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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: MARGARET L. KINNEY,

Debtor.

MARGARET L. KINNEY,

Appellant,

v.

HSBC BANK USA, N.A.,

Appellee.

DOUGLAS B. KIEL, Chapter 13 Trustee,

Amicus Curiae.

No. 20-1122

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

Stephen E. Berken, Berken Cloyes, Denver, Colorado, for the Appellant.

Jamie G. Siler, Murr Siler & Accomazzo, Denver, Colorado, for the Appellee.

Matthew W. Hoelscher, Greenwood Village, Colorado, for Chapter 13 Trustee, Douglas B. Kiel, Amicus Curiae

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Before **BACHARACH**, **EBEL**, and **EID**, Circuit Judges.

BACHARACH, Circuit Judge.

The bankruptcy code provides a five-year limit on payment plans under Chapter 13. 11 U.S.C. § 1322(d). Once a debtor completes payments under the plan, the bankruptcy court must grant a discharge. 11 U.S.C. § 1328(a).

This appeal arises because Ms. Margaret L. Kinney failed to make some of the required mortgage payments within her plan's five-year period. Shortly after the five-year period ended, however, she made the back payments and requested a discharge. The bankruptcy court denied the request and dismissed the case.

The issue on appeal is whether the bankruptcy court could grant a discharge, and the answer turns on how we characterize Ms. Kinney's late payments. She characterizes them as a cure for her earlier default; HSBC Bank characterizes them as an impermissible effort to modify the plan. We agree with the bank and affirm.

1. Chapter 13 plans are limited to five years.

Chapter 13 of the bankruptcy code allows qualifying debtors to cover claims through "plans" that pledge future earnings. 11 U.S.C. §§ 1321,

1322(a)–(c). Upon confirmation, the plans bind the debtors and creditors. 11 U.S.C. § 1327.

But the code also allows modification of the plan. Through modification, a bankruptcy court can

- "extend or reduce the time for . . . payments" (11 U.S.C. § 1329(a)(2)) and
- permit the debtor to cure a default on a mortgage payment (*In re Hoggle*, 12 F.3d 1008, 1011 (11th Cir. 1994)).

But modifications cannot provide for payments more than five years after the deadline for the first payment. 11 U.S.C. § 1329(c).

A Chapter 13 bankruptcy case ends in discharge, conversion to Chapter 7, or dismissal. *See* Part 5(B)(1), below. Dismissals and conversions are governed by 11 U.S.C. § 1307; discharges are governed by 11 U.S.C. § 1328.

2. After suffering a car accident, Ms. Kinney missed two mortgage payments to the bank in the final months of her Chapter 13 plan.

Ms. Kinney filed bankruptcy under Chapter 13. Her plan, ultimately confirmed, required monthly mortgage payments to the bank.[1]

Ms. Kinney was current with her mortgage payments when she filed bankruptcy, and she made her first post-petition payment in November

[1] The parties agree that Ms. Kinney's mortgage payments during the plan were payments "under the plan."

2013.[2] Under the plan, she needed to keep making timely mortgage payments through November 2018.

But misfortune struck: In March 2018, Ms. Kinney suffered a car accident. The accident triggered substantial expenses, and Ms. Kinney missed two mortgage payments in the final months of the five-year plan. (After the plan ended, Ms. Kinney missed two more mortgage payments.)

3. Because Ms. Kinney had not completed her payments within five years, the bankruptcy court concluded that it lacked discretion to grant a discharge.

The missed mortgage payments constituted a material default; so after the five-year plan had ended, the bank moved to dismiss the bankruptcy case. Ms. Kinney objected and tendered the back payments; but the bankruptcy court granted the motion to dismiss, reasoning that a

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[2] Ms. Kinney notes that courts are divided on whether the five-year period begins with the first post-petition payment or after confirmation of the plan. Appellant's Opening Br. at 4 n.1. But she does not argue that the five-year period begins after confirmation of the plan or contest the bank's assertion that the five-year period began on the due-date of the first payment. So Ms. Kinney has waived any argument that the term started after confirmation of the plan. *See United States v. Harman*, 297 F.3d 1116, 1131 (10th Cir. 2002) (en banc) ("Arguments raised in a perfunctory manner, such as in a footnote, are waived."). Given this waiver, we assume without deciding that the five-year period began with the due-date of the first post-petition payment.

discharge was no longer possible. Ms. Kinney unsuccessfully moved for reconsideration and now appeals.

