period ending March 31, 2017,[20] confirming that a debtor is not proposing a plan to either exploit the "provisions, purpose, or spirit of . . . chapter [13]" is essential, but at times difficult.[21] Making a determination of good faith shall be done on an ad hoc basis, taking into consideration

[14] *See id.*; Coleman, *supra* note 5, at 366–67.

[15] Scott F. Norberg & Andrew J. Velkey, *Debtor Discharge and Creditor Repayment in Chapter 13*, 39 CREIGHTON L. REV. 473, 477 (2006).

[16] *See* Norberg, *supra* note 3, at 424–25.

[17] Roszkowski, *supra* note 1, at 69.

[18] *See* Coleman, *supra* note 5, at 366 ("[T]he debtor's plan [must] provide[] unsecured creditors with an amount equal to what they would have received under a hypothetical chapter 7 case[.]").

[19] *See* Roszkowski, *supra* note 1, at 76 ("[Good faith] 'is one of the central, perhaps the most important confirmation finding to be made by the court in any Chapter 13 case.'") (quoting *In re* Kull, 12 B.R. 654, 658 (S.D. Ga. 1981)).

[20] U.S. CTS., REPORT F-5A: BUSINESS AND NONBUSINESS CASES FILED, BY CHAPTER OF THE BANKRUPTCY CODE, DISTRICT, AND COUNTY, http://www.uscourts.gov/sites/default/files/data_tables/bf_f5a_0331.2017.pdf (last visited Jan. 11, 2019).

[21] Roszkowski, *supra* note 1, at 80.

several factors.[22] However, bankruptcy courts in non-conduit[23] jurisdictions must become far more vigilant when conducting said inquiry.

This paper will address the underlying issues bankruptcy courts in non-conduit jurisdictions face when permitting consumer debtors to directly remit post-petition mortgage payments to the mortgage holder, as opposed to the designated chapter 13 trustee making such payments. This note argues that consumer debtors—under a cure and maintain plan—who fail to remain current with respect to their post-petition mortgage payments, should not receive a chapter 13 discharge. To provide context for this recommendation, Section II provides an overview of consumer debtor bankruptcy cases, Section III addresses the existing precedent supporting the proposition that direct post-petition mortgage payments constitute "payments under the plan," and Section IV establishes—based on statutory analysis and case law—why a delinquency with respect to direct post-petition mortgage payments constitutes a material default and several factors courts should consider in determining whether to dismiss or convert the chapter 13 case respectively. Finally, in Section V, I will offer several courses of action bankruptcy courts—namely, courts in the Second Circuit—may utilize in an attempt to remediate and potentially repair this recent ongoing dilemma.

II. OVERVIEW OF A CONSUMER DEBTOR BANKRUPTCY CASE

The chapter 13 case can be summarized in six notable steps: (1) the

[22] Many courts adhere to a number of enumerated factors when making a determination of good faith. Apart from "the percentage of repayment to unsecured creditors," courts also consider:

> (1) the amount of the proposed payments and the amount of the debtor's surplus;
> . . .
> (4) the accuracy of the plan's statements of the debts, expenses, and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court;
> (5) the extent of preferential treatment between classes of creditors
> . . .
> (7) the type of debt sought to be discharged
> . . . [and]
> (10) the motivation and sincerity of the debtor in seeking Chapter 13 relief.

Id. at 78–79; *see, e.g.*, Meyer v. Lepe (*In re* Lepe), 470 B.R. 851, 857 (B.A.P. 9th Cir. 2012); *In re* Estus, 695 F.2d 311, 317 (8th Cir. 1982); Henri v. Wheeler (*In re* Wheeler), 511 B.R. 240, 250 (Bankr. N.D.N.Y. 2014); *In re* Yarborough, No. 12-30549, 2012 Bankr. LEXIS 4403, at *9 (Bankr. E.D. Tenn. Sept. 24, 2012).

[23] *See* Viegelahn, *supra* note 11, at 30 ("A plan that provides for direct payments to a mortgage lender is referred to as a 'non-conduit' plan.").

filing of a voluntary, chapter 13 petition by the debtor; (2) the appointment of a trustee; (3) formulation of the rehabilitation plan; (4) confirmation of the plan; (5) commencement of the plan while remaining steadfast to all obligatory undertakings enumerated therein; and (6) provided all provisions and commitments pursuant to the plan are fulfilled, the granting of a discharge.[24]

A. The "Perfect Case"

Presumably, all parties involved in the chapter 13 case would aspire to a conflict free proceeding whereby everyone receives what is sought after in the chapter 13 plan. For example,[25] assume Anthony Filer, a single father with a dependent daughter, works for Acme Corporation with a salary of approximately $50,000 annually. However, given a downturn in the economy, Acme Corporation pursues a collective layoff, Anthony Filer being one of the employees caught up in the downsizing of the company. Anthony Filer, being unemployed for nearly six months, fell behind on three of his mortgage payments, thus forcing him to accept employment with a much lower salary of $30,000 annually. Burdened with mortgage, credit card, and car payments, Filer was doubtful of his ability to catch up on his financial obligations. After consulting with an attorney, Filer elected to seek chapter 13 relief.

Filer filed all necessary forms with the bankruptcy court, stopping the foreclosure proceeding and staying all collection activities pending against him. Following the meeting of creditors, the bankruptcy court held a confirmation hearing and Filer's chapter 13 plan was confirmed.[26] Filer's plan called for the curing of all pre-petition arrearages whereby Filer was to also make all post-petition mortgage payments directly to his mortgage company. Throughout the duration of the five-year plan, Filer remained current on all of his mortgage payments. At the conclusion of the five-year term, the bankruptcy court entered an order granting Filer a discharge, providing Filer with a fresh start.

However, as we will see, such a perfect case does not always transpire.

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[24] *See* Roszkowski, *supra* note 1, at 73, 74, 75.

[25] Due to privacy constraints, the following example portrays a hypothetical case outlining a typical fact pattern involving individual chapter 13 debtors bankruptcy courts throughout the United States face.

[26] *See* 11 U.S.C. §§ 341(a), 362(a), 1324(a), 1325(a) (2012).