4. We conduct de novo review of the bankruptcy court's interpretation of the code provision.

The bankruptcy code states that the court "may" dismiss a Chapter 13 case. 11 U.S.C. § 1307(c). Given the word "may," we would ordinarily review the dismissal for an abuse of discretion. *See Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.,* 170 F.3d 985, 995–96 (10th Cir. 1999) (applying the abuse-of-discretion standard based on the statutory term "may").

But the issue here is a legal one, and a bankruptcy court abuses its discretion by making a legal error. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). To determine whether the bankruptcy court legally erred in construing the code provisions, we conduct de novo review. *In re Scrivner*, 535 F.3d 1258, 1262 (10th Cir. 2008).

5. Though the bankruptcy code is ambiguous, its language suggests that discharge is allowable only if the debtor had no ongoing material default when the plan ended.

Conducting de novo review, we consider whether the bankruptcy code permits the court to treat Ms. Kinney's late payments as a "cure" rather than an impermissible "modification" of the plan. On this question, the code itself is ambiguous; but its language suggests that the late payments do not constitute a cure of the default. The statutory language thus

supports the bank's position that the court couldn't grant Ms. Kinney a discharge.

A. We consider the code's language.

We start with the language of the code, giving undefined terms their "ordinary meaning." *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011); *Hamilton v. Lanning*, 560 U.S. 505, 513 (2010) (quoting *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995)). To avoid interpretations incompatible with the rest of the code, we read the provisions in the context of each other. *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.,* 484 U.S. 365, 371 (1988).

The code is ambiguous if it can be "understood by reasonably well-informed persons in two or more different senses." *In re Geneva Steel Co.*, 281 F.3d 1173, 1178 (10th Cir. 2002) (internal quotation marks omitted). Ambiguity depends on "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792, 804 (10th Cir. 2020) (quoting *Ceco Concrete Const., LLC v. Centennial State Carpenters Pension Tr.*, 821 F.3d 1250, 1258 (10th Cir. 2016)). If the code is ambiguous, we can consider congressional intent. *In re Geneva Steel Co.*, 281 F.3d at 1178.

B. The code's language is ambiguous.

A discharge is necessary upon the debtor's "completion . . . of all payments under the plan." 11 U.S.C. § 1328(a). But the code doesn't define this phrase, so we must decide whether payments could contribute to a "completion . . . of all payments under the plan" when the payments come after expiration of the plan's five-year term.

On this question, other courts differ based on how they interpret the statutory phrase "completion . . . of all payments under the plan."[3] These differences are understandable in light of the ambiguity inherent in the combination of §§ 1307(c), 1322, 1325, 1328(a), and 1329.

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[3] In *In re Klaas*, the Third Circuit held that such payments after five years are "under the plan." 858 F.3d 820, 827–33 (3d Cir. 2017). Before that opinion, bankruptcy courts had divided on the issue.

Many bankruptcy courts had concluded that untimely payments are allowable under the plan. *In re Hill*, 374 B.R. 745, 749–50 (Bankr. S.D. Cal. 2007); *In re Henry*, 343 B.R. 190, 192–93 (Bankr. N.D. Ill. 2006); *In re Aubain*, 296 B.R. 624, 634 (Bankr. E.D.N.Y. 2003); *In re Brown*, 296 B.R. 20, 22 (Bankr. N.D. Cal. 2003); *In re Harter*, 279 B.R. 284, 287–88 (Bankr. S.D. Cal. 2002); *In re Black*, 78 B.R. 840, 842–43 (Bankr. S.D. Ohio 1987).

But many other bankruptcy courts had disagreed, concluding that untimely payments are not "under the plan." *In re Hanley*, 575 B.R. 207, 217–19 (Bankr. E.D.N.Y. 2017); *In re Ramsey*, 507 B.R. 736, 739 (Bankr. D. Kan. 2014); *In re Grant*, 428 B.R. 504, 507–08 (Bankr. N.D. Ill. 2010); *In re Goude*, 201 B.R. 275, 277 (Bankr. D. Or. 1996); *In re Jackson*, 189 B.R. 213, 214 (Bankr. M.D. Ala. 1995); *In re Woodall,* 81 B.R. 17, 18 (Bankr. E.D. Ark. 1987).

(1) Sections 1307(c) and 1328(a) don't definitively resolve the extent of discretion over dismissal and discharge, but suggest that discharge is unavailable when the plan ends with an ongoing material default.

The code gives the bankruptcy courts three options:

1. grant a discharge (11 U.S.C. § 1328(a))

2. dismiss the case (11 U.S.C. § 1307(c)(6))

3. convert the case to a Chapter 7 bankruptcy (11 U.S.C. § 1307(c)(6))

The options differ in the extent of discretion that they provide.

Section 1307(c)(6) says that a bankruptcy court "may" order dismissal or conversion if debtors have materially defaulted. 11 U.S.C. § 1307(c)(6). "May" usually implies some discretion. *Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 193, 198–99 (2000); *see* Part 4, above.

But under § 1328(a), a district court "shall" grant discharges to debtors who have completed payments under the plans. 11 U.S.C. § 1328(a).[4] The term "shall" means that discharges are mandatory if

[4] Ms. Kinney points out that "nothing in the Code mandates dismissal of a case with a confirmed plan which ends up needing some extra time to complete." Appellant's Opening Br. at 16 (quoting *In re Klaas*, 858 F.3d 820, 829 (3d Cir. 2017)). But this omission in the bankruptcy code does not necessarily imply discretion to grant a discharge when the plan ends with a material default. To the contrary, the existence of discretion may stem from flexibility built elsewhere into the bankruptcy code. Such flexibility exists, for example, when a debtor seeks a partial discharge based on a hardship after committing a material default. 11 U.S.C. § 1328(b).

debtors complete the payments under their plans. *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999); *see* 11 U.S.C. § 1328(a). So § 1328(a) supports a discharge only if the late payments were considered "under the plan."

Ms. Kinney argues that discharge was permissible because the court could regard her payments as "under the plan." She did make the payments, but were they completed "under the plan" if they came after its expiration?

To answer we start with the term "under." The term "under" is a "chameleon," bearing ambiguity in light of its multiple meanings. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2117 (2018) ("chameleon"); *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 40–41 (2008) (recognizing that "under" bears multiple meanings and "both sides present credible interpretations").[5] To ascertain the better interpretation of this ambiguous term, we must focus on the context. *See Pereira*, 138 S. Ct. at 2117 (stating that the Court must draw the meaning of "under" from its context). The context here suggests that the payments are "under the plan" only if they are subject to or under the authority of the plan.

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[5] Though the Supreme Court regarded the competing interpretations of the statutory term "under" as "credible," the Court ultimately declined to decide whether the term was ambiguous facially or within the statutory context. *Piccadilly Cafeterias*, 554 U.S. at 41, 47. Irrespective of the term's ambiguity, the Court interpreted the term "under" based not only on the statutory text but also on legislative intent. *Id.* at 47–52. We've likewise considered legislative intent, though the concurrence does not. *See* Part 6, below.

"Under" connects two nouns: "payments" and "plan." 11 U.S.C. § 1128(a). Though "under" bears multiple meanings, a payment "under" a bankruptcy plan is "more natural[ly]" read as something "subject to . . . or under the authority of" the plan. *Piccadilly Cafeterias*, 554 U.S. at 39–41.

An earlier version of the code used a similar term in a different provision, referring to a transfer "under a plan confirmed." 11 U.S.C. § 1146(c) (2000). To apply this provision, the Supreme Court considered whether a transfer could be "under" a confirmed plan if the transfer had preceded confirmation of the plan. *Piccadilly Cafeterias*, 554 U.S. at 35. The Court answered "no," reasoning that

- the "more natural" reading of "under" suggests that the transfer must be "subject to" or "under the authority of" the plan (*id.* at 39) and
- the transfer could not be subject to or under the authority of the plan if the plan had not yet been confirmed (*id.* at 41).