B. The Delinquent Mortgagor

While "[t]he idea was for Chapter 13 debtors to be able to complete their plans successfully, then all could live happily ever after," this is but a mere abstraction, for the success rate, measured by completion of the plan, is far lower than what we presumably would anticipate.[27] The recent trend, particularly in the district courts, is that of an influx of consumer debtors electing the benefits of § 1322(b)(5), but subsequently failing to remit direct post-petition mortgage payments to the mortgage holder.[28] The recent trend at the door of bankruptcy courts throughout the United States consists of chapter 13 debtors requesting a discharge, demanding a fixed distribution to unsecured creditors and all-encompassing authority to appropriate post-petition income as they deem appropriate.[29]

The issue is illustrated in *In re Hoyt-Kieckhaben*, where the Debtor sought relief pursuant to chapter 13 of the Code.[30] Under the plan, as confirmed by the court, the Debtor elected to cure past mortgage delinquencies while "continu[ing] to make the future contractual monthly mortgage payments directly to the mortgage holder."[31] Post-confirmation, however, the Debtor neglected to make twenty-four direct post-petition mortgage payments, amounting to an exceeding delinquency of $49,000.[32] In fact, this degree of delinquency is not uncommon: Bankruptcy courts throughout the United States have seen post-petition mortgage delinquencies valued at $49,000,[33] $33,467.35,[34] $30,378.21,[35] and $48,335.06.[36]

Repeatedly, such post-petition delinquencies fly under the radar, evading detection from the bankruptcy court and appointed chapter 13 trustees throughout the entire term of the plan up until the point at which the chapter 13 trustee sends and receives a notice of final

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[27] Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103, 106, 107 (2011) (based on studies, there was found to be about a "one-in-three success rate").

[28] *See In re* Coughlin, 568 B.R. 461, 465, 466 (Bankr. E.D.N.Y. 2017); *In re* Evans, 543 B.R. 213, 219 (Bankr. E.D. Va. 2016); *In re* Hoyt-Kieckhaben, 546 B.R. 868, 869 (Bankr. D. Colo. 2016); *In re* Heinzle, 511 B.R. 69, 72 (Bankr. W.D. Tex. 2014); *In re* Mascari, 70 B.R. 325, 327 (Bankr. N.D.N.Y. 1987).

[29] *See, e.g., In re* Coughlin, 568 B.R. at 463.

[30] *See In re Hoyt-Kieckhaben*, 546 B.R. at 870.

[31] *Id.*

[32] *See id.* at 869.

[33] *Id.*

[34] *In re Heinzle*, 511 B.R. at 72.

[35] *In re* Young, No. 12-11509, 2017 Bankr. LEXIS 3170, at *2 (Bankr. M.D. La. Sept. 19, 2017).

[36] *In re* Ramos, 540 B.R. 580, 587 (Bankr. N.D. Tex. 2015).

cure payment and response to notice of final cure payment respectively.[37] Moreover, the overall impact stemming from a consumer debtor's reluctance to satisfy all contractual monthly mortgage payments expressed in the plan is compounded when the proposed level of repayment to unsecured creditors fails to reach one-hundred percent.[38] That is, given that "the Code provides . . . that the plan, once approved . . . require[s] 'that all of the debtor's projected disposable income . . . beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan,'" consumer debtors who default with respect to their post-petition mortgage payments are living a "more comfortable lifestyle at the expense of their creditors," living interest and mortgage free for several years.[39] Thus, such a "beneficial change in income" could have, and should have gone to the unsecured creditors, increasing their "distribution from pennies on the dollar to [potentially] the full amount owed."[40] In any event, irrespective of the financial repercussions involved when consumer debtors become delinquent with respect to their post-petition mortgage payments, the question that remains is what should the court do; what, if any, are the consequences? More importantly, should the debtor still be eligible for a discharge?

Many consumer debtors rely on the phrase "under the plan," as provided in the Code,[41] to argue that in situations in which the debtor serves as the disbursing agent for post-petition mortgage payments, such payments fall "outside the plan" and thus do not constitute "payments under the plan."[42] Accordingly, the question that remains is whether direct post-petition mortgage payments constitute

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[37] *See In re Hoyt-Kieckhaben*, 546 B.R. at 870; Viegelahn, *supra* note 11, at 30 ("[A]bsent a motion to terminate the automatic stay, a trustee in a nonconduit jurisdiction would not have known that a debtor was delinquent with direct payments due to a creditor pursuant to the plan.").

[38] *See In re* Formaneck, 534 B.R. 29, 34 (Bankr. D. Colo. 2015).

[39] Famose T. Garner, Comment, *Putting the Honest Back in "Honest but Unfortunate Debtor": A Debtor's Duty to Report a Beneficial Change in Circumstances*, 47 HOUS. L. REV. 105, 108, 112–13 (2010).

[40] *Id.* at 109, 129; *see also In re Formaneck*, 534 B.R. at 34 ("Although the missed payments are reflected in the $109,022.42 post-petition arrears owed to Wells Fargo, the Debtors have not accounted for any of these funds. At the outset of their case, the Debtors made the choice to retain their Residence and confirm a plan committing sixty months of post-petition income to mortgage payments. The Confirmed Plan does not provide a 100% return to unsecured claims . . . . Had the Debtors sold or surrendered their Residence, they would have had the ability to increase monthly plan payments and the overall distribution to unsecured creditors.").

[41] *See* 11 U.S.C. § 1328(a) (2012).

[42] *See In re* Foster, 670 F.2d 478, 490–91 (5th Cir. 1982).

payments under the plan? An answer in the negative means that a consumer debtor could receive a discharge pursuant to § 1328(a) of the Code irrespective of their failure to make said payments.[43] Alternatively, and to be discussed *infra*, an answer in the affirmative likely would mean that a chapter 13 debtor who fails to make post-petition mortgage payments would be susceptible to several adverse legal consequences.