The Supreme Court cited a Third Circuit opinion, *In re Hechinger Investment Co. of Delaware, Inc.*, 335 F.3d 243 (3d Cir. 2003). *E.g.*, *id.* at 38, 40. *Hechinger* had drawn the same conclusion:

> After considering all of these definitions [of the term "under"], we believe that the most natural reading of the phrase "under a plan confirmed" in 11 U.S.C. § 1146(c) is "authorized" by such a plan. [*See Random House Dictionary of the English Language* 1543 (unabridged ed. 1967)]. When an action is said to be taken "under" a provision at law or a document having legal effect, what is generally meant is that the action is "authorized" by the provision of law or legal document. Thus, if a claim is asserted "under" 42 U.S.C. § 1983, Section 1983 provides the authority for the claim. If a motion is made "under" Fed. R. Civ. P.

> 12(b)(6), that rule provides the authority for the motion. If benefits are paid "under" a pension or welfare plan, the payments are authorized by the plan.
>
> On this reading, if an instrument of transfer is made or delivered "under" a plan, the plan must provide the authority for the transaction.

335 F.3d at 252; *see also In re NVR, LP*, 189 F.3d 442, 457–58 (4th Cir. 1999) (concluding that the plain meaning of "under" forecloses characterization of preconfirmation transfers as "under a plan confirmed" for purposes of 11 U.S.C. § 1146(c)).

Likewise, the more natural reading here is that the payments could fall "under" a plan only if the plan remained in existence. The Supreme Court concluded that a transfer likely hadn't fallen "under" a plan if it hadn't been confirmed yet. *See* pp. 10–11, above. There is no reason for a different result when a plan has expired.

Ms. Kinney insists that even though the plan had ended, she could informally cure her default by making the late payments. But if those payments came after the plan had ended, they wouldn't have been "subject to" or "authorized by" the plan. So the statutory term "under" suggests that the payments would permit a discharge only if they had been made during the existence of the plan.

(2) Section 1307(c) does not control.

Ms. Kinney argues that § 1307(c) controls because it is specific to dismissals. But § 1307(c) is no more specific than § 1328(a); these sections

simply authorize the three possible outcomes (dismissal, conversion to a Chapter 7 bankruptcy, or discharge). *See* Part 5(B)(1), above.

Ms. Kinney also argues that § 1307(c)'s permissive language creates discretion to order dismissal. The bank disagrees, arguing that the court lacks discretion under § 1328(a) because the five-year plan ended with an ongoing material default.

According to Ms. Kinney, the bank's interpretation erases § 1307's use of the word "may." We disagree, for the code still gives discretion to the court in various situations involving material defaults. For example, the court has discretion to avoid dismissal of a Chapter 13 case by

- permitting modification of the plan before it has ended and
- granting a hardship discharge.

See, e.g., *In re Hoggle*, 12 F.3d 1008, 1011 (11th Cir. 1994) (allowing a debtor to cure a default on mortgage payments through modification of the plan); 11 U.S.C. § 1328(b)–(c) (permitting a court to grant a discharge based on partial hardship despite the failure to complete the plan payments). So even if the bankruptcy court lacked discretion to regard Ms. Kinney's late payments as "under the plan," the bank's interpretation would still give effect to § 1307(c)'s permissive "may."

* * *

The bankruptcy code suggests that material defaults cannot be cured after the plan has ended. But § 1307(c) does not say whether payments can

be "under the plan" when they're made after the plan has ended. So we must consider whether other sections clarify the meaning of the phrase "under the plan."

(3) The other statutory provisions are ambiguous on whether payments after the five-year period are "under the plan."

The parties point to four other sections (§§ 1322, 1325, 1328, and 1329) in debating whether "payments under the plan" include payments following expiration of the plan. These sections are not conclusive, but the better interpretation is that the late payments are not "under the plan" if it has already expired.

a. Sections 1322 and 1329 suggest that payments after the plan's expiration are not "under the plan."

The bank argues that under §§ 1322 and 1329, a debtor doesn't complete payments "under the plan" if the payments come after the plan has expired. As Ms. Kinney argues, these sections don't remove the ambiguity. But they do suggest that the late payments are not "under the plan."

Under § 1322, a Chapter 13 debtor cannot commit to a plan lasting more than five years. 11 U.S.C. § 1322(d). And § 1329 permits some types of plan modifications, including those extending or shortening "the time for . . . payments [under the plan]." 11 U.S.C. § 1329(a)(2). But modified plans are also subject to the five-year time limit. 11 U.S.C. § 1329(c).