III. DIRECT POST-PETITION MORTGAGE PAYMENTS CONSTITUTE "PAYMENTS UNDER THE PLAN"

A. *The Evolutionary Progression of "Payments Under the Plan"*

A workable understanding of the phrase "payments under the plan," particularly in the realm of direct post-petition mortgage payments and its significance on a chapter 13 debtor's discharge, is not defined in the Code.[44] Nevertheless, courts throughout the United States—the United States Supreme Court[45] and the Fifth Circuit[46] in particular—slowly began laying the foundation, brick-by-brick, until we had finally established a principal after decades of dancing around the problem.

1. *In re Foster*

In 1982, the court in *In re Foster*—while not addressing the meaning of "payments under the plan" in light of a consumer debtor's eligibility for a chapter 13 discharge—nevertheless provided meaning to the ambiguous phrase in the context of plan confirmation and the computation of the trustee's percentage fees.[47] In that case, the bankruptcy court "refus[ed] to confirm a 'wage earner plan,' . . . which called for the making of the current regular payments on the debtors' homestead mortgage (current mortgage payments) 'outside the plan' while the arrearage on the mortgage claim was to be cured pursuant to the provisions of § 1322(b)(5) of the Bankruptcy Code."[48]

On appeal, the debtors contended that their use of the language "outside the plan" regarding their current mortgage payments, meant only that they would act as the disbursing agent rather than

[43] *See* 11 U.S.C. § 1328(a).
[44] *See id.*
[45] *See* Rake v. Wade, 508 U.S. 464, 474–75 (1993).
[46] *See In re Foster*, 670 F.2d at 492–93.
[47] *See id.* at 482, 491.
[48] *Id.* at 482.

having such payments remitted by the standing trustee.[49] Notwithstanding this proposition, the debtors went a step further in asserting that the post-petition mortgage payments "should not be included in the computation of the standing trustee's percentage fee, which is collected from 'all payments under plans.'"[50] Despite the debtor's noble attempt to exclude such payments from the trustee's percentage fee, the court ultimately concluded that payments under plans include those "to which the debtor serves as disbursing agent."[51]

The Fifth Circuit's opinion was the inaugural case, shedding light on a particular ambiguity enumerated in the Code. Until that time, no court had directly addressed the legal and statutory significance of the meaning payments "under the plan" in the context of direct post-petition mortgage payments.

2. *Rake v. Wade*

While no definitive answer was articulated in *Foster* with respect to the legal ramifications of failing to pay direct post-petition mortgage payments had on the debtor's ability to receive a discharge, the jurisprudence nevertheless expanded with the Supreme Court's assistance in the next significant holding rendered in the 1993 case *Rake v. Wade*. The Court in *Rake*, despite being concerned with the task of construing the phrase "provided for by the plan" in the context of § 1325(a)(5), otherwise had a lasting effect on future courts burdened with the task of giving meaning to the phrase payments *under the plan* as provided for in the Code's discharge provision in § 1328(a).[52]

The Court characterized the issue before them as the following: "[W]hether Chapter 13 debtors who cure a default on an oversecured home mortgage pursuant to § 1322(b)(5) of the Bankruptcy Code . . . must pay postpetition interest on the arrearages."[53] The Court, after partaking in an extensive statutory analysis, ruled in the affirmative.[54]

In *Rake*, a consolidation of "debtors were in arrears on a long-term

[49] *See id.* at 485.
[50] *Id.* at 490–91.
[51] *Id.* at 491. The Court noted that "a plan cannot provide that the current portion of a mortgage claim will be made 'outside the plan' . . . when the arrearages on the mortgage claim are being cured under § 1322(b)(5)." *Id.* at 488.
[52] *See* Rake v. Wade, 508 U.S. 464, 472–75 (1993) (emphasis added).
[53] *Id.* at 465–66.
[54] *See id.* at 466.

promissory note assigned" to the trustee.[55] The debtors' plan contained several significant provisions, one being a proposal to pay the trustee all forthcoming payments on the notes, including principal and interest.[56] Furthermore, the debtors' plans called for the curing of all arrearages on the mortgages, excluding however, any interest payments attached thereto.[57] The trustee ultimately objected to confirmation of the debtors' plans, contending that both attorney's fees and interest were to be attached to any and all arrearage payments.[58] Petitioners endeavored to take a more formalistic approach, contending "that § 1325(a)(5)(B)(ii) 'applies only to secured claims which have been modified . . . and which, by reason of Section 1322(b)(2), may not include home mortgages.'"[59] In finding petitioners' proposition unpersuasive, the Court bolstered its position by way of examining other provisions which include the "provided for by the plan" language.[60] Subsequent to its analysis, the Court held the Code's statutory framework ultimately entitled the trustee to "interest on arrearages paid off under petitioners' plans."[61] The Court's examination of the meaning of "provided for by the plan" gave rise to the opportunity for numerous courts to analogize the Court's interpretation in *Rake*, to the phrase "payments under the plan" articulated in § 1328(a) of the Code.[62]

3. *Kessler v. Wilson*[63]

It took approximately three decades—following *In re Foster's* brief glimpse as to the meaning of "payments under the plan"—for the legal community to finally obtain closure, receiving an answer, narrowly tailored to the legal consequences of a consumer debtor's failure to make direct post-petition mortgage payments in a cure and maintain plan.[64]

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[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.* at 472.
[60] *See id.* at 474 ("As used in § 1328(a), that phrase is commonly understood to mean that a plan 'makes a provision' for, 'deals with,' or even 'refers to' a claim. In addition, § 1328(a) unmistakably contemplates that a plan 'provides for' a claim when the plan cures a default and allows for the maintenance of regular payments on that claim, as authorized by § 1322(b)(5).") (internal citations omitted).
[61] *Id.* at 475.
[62] *See id.* at 473–75.
[63] Kessler v. Wilson (*In re* Kessler), 655 F. App'x 242 (5th Cir. 2016).
[64] *See id.* at 244; *In re* Foster, 670 F.2d 478, 488 (5th Cir. 1982). Precisely thirty-three years had transpired between *In re* Foster (1983) and *In re* Kessler (2016).