Together, §§ 1322 and 1329(a)(2) suggest that a late payment is simply an effort to modify the plan by extending the time for payment.

Suppose that after the accident, Ms. Kinney had moved for an extension of time, asking the bankruptcy court to allow her to make the back payments soon after the five-year period had ended. As Ms. Kinney conceded in oral argument, the court would have needed to deny the motion. Oral Argument at 2:36–2:50.

Ms. Kinney nonetheless urges consideration of her late payments as an informal cure rather than an improper modification. But this approach would nullify the code's restrictions on modifications. *See In re Scrivner*, 535 F.3d 1258, 1263 (10th Cir. 2008) ("[T]o allow the bankruptcy court, through principles of equity, to grant any more or less than what the clear language of [the code] mandates would be tantamount to judicial legislation and is something that should be left to Congress, not the courts.") (quoting *In re Alderete*, 412 F.2d 1200, 1207 (10th Cir. 2005)). How could a bankruptcy court forgive a late payment as an informal cure if the court couldn't approve the payment through a properly filed motion? So §§ 1322 and 1329(a)(2) suggest that a debtor completes payments "under the plan" only when the payments come during the plan's five-year period.

b. Sections 1325 and 1328 do not require us to characterize payments after the five-year period as payments under the plan.

Section 1325. Ms. Kinney relies partly on § 1325(a)(6), which requires confirmation of a plan if "the debtor will be able to make all payments under the plan and to comply with the plan." 11 U.S.C. § 1325(a)(6). The Third Circuit interpreted this language to imply that a debtor can make payments under the plan without complying with the plan's terms. *In re Klaas*, 858 F.3d 820, 829–30 (3d Cir. 2017).

But this language doesn't show that post-plan payments are "under the plan." For instance, a debtor may make a late payment while the plan remains in effect. The late payment would not "comply with" the plan, but could still be "under the plan." So the Third Circuit's distinction sheds no light on whether payments after the five-year period are payments "under the plan."

Section 1328. Ms. Kinney also argues that because § 1328(a) does not require timeliness for "payments under the plan," debtors need not complete the plan payments within five years. We disagree.

As Ms. Kinney points out, § 1307 elsewhere requires "timely" actions. 11 U.S.C. § 1307(c)(3)–(4). In those places, however, the code otherwise gives no guidance on timing. For example, § 1307(c)(3) allows dismissal for "failure to file a plan *timely* under section 1321 of this title." 11 U.S.C. § 1307(c)(3) (emphasis added). Because § 1321 does not itself

specify a time requirement, the term "timely" is needed to prevent overeager creditors from moving to dismiss when the debtor still has time to file a plan.

But the term is unnecessary in § 1328(a); here the phrase "under the plan" is naturally read to require that a plan remain in effect when the payments are made. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 45 (2008). And it's not clear whether "timely" here would mean that the payments came

- within the five-year period or
- by the due-date for each monthly payment.

Either interpretation is reasonable.

* * *

The parties present competing arguments from the statutory language, but none is conclusive. In the end, there's no code provision that expressly allows or prohibits a discharge when the debtor has not completed the plan payments by the end of the five-year period. So the text is ambiguous.

Because the text is ambiguous, we "seek guidance from Congress's intent, a task aided by reviewing the legislative history." *In re Geneva Steel Co.*, 281 F.3d 1173, 1178 (10th Cir. 2002). Along with the legislative history, we consider which interpretation best fits the statutory language. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

In our view, the statutory language suggests that Ms. Kinney's late payments are not "under the plan" because they came after the plan had already ended. This suggestion is supported by the legislative history of Chapter 13.

6. Congress intended to limit payments under Chapter 13 plans to five years.

The legislative history is also ambiguous, but likewise supports the bank's interpretation of the code.

"The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) (quoting *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991)). Concern for this purpose led the 1977 House Judiciary Committee to criticize the frequency of court-supervised repayment plans lasting seven to ten years:

> [I]nadequate supervision of debtors attempting to perform under wage earner plans have made them a way of life for certain debtors. Extensions on plans, new cases, and newly incurred debts put some debtors under court supervised repayment plans for seven to ten years. This has become the closest thing there is to indentured servitude; it lasts for an identifiable period, and does not provide the relief and fresh start for the debtor that is the essence of modern bankruptcy law.