In *In re Kessler*, the chapter 13 plan provided for the curing of pre-petition mortgage arrears to a trustee and for direct post-petition mortgage payments to Bank of America Home Loans ("BOA").[65] Notwithstanding the Kesslers completing all payments payable to the trustee, they failed to make direct payments to BOA, resulting in a post-petition arrearage totaling $40,922.89.[66]

Despite this delinquency, the Kesslers moved for discharge.[67] After the Court denied the Kesslers' motion, they filed an appeal to the district court, where the Kesslers asserted "that the bankruptcy court erred by holding that . . . payments on the post-petition mortgage debt were provided for 'under the plan' and thus nonpayment barred discharge."[68] Pertinent to the Kesslers' appeal was the claim that not only is *Foster* inapplicable for it dealt specifically with plan confirmation, but "[b]ecause post-petition mortgage payments are explicitly nondischargeable under § 1322(b)(5)[,] . . . these direct payments fall outside of their plan and cannot be required for discharge under § 1328(a)."[69]

While the Kesslers attempted to distinguish their case from *Foster* on the ground that, at issue in *Foster* was plan confirmation, whereas in the Kesslers' case, discharge, the district court held that binding precedent, set by the court in *Foster*, stands for the proposition that "payments on § 1322(b)(5) debts" constitute payments under the plan.[70] The district court—irrespective of appellants' waiver claim—affirmed the bankruptcy court's decision, ultimately denying the Kesslers their chapter 13 discharge for, according to the district court, "the Kesslers plainly included terms in their Chapter 13 plan for maintaining their post-petition mortgage payments; therefore, their post-petition payments are payments under the plan."[71]

B. The Evolutionary Impact on United States Bankruptcy Courts

Following the pragmatic foundation set by the Supreme Court and the Fifth Circuit,[72] bankruptcy courts throughout the United States began to experience an influx of rulings adhering to and adopting the

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[65] *See Kessler*, 655 F. App'x at 243.
[66] *See id.*
[67] *See id.*
[68] *Id.*
[69] *Id.* at 244.
[70] *Id.* at 244 ("We held that post-petition payments of § 1322(b)(5) debts fall under the plan when pre-petition defaults are also provided for in the plan.") (citing *In re* Foster, 670 F.2d 478, 489, 493 (5th Cir. 1982)).
[71] *Kessler*, 655 F. Appx. at 244.
[72] *See supra* notes 41–75 and accompanying text.

reasoning set forth in *Kessler*.[73] While no other Circuit Courts—other than the Fifth Circuit—have ruled on this particular issue, numerous bankruptcy and district courts, apart from those under the umbrella of the Fifth Circuit itself, have handed down rulings, painting a picture for the legal community as to their stance regarding the issue.[74]

Of great importance, and highly relevant to the topic, is that the Second Circuit has yet to rule on this issue. The leading case circulating in the lower courts in the Second Circuit is *In re Coughlin*. *Coughlin*, though a consolidation of dissimilar chapter 13 cases involving additional issues, shared the same underlying issue, stated by the court as "whether a chapter 13 debtor is entitled to a discharge when he/she does not make his/her direct post-petition mortgage payments due under a confirmed plan."[75]

Both the Coughlin's and the Sangamaya's plan contained provisions indicating that they would cure all pre-petition arrearages throughout the life of the plan while remaining current on their post-petition mortgage payments.[76] Nevertheless, the Coughlins and the Sangamayas compiled a delinquency of $17,441.25 and $24,402.24, respectively.[77] The court concluded, "absent compelling circumstances . . . granting a discharge to a debtor who has not paid substantial sums dedicated to post-petition mortgage payments [is] contrary to the chapter 13 process."[78] In coming to its conclusion, the

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[73] *See infra* notes 83–90.

[74] *See In re* Coughlin, 568 B.R. 461, 463 (Bankr. E.D.N.Y. 2017); *In re* Hoyt-Kieckhaben, 546 B.R. 868, 874 (Bankr. D. Colo. 2016); *In re* Evans, 543 B.R. 213, 226 (Bankr. E.D. Va. 2016); *In re* Gonzalez, 532 B.R. 828, 832 (Bankr. D. Colo. 2015) ("[F]ind[ing] no authority . . . to suggest a cogent argument that payments to be made directly to a creditor . . . are not 'payments under the plan' as that term is used in 11 U.S.C. § 1328(a)."); *In re* Hankins, 62 B.R. 831, 835 (Bankr. W.D. Va. 1986) ("[Direct] payments are nonetheless payments 'under the Plan' in the sense that they are dealt with by the Plan.").

[75] *In re Coughlin*, 568 B.R. at 463. Pending before the court were two chapter 13 petitions.

> The Coughlin case involve[d] the additional issue of whether the Court should vacate a discharge granted to a debtor who failed to make direct post-petition mortgage payments, while the Sangamaya case involve[d] the additional issue of whether debtors should be allowed to modify a confirmed plan in the final month to change the treatment of their home from retain to surrender.

Id.

[76] *See id.* at 464, 465.

[77] *Id.* at 464, 466.

[78] *Id.* at 471. By incorporating the phrase "absent compelling circumstances," it appears the court left room for the construction of a potential exception to the general rule that under such circumstances, a chapter 13 debtor shall not be entitled to a discharge. *See id.* at 471. In support of this idea is the court's reference to *In re* Diggins, 561 B.R. 782, 787 (Bankr. D. Colo. 2016) which noted:

court first conducted a statutory overview of "payments under the plan," looking first to particular provisions of the Code pertaining to the contents of a chapter 13 plan[79] and who may act as dispersing agent with respect to direct payments to their creditors.[80] Next, the court conducted an inquiry as to the proper timing to grant discharge, utilizing the reasoning provided in *Rake* and *Kessler*.[81]

For courts that fall under the precedential control of the Second Circuit, *Coughlin* is the sole ruling which has opined on the issue of granting discharge when a Chapter 13 debtor fails to remain current with respect to post-petition mortgage payments. This alone is legally significant for five other districts throughout the Second Circuit are presumptively continuing to grant discharges despite a debtors' failure to pay all post-petition mortgage payments as stipulated in their plan.[82]

IV. CESSATION OF DIRECT POST-PETITION MORTGAGE PAYMENTS CONSTITUTES A MATERIAL DEFAULT PURSUANT TO § 1307(C)(6)

Section 1307(c) states in pertinent part:

> [O]n request of a party in interest or the United States trustee and after notice and a hearing, the court *may* convert a case under this chapter to a case under chapter 7 of this title, or *may* dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, *for cause*.[83]

> "[I]t would be inequitable to deny discharge in this unique situation," as debtor "regularly paid her mortgage for four years of her plan, and then acted promptly to modify the mortgage as soon as her income dropped. Even if this Court believed that Debtor's temporary inability to make payments to Carrington as they worked out a modification was a default, it was not material under 11 U.S.C. § 1307(c)(6)."