House Judiciary Committee Report for the Reform Act, H.R. Rep. No. 95–595, at 117 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6078 (footnotes omitted).

On the other hand, the 1977 House Judiciary Committee regarded Chapter 13's predecessor as "overly stringent and formalized." *Id.* The Committee observed that Chapter 13 had "simplifie[d], expand[ed], and ma[de] more flexible wage earner plans." *Id.* at 117–18.

The bank argues that allowing debtors to informally cure their plans would lead to a "slippery slope" that extends the duration of plans, the evil that Congress tried to prevent. This concern is not entirely hypothetical. In *In re Henry*, 368 B.R. 696 (N.D. Ill. 2007), the district court applied a flexible test to allow a debtor to take an "extra 30 months" beyond the 5-year plan. *Id.* at 701–02.

Despite the potential for lengthy plans, recognition of informal cures could permit fresh starts by injecting flexibility into administration of the plan.[6] Given the benefit of flexibility, the Third Circuit views the five-year limit on plans as a "shield" for debtors rather than as a "sword" for creditors. *In re Klaas*, 858 F.3d 820, 830 (3d Cir. 2017). This approach

[6] As an amicus, Ms. Kinney's Trustee contends that attorney fees would skyrocket if every late payment requires modification. Here, though, we are addressing only the inability to cure a default after the five-year period has ended. At that point, the parties agree that the court cannot modify the plan to permit future payments. In any event, we must interpret the bankruptcy code as Congress drafted it even if this interpretation would increase legal expenses.

makes sense because dismissal or conversion to a Chapter 7 bankruptcy could hurt both the debtor and creditor.[7]

But the 1977 House Judiciary Committee Report reflects Congress's concern as to "inadequate supervision" and indefinite extensions of payment plans. House Judiciary Committee Report for the Reform Act, H.R. Rep. No. 95–595, at 117 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6077. The Committee apparently reasoned that

- what is best for an individual debtor might not be what is best for debtors as a whole and
- strict deadlines are best for debtors as a whole.

Second, the bankruptcy court points out that without informal extensions, most Chapter 13 debtors would lack meaningful breathing room. Appellant's App'x at 175. After 2005, Chapter 13 plans for above-

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[7] The alternatives to discharge may be harsh for debtors, like Ms. Kinney, suffering unanticipated setbacks late in a five-year payment period. To soften the blow, Congress has added a temporary provision allowing discharges for debtors defaulting on mortgage payments. 11 U.S.C. § 1329(i) (2021).

But the permanent alternatives—hardship discharge, dismissal, and conversion—are tough. The hardship discharge is not always available and even when it is, the relief is limited to unsecured debts. 11 U.S.C. § 1328(b), (c). And after a dismissal, the debtor does not get a fresh start and might need to re-enter bankruptcy or continue in debt. 11 U.S.C. § 349. Conversion also has downsides. For some Chapter 13 debtors, conversion to Chapter 7 may not be available. *See* 11 U.S.C. § 707(b). And even if conversion to Chapter 7 were available, it could jeopardize debtors' ability to remain in their homes. *See* 11 U.S.C. § 726.

median debtors must last exactly five years (unless the debtors are fully paying all unsecured claims). *See* 11 U.S.C. § 1325(b)(4).[8]

Strict enforcement of the five-year period would inevitably limit the court's flexibility when debtors experience unexpected calamities in the final stages of their plans. But Congress presumably recognized the problem when requiring plans to last five years and prohibiting plan extensions. Indeed, Congress labelled the section "Chapter 13 plans to have 5-year duration in certain cases." Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109–8, Title III, § 318, Apr. 20, 2005, 119 Stat. 23.

Recent legislation suggests congressional recognition that the bankruptcy code prohibited informal cures after expiration of the five-year period. In December 2020, Congress inserted a new subsection "i" in 11 U.S.C. § 1328. The new subsection allows discharges for debtors, like Ms. Kinney, who have "not completed payments to . . . a creditor holding a security interest in the principal residence of the debtor" if

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[8] Some exceptions may exist. *See In re Lanning*, 545 F.3d 1269, 1274 n.4 (10th Cir. 2008) ("The ruling on the relevant duration of the commitment period is not at issue in this appeal."); *see also* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109–8 (titling the relevant section of the bill "Chapter 13 plans to have 5-year duration in certain cases"); *In re Sisk,* 962 F.3d 1133, 1146 (9th Cir. 2020) (concluding that 11 U.S.C. § 1325(b)(4) requires the plan to last a minimum of five years "only if the plan triggered an objection" by a trustee or creditor).

> (2)(A) the plan provides for the curing of a default and maintenance of payments on a residential mortgage under § 1322(b)(5); and
>
> (B) the debtor has entered into a forbearance agreement or loan modification with the holder or servicer . . . .

11 U.S.C. § 1328(i)(2); Consolidated Appropriations Act, 2021, Pub. L. 116-260, Div. FF, Title X, § 1001(b)(1)–(2), Dec. 27, 2020, 134 Stat. 3217. This provision, which was effective upon enactment, expires in December 2021. *Id.*

This enactment suggests that (1) Congress realizes that unexpected calamities prevent many Chapter 13 debtors, like Ms. Kinney, from timely paying their mortgages and (2) Congress tried to soften the blow without disturbing the code's other limitations.

* * *

So in our view, Congress intended to strictly limit the time for payments under Chapter 13 plans.

7. Conclusion

We affirm the dismissal of Ms. Kinney's Chapter 13 case. Although the Code's language and legislative history are ambiguous, both suggest that Congress intended to limit Chapter 13 plan payments to five years.

If Ms. Kinney wanted to avoid a material default, she needed a plan modification. But the court couldn't permit Ms. Kinney to cure her default once the plan's five-year period ended.

Given Ms. Kinney's material default, the plan's expiration left the bankruptcy court without authority to grant a discharge. We thus affirm dismissal of the Chapter 13 bankruptcy case.

20-1122, *Kinney v. HSBC Bank*

EID, J., concurring in the judgment.

Although I agree with the majority's conclusion that payments made after the five-year payment period cannot cure a default and permit discharge, I write separately because I would not find the statutory scheme to be ambiguous on this point. *Contra* Maj. Op. at 6, 16.

Under the statutory scheme, a plan can only last five years. 11 U.S.C. § 1322(d)(1) ("the plan may not provide for payments over a period that is longer than 5 years"). As the majority points out, a discharge can occur only when the debtor "complet[es] . . . all payments under the plan." Maj. Op. at 8 (citing 11 U.S.C. § 1328(a)). While the majority suggests that the term "under" is automatically ambiguous, *id.* at 9, the statutory language and context in this case show that the plain meaning of "under" is "subject to." *See Pereira v. Sessions*, 138 S. Ct. 2105, 2113, 2117 (2018) (explaining that while the word "under" is a "chameleon," the "plain language and context" in the case before it showed that "Congress ha[d] supplied a clear and unambiguous answer to the interpretive case at hand"). As the majority concludes, properly in my view, a payment cannot be made subject to a plan if the plan no longer exists—that is, if the five-year period has passed. Maj. Op. at 11, 16. Given that Kinney did not "complet[e] . . . all payments under the plan," as required by § 1328(a), within five years, as required by § 1322, the bankruptcy court was without jurisdiction to grant a discharge and properly dismissed the case. There is no ambiguity here. *See* A. Scalia &

B. Garner, Reading Law 167 (2012) ("The text must be construed as a whole"); *Pereira*, 138 S. Ct. at 2116 (rejecting "strain[ed]" efforts "to inject ambiguity into the statute").[1]

The majority concludes that the language is ambiguous because "[i]n the end, there's no code provision that expressly allows or prohibits a discharge when the debtor has not completed the plan payments by the end of the five-year period." Maj. Op at 16. The majority then proceeds to consider the legislative history of the statute, concluding that it too is ambiguous. *Id*. at 17.

It was not necessary for Congress to have added an express provision regarding payments made after the five-year period because the language already provides for such a result: a plan expires after five years, and payments cannot be "under" a plan that has come to an end. Because the majority's definition of ambiguity places an untenable burden on Congress to expressly spell out a result even where the result is plain under application of existing statutory provisions, I respectfully concur only in the judgment it reaches.

[1] In addition to *Pereira*, the majority cites to *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc*., 554 U.S. 33, 39–41 (2008). That decision provides no support for its finding of ambiguity, however, as it assumed for the sake of argument that the language in that case was ambiguous. *Id.* at 41.