In re Coughlin, 568 B.R. at 471 (quoting *In re Diggins*, 561 B.R. at 787).

[79] *In re Coughlin*, 568 B.R. at 467 ("The contents of a chapter 13 plan are governed by § 1322, which is generally divided between mandatory provisions outlined in § 1322(a) . . . and permissive provisions outlined in § 1322(b).").

[80] *See id.* at 468 (citing Mendoza v. Temple-Inland Mortg. Corp. (*In re* Mendoza), 111 F.3d 1264, 1269 (5th Cir. 1997)) (holding that Congress, pursuant to § 1326(c) of the Code, has permitted chapter 13 debtors to disperse direct payments to their creditors rather than the chapter 13 trustee).

[81] *See In re Coughlin,* 468 B.R. at 468, 470.

[82] *See United States Court of Appeals for the Second Circuit*, U.S. CTS., http://www.ca2.uscourts.gov/about_the_court.html (last visited Jan. 11, 2019) (The Second Circuit consists of the District of Connecticut, Eastern District of New York, Northern District of New York, Southern District of New York, Western District of New York, and the District of Vermont).

[83] 11 U.S.C. § 1307(c) (2012) (emphasis added) (internal citations omitted).

The Code goes on and enumerates a non-exhaustive list of "[eleven] specific occurrences which constitute sufficient cause for the dismissal or conversion of a chapter 13 case to chapter 7."[84] Of particular importance is § 1307(c)(6), which articulates a "material default by the debtor with respect to a term of a confirmed plan" as sufficient cause for dismissal or conversion of a chapter 13 case.[85] Although the issue has not been extensively addressed in the Second Circuit, several courts, including the United States Bankruptcy Court for the District of Colorado, have concluded that a "debtors' failure to make post-petition payments directly to a secured creditor outside a confirmed plan constitutes a material default with respect to a term of the confirmed plan."[86] Accordingly, finding sufficient cause only satisfies the first step of § 1307(c), for the court must then elect whichever outcome (conversion or dismissal) is in the best interests of creditors and the estate.[87]

A. Dismissal Versus Conversion to Chapter 7

Discovering a material default regarding a term of a confirmed plan does not, by itself, terminate a chapter 13 case since "dismissal or conversion is not automatic, but rather a matter of the court's discretion."[88] Determining whether to convert or dismiss a chapter 13 case must be done on an ad hoc basis for no two bankruptcy cases

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[84] COLLIER ON BANKRUPTCY ¶ 1307.04 (Richard Levin & Henry J. Sommer eds., 16th ed. 2018).

[85] 11 U.S.C. § 1307(c)(6).

[86] *In re* Formaneck, 534 B.R. 29, 33 (Bankr. D. Colo. 2015); *see also* Evans v. Stackhouse, 564 B.R. 513, 533 (E.D. Va. 2017) ("Appellant's failure to complete the direct payments to the Lender constitutes a material default of the terms of the confirmed plan."); *In re* Young, No. 12-11509, 2017 Bankr. LEXIS 3170, at *3–4 (Bankr. M.D. La. Sept. 19, 2017) ("A debtor's failure to make thirty-nine mortgage payments that a confirmed chapter 13 plan requires undoubtedly constitutes a material default under the plan."); *In re* Tumblson, No. 12-80365, 2016 Bankr. LEXIS 735, at *3–4 (Bankr. E.D. Okla. Mar. 8, 2016) (finding that Debtor's failure to make direct payments to JP Morgan Chase was a material default of the confirmed plan); *In re* Daggs, No. 10-16518, 2014 Bankr. LEXIS 2509, at *8 (Bankr. D. Colo. Jan. 6, 2014) ("[T]he Debtor's failure to make her direct payments to Bank of America constitutes a material default under § 1307(c)(6)."); *In re* Heinzle, 511 B.R. 69, 83 (Bankr. W.D. Tex. 2014) ("Debtors' assertion that the failure to make mortgage payments in the amount of $33,467.32 was not a material default under the plan is without merit.").

[87] *See* 11 U.S.C. § 1307(c).

[88] 8 COLLIER ON BANKRUPTCY ¶ 1307.04; *see also In re* Soppick, 516 B.R. 733, 763 (Bankr. E.D. Pa. 2014) ("Once grounds for relief under § 1307(c) have been demonstrated, whether to dismiss the case or convert it to chapter 7 is within the discretion of the bankruptcy court, with the exercise of that discretion focused . . . upon 'whichever is in the best interests of creditors and the estate.'").

are identical.[89] Although "[t]he Bankruptcy Code does not identify factors for bankruptcy courts to consider when determining what is in the best interests of creditors and the estate," many courts rely on the factors enumerated in the leading bankruptcy treatise.[90] Those ten factors are as follows:

> [1] whether there are preferential payments to be recovered, [2] whether there would be a loss of rights if the case were dismissed, [3] whether the debtor would refile after dismissal, [4] the ability of the trustee to reach assets in Chapter 7, [5] which option would maximize the estate's value as an economic enterprise, [6] whether remaining issues would be better resolved in another forum, [7] whether the case is a single asset case, [8] whether creditors are in need of chapter 7 to protect their interests, [9] whether property needs to be administered under a confirmed plan, and [10] whether a trustee is needed to address environmental and safety issues.[91]

Equally important are the Code provisions in which the effect of dismissal[92] and conversion[93] are recognized. For example, in *In re Toronto*,[94] following the determination that the particular debtors were ineligible for chapter 13 relief, the bankruptcy court then encountered the issue of dismissal versus conversion to chapter 7.[95] With the assistance of a number of factors itemized in one of the leading bankruptcy treatises and the Code itself, bankruptcy courts will be better equipped to make practical and economically-justifiable rulings.

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[89] *See In re Soppick*, 516 B.R. at 763; 8 COLLIER ON BANKRUPTCY ¶ 1307.04; *see also* Indus. Clearinghouse, Inc. v. Mims (*In re* Coastal Plains, Inc.), 338 B.R. 703, 712–13 (Bankr. N.D. Tex. 2006) (discussing the uniqueness of each bankruptcy case).

[90] *See In re* Mattick, 496 B.R. 792, 802–03 (Bankr. W.D.N.C. 2013).

[91] Chertok v. Phelan, No. 1:15-BK-04101, 2017 Bankr. LEXIS 502, at *13–14 (Bankr. M.D. Pa. Feb. 21, 2017); *see also In re* Wynn, 573 B.R. 485, 494 (Bankr. W.D.N.Y. 2017) (considering whether there is any remaining equity in the properties in question); *In re* Dores, No. 16-10169-B-13, 2017 Bankr. LEXIS 1539, at *36–37 (Bankr. E.D. Cal. June 7, 2017) (taking into consideration collection risks and potential need for prosecution of an adversary proceeding).

[92] 11 U.S.C. § 349 (2012).

[93] 11 U.S.C. § 348 (2012).

[94] *In re* Toronto, 165 B.R. 746 (Bankr. D. Conn. 1994).

[95] *See id.* at 756–57 (considering both §§ 348(a) and 349 with respect to the chapter 13 case).

V. POTENTIAL SOLUTIONS

This paper is not asserting that the following solutions are superior to all others. Rather, this paper will provide courts—the Second Circuit in particular—with a non-exhaustive list of potential solutions and/or remedies which may be advantageous when chapter 13 debtors are seeking a discharge pursuant to § 1328 of the Code, but are nevertheless delinquent with respect to their direct post-petition mortgage payments.

A. Convert to a Conduit Jurisdiction

A conduit plan is one that "provides for trustee payment[s]" to a "creditor having a long-term debt."[96] Section 1326(c) of the Code provides, "[e]xcept as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan."[97] Irrespective of such discretionary power entrusted in the debtor and the fact that "[m]any model plans adopted throughout the nation permit direct payments to . . . creditors,"[98] bankruptcy courts throughout the country have experienced the making of a new development as "more and more trustees have been making disbursements of ongoing, post-petition mortgage payments."[99] In fact, "[t]wo distinguished judges have argued . . . that all payments, including current mortgage payments, be made through the trustees as the most effective way to ensure that the debtor completes the plan."[100] While the ultimate hope at the conclusion of a chapter 13 case is that the particular debtor(s) will thereafter effectively manage their money, considering the failure to adequately do so when viewed on a nationwide scale, said aspiration may be too ambitious.[101] Nevertheless, money management skills undoubtedly play a large role in the circumstances which have placed the debtor in the bankruptcy court's jurisdiction.[102] However, taking into consideration the many moving parts accompanying a chapter 13 petition, it is imperative to consider the effects on each participant

[96] *See* Viegelahn, *supra* note 11, at 30 (noting mortgage lenders, auto lenders, and student loans as such creditors having a long-term debt).

[97] 11 U.S.C. § 1326(c) (2012).

[98] Viegelahn, *supra* note 11, at 30.

[99] Gordon Bermant & Jean Braucher, *Making Post-Petition Mortgage Payments Inside Chapter 13 Plans: Facts, Law, Policy*, 80 AM. BANKR. L.J. 261, 261 (2006).

[100] *Id.* at 262.

[101] *See id.* at 273 ("[A] chapter 13 plan is to teach the debtor improved money management skills.").

[102] *See id.*; Norberg & Velkey, *supra* note 15, at 522.

to the case[103] which becoming a conduit jurisdiction would present.

Conduit payments are likely to alleviate many of the concerns associated with the budgeting process and mortgage servicing companies.[104] As for the debtors, "[b]y including post-petition mortgage payments in the monthly plan amount, debtors can more easily budget the costs of bankruptcy into their total monthly cash flow."[105] Of greater importance is that the burden of record keeping with respect to making the post-petition mortgage payments now falls in the lap of the standing chapter 13 trustee, which becomes particularly beneficial given the "complexity and error . . . of mortgage servicing."[106] Provided consumers have no role in selecting mortgage servicers, the interpolation of "a trustworthy fiduciary . . . can become particularly valuable[, ultimately increasing transparency] when the case completes or otherwise terminates because debtors are less likely to need further legal help in resolving disputes with mortgage companies and servicers."[107]

Due to the insignificant percentage of unsecured debt characteristically paid throughout the life of a chapter 13 plan, unsecured creditors are in favor of "[a]ny device that keeps the debtor in the plan for as long as possible."[108] As the time in which the debtor remains in the plan increases, so does the likelihood that unsecured creditors will receive any amounts stipulated to in the confirmed plan.[109]

Additionally, chapter 13 trustees too would acquire monetary benefits such that the fees connected with making conduit payments would enable chapter 13 trustees to increase their cash flows, empowering them with the ability to otherwise grow their current operations, if desired.[110] Not to be forgotten however, is the last remaining participant to a chapter 13 petition, the bankruptcy court. Conduit payments will almost certainly diminish any uncertainty between debtors, mortgage companies and servicers regarding potential defaults with respect to post-petition mortgage payments,

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[103] Bermant & Braucher, *supra* note 99, at 272–77 (considering the debtor(s), unsecured creditors, mortgage companies and servicers, chapter 13 trustees, and the bankruptcy court).

[104] *See id.* at 264–65, 272.

[105] *Id.* at 272.

[106] *Id.* at 264, 265, 272 ("If debtors pay their mortgages directly, neither they nor their servicers may have good records concerning whether debtors are current.").

[107] *Id.* at 264, 272–73. "Trustees report that conduit payments reduce confusion and litigation during the case and particularly at case closing, because the trustees have maintained accurate records of debtor payments." *Id.* at 275.

[108] *Id.* at 274.

[109] *See id.*

[110] *See id.* at 275.

ultimately increasing transparency between all participants and easing any administrative burdens the bankruptcy court would likely face if "litigation [were to] arise about the completion of post-petition payments."[111]

Despite the positive outlook of conduit payments, this practice does have its drawbacks. For example, "conduit payments are bound to increase the costs of the plan to home-owning debtors who must pay the trustee's fee to manage post-petition debt payments, reducing the amount left over for unsecured creditors."[112] Moreover, "the fees trustees charge for disbursing the funds to the creditors" will likely result in financial shortcomings to the average chapter 13 debtor for "the additional ten percent . . . will likely make it harder for the poor to confirm a chapter 13 plan because they will be required to make more payments to creditors over a greater period of time."[113] This is outlined in a 2011 report by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), which noted that in the Second Circuit alone, the average monthly income for individual debtors in chapter 13 cases was approximately $4,575.00.[114]

Not only are fees associated with conduit payments additional cost constraints, but they too diminish any excess disposable income that is to assist in compensating unsecured creditors.[115] Furthermore, once a conduit trustee is appointed, consumer debtors presumably are relieved of all discretionary power, such that their ability to negotiate and/or settle any incongruities with mortgagees, without the bankruptcy court's oversight, virtually vanishes.[116] Conversely, if anything, chapter 13 trustees with continuing operations in a non-conduit jurisdiction will, at the outset, face a whirlwind of both financial and administrative hurdles if forced to conduct conduit payments henceforth.[117]

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[111] *Id.* at 276.

[112] *Id.* at 274.

[113] Andrew P. MacArthur, *Pay to Play: The Poor's Problems in the BAPCPA*, 25 EMORY BANKR. DEV. J. 407, 475 (2009).

[114] *See 2011 Report of Statistics Required by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, ADMIN. OFF. U.S. CTS., 40 tbl. 2D (2012), http://www.uscourts.gov/sites/default/files/bapcpa-report.pdf.

[115] *See* Bermant & Braucher, *supra* note 99, at 274.

[116] *See id.* at 275.

[117] *See id.* at 275–76 ("[T]he startup costs involved in switching to conduit payment practice by an ongoing trustee operation are significant. Trustees need to have policy positions worked out in the event a debtor misses a payment . . . . The trustee may have to add one or more staff members in order to handle the additional check writing and address change verifications.").

B. Issuance of a Case Management Order

Another potential resolution is for bankruptcy courts to issue a case management order for every chapter 13 petition, illustrating how that particular court will treat the issue at bar. As a matter of fact, the Bankruptcy Court for the Western District of New York, Rochester Division has adopted said method.[118] Specifically, the chapter 13 case management order states:

> [T]hat, for confirmed Chapter 13 Plans under which the Debtor is required to make payments directly to a mortgagee or its servicer, the Debtor is required to file an Affidavit, after plan payments are complete, certifying that *all such direct payments have been made as required*. Such direct payments, often called "payments outside the plan," are considered by the Court to be "payments under the plan" for purposes of 11 U.S.C. § 1328(a). The failure to file the Affidavit, or the failure to make all required post-petition and post-confirmation direct payments, may result in the closing of the case without entry of a discharge order.[119]

Said orders are tremendously authoritative, given the Supreme Court's recent holding in *United Student Aid Funds, Inc. v. Espinosa*.[120] Provisions enunciated in case management orders such as the one outlined above, provides all relevant participants of the chapter 13 case with increased transparency.

However, given the lack of uniformity throughout the United States, "creditors must [now] carefully scrutinize plans prior to confirmation," thus increasing administrative pressures on creditors.[121] While a supplementary case management order will certainly rectify any opaque provision in the chapter 13 plan with respect to the duties and obligations of the debtor—in particular the legal ramifications for failing to pay direct post-petition mortgage

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[118] *See Chapter 13 Case Management Order*, U.S. CTS., http://www.nywb.uscourts.gov/sites/nywb/files/Ch.%2013%20Case%20Management%20Order%20%28Rochester%29%20-%20watermark.pdf (last visited Jan. 11, 2019).

[119] *Id.* (emphasis in original).

[120] *See* United Students Aid Funds v. Espinosa, 559 U.S. 260, 275 (2010) (holding that an order confirming a plan is binding on all parties who receive notice, despite the fact that some provisions may be inconsistent with the Code).

[121] REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES, STANDING COMM. ON RULES OF PRACTICE & PROCEDURE 180 (Dec. 5, 2016), http://www.uscourts.gov/sites/default/files/2017-01-standing-agenda_book_0.pdf [hereinafter STANDING COMM.].

payments—the irregularities spanning across the country "makes it difficult for creditors to know where to look for their treatment from district to district."[122] Additionally, another potential weakness with the language contained in the case management order noted *supra*[123] is that it only applies to the time in which all direct post-petition payments are theoretically to come to an end, failing to police the debtor's payments on a month-to-month basis, such that creditors still may remain in the dark.[124]

C. Insertion of a Provision in the Chapter 13 Plan

Bankruptcy courts falling under the authority of the Second Circuit could supplement their localized chapter 13 plan forms with a provision expressly enunciating that a debtor who fails to remit all direct post-petition mortgage payments will not be entitled to a discharge pursuant to § 1328(a) of the Code, potentially lessening the likelihood that the bankruptcy court will be burdened by any subsequent litigation involving the denial of discharge. Currently, no bankruptcy court in the Second Circuit has included such a provision in their chapter 13 plan forms.[125] While this would undoubtedly increase transparency as to the rights and obligations for the debtor, Trustee, secured creditors and mortgage servicing companies, it too has similar shortcomings as with the issuance of a

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[122] *Id.*

[123] *See supra* note 118 and accompanying text.

[124] The Tyler, Marshall, Lufkin, and Beaumont Divisions of the Easter District of Texas have in place, a system allowing the Trustee to oversee the status of each direct post-petition mortgage payment to be made by the Debtor, on a monthly basis. *See Office of the Chapter 13 Trustee: Post-Petition Mortgage Payments*, www.ch13tyler.com/index_files/Page937.htm (last visited Jan. 11, 2019) ("For Section 3.1 of Chapter 13 Plans filed by a Debtor on or after December 1, 2017, the Trustee 'will monitor' the Debtor's fulfillment of the payment of these post-petition monthly mortgage payments. Accordingly, the Trustee has set up certain procedures that the Debtor must follow to verify to the Trustee each monthly post-petition mortgage payment has been made. The Trustee will report this information to the Court on a monthly basis.").

[125] *See* U.S. BANKR. CT. DISTRICT OF CONN., *Connecticut Local Form* Chapter 13 Plan, http://www.ctb.uscourts.gov/sites/ctb/files/ctb_ch13plan.119.ForPrint.pdf; U.S. BANKR. CT. EASTERN DISTRICT OF N.Y., *Chapter 13 Plan*, http://www.nyeb.uscourts.gov/sites/nyeb/files/forms/Chapter13-Plan_1.pdf; U.S. BANKR. CT. FOR THE NORTHERN DISTRICT OF N.Y., *Chapter 13 Plan*, http://www.nynb.uscourts.gov/?q=forms/chapter-13-local-form-plan-effective-december-1-2017; U.S. BANKR. CT. SOUTHERN DISTRICT OF N.Y., *Chapter 13 Plan*, http://www.nysb.uscourts.gov/chapter-13-filing-and-plan-information; B-113 (Official Form 113): Chapter 13 Plan, http://www.uscourts.gov/sites/default/files/b_113_1217_0.pdf (United States Bankruptcy Court for the Western District of New York); Form E (Official Form 113): Chapter 13 Plan, http://www.vtb.uscourts.gov/sites/vtb/files/Form%20113.pdf (United States Bankruptcy Court for the District of Vermont).

case management order.[126] So too is the issue of whether bankruptcy courts will be permitted to insert such a provision in their chapter 13 plan forms in light of the recent adoption of a national plan.[127]

On January 3, 2017, the Committee on Rules of Practice and Procedure issued a report to the Standing Committee articulating the overall approval of a national plan, "*subject to certain conditions*."[128] There was a great deal of pushback from bankruptcy judges throughout the United States "to the original proposal of a mandatory national plan form," such that "the Committee concluded that it was . . . prudent to give bankruptcy districts the ability to opt out of using [the national plan form]."[129] However, it appears that the national plan form pertains strictly to formalistic requirements, leaving the contents of the plan to be decided by the bankruptcy courts and their accompanying district.[130] Thus, on its face, it looks as if the legitimacy of a provision dictating that a debtor who fails to remit all direct post-petition mortgage payments will not be entitled to a discharge, will be something debtors will have to challenge on appeal.

Given the novelty of the national plan form, the issue regarding the scope of the courts' discretion with respect to the addition of district specific provisions remains to be unsettled. Hence, inserting such a provision may either be a quick-and-easy fix for bankruptcy courts or an alternative avenue for increased litigation.

VI. CONCLUSION

Considering the underlying issues bankruptcy courts in non-conduit jurisdictions are currently facing, "a word to the wise to debtors' counsel is that they should periodically communicate with clients to verify that those payments made directly by a debtor in a cure-and-maintain situation are current."[131] However, placing the oversight burden solely on debtors' counsel is presumably not the

[126] *See supra* notes 131–34 and accompanying text.

[127] *See* STANDING COMM., *supra* note 121, at 183.

[128] *See id.* at 179 (emphasis added).

[129] *Id.* at 182, 183 ("While the bulk of the comments received were directed at the plan form itself, rather than at the opt-out proposal, three groups (NBC, NCBJ, and the mortgage servicers) and seven individual trustees did express support for allowing districts to opt out of a national plan form.").

[130] *See id.* at 183 ("The Committee concluded that promulgating a form for chapter 13 plans and related rules that require debtors to format their plans in a certain matter but do not mandate the content of such plans was consistent with the Rules Enabling Act.").

[131] Viegelahn, *supra* note 11, at 77.

preeminent choice given the poor chapter 13 completion rate.[132] Bankruptcy courts, trustees, and mortgage servicing companies, especially those in non-conduit jurisdictions, must become more vigilant and attentive with respect to the month-to-month operations of the debtor's plan to bar debtors from obtaining a windfall at the expense of their creditors. Hence, debtors who fail to remit all direct post-petition mortgage payments should not, absent exigent circumstances, be granted the benefit of having their debts discharged at a substantial discount, while stripping their creditors from any benefit they were contractually entitled to receive under the plan.

Debtors in the Western District of New York frequently fell behind on their monthly mortgage payments and, at no fault of the bankruptcy court, said defaults were discovered only at the time at which the debtor was to make their last plan payment.[133] Yet, given the common practice in the jurisdiction, despite debtors defaulting on their post-petition mortgage payments, debtors were receiving a discharge and not only being relieved of substantial debt, but also thousands of dollars in delinquent mortgage payments were allowed to go unaccounted for. This unaccounted-for surplus presumably could have gone directly to the debtors' unsecured creditors.[134]

Formalistic arguments from debtors' counsel of what does and does not constitute payments under the plan[135] should no longer be used as a scapegoat enabling debtors to receive an unwarranted discharge. To preserve the integrity of the chapter 13 process and the bankruptcy system as a whole, reformation both in the way debtors' direct post-petition mortgage payments are monitored and the consequences for debtors' lack of adherence are much needed.

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[132] *See supra* note 26 and accompanying text.

[133] *See, e.g., In re* Conolly, 195 B.R 230, 233 (Bankr. W.D.N.Y 1993) (noting that the Debtor had failed to make postpetition mortgage payments for ten months while the case was pending).

[134] *See* Garner, *supra* note 39 at 129; *see also In re* Formaneck, 534 B.R. 29, 34 (Bankr. D. Colo. 2015) ("Had the Debtors sold or surrendered their Residence, they would have had the ability to increase their monthly plan payments and the overall distribution to unsecured creditors.").

[135] *See In re* Foster, 670 F.2d 478, 490–91 (5th Cir. 1982).