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CAN A DEBTOR DEFAULT ON DIRECT MORTGAGE PAYMENTS AND STILL RECEIVE A DISCHARGE?

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In an ideal world, a debtor in a Chapter 13 case makes all of the payments due to the Chapter 13 trustee as proposed by the plan so that the trustee cures any pre-petition mortgage arrears, while the debtor remains current on direct-pay mortgage payments for the duration of the case. It is no surprise that things do not always go as planned. Sometimes a debtor cannot make all of the scheduled payments to the trustee and the case gets dismissed without a discharge. It may be more of a surprise when a debtor makes all payments to the trustee, and otherwise complies with the requirements of Chapter 13, but does not receive a discharge because of failure to remit post-petition, regular mortgage payments that should have been paid direct pursuant to the debtor's plan. While several courts have determined that a debtor should not receive a discharge when post-petition mortgage payments are in arrears at the end of the case, the court in *In re Gibson*, 582 B.R. 15 (Bankr. C.D. Ill. 2018) has recently determined that a debtor in this situation should nonetheless receive a discharge.[1]

A. DISCHARGE IS APPROPRIATE

In re Gibson, 582 B.R. 15 (Bankr. C.D. Ill. 2018)

The debtors' confirmed plan provided that they would make payments to the Chapter 13 trustee, who would cure the pre-petition arrears on the debtors' second mortgage. *In re Gibson*, 582 B.R. 15, 16 (Bankr. C.D. Ill. 2018). The debtors were to make their regular monthly mortgage payments directly to the holder of the second mortgage. *Id*. At the end of the case when the trustee filed the notices required under Bankruptcy Rule 3002.1(f)[2] indicating that the pre-petition

[1] The American Bankruptcy Institute Journal has recently published a "Consumer Point/Counterpoint" feature addressing both sides of this issue. David Cox, *Don't Move the Goalposts: Section 1328 Should Not Deny Discharge to Debtor Who Completes Payments to the Trustee, but is Behind on Direct Payments*, ABI J., May 2018, at 20; Elizabeth L. Gunn, *With Notice Comes Responsibility: Direct Payments to Creditors are Payments "Under the Plan" and Required for Debtor to be Granted § 1328(a) Discharge*, ABI J., May 2018, at 21.

[2] Pursuant to Rule 3002.1(f) of the Federal Rules of Bankruptcy Procedure, at the end of the case the trustee shall file a Notice of Final Cure Payment regarding the cure of arrearages and the completion of payments. Bankruptcy Form 4100N, Notice of Final Cure Payment, provides "[a]ccording to Bankruptcy Rule 3002.1(f), the trustee gives

mortgage default had been cured, and that the debtors had completed all plan payments proposed by the plan, the mortgage company filed a response[3] indicating that the debtors had not made a direct payment on the second mortgage since one month after the case was filed.[4] *Gibson*, 582 B.R. at 16-17. The trustee then filed a motion to dismiss, asserting that the debtors had not completed "all payments under the plan" as required under Bankruptcy Code § 1328(a)[5] in order to receive a discharge. *Id*. at 17.

According to the court it had "never dismissed a chapter 13 case without a discharge, where the required payments to the trustee were completed, for the reason that the debtor failed to make all of the direct mortgage payments." *Id*. at 18. The court observed that only recently had courts begun to include direct payments within the phrase "all payments under the plan," even though § 1328 has included the phrase since 1978. *Id*. Some courts have even concluded that the plain and unambiguous meaning of "payments under the plan" includes all payments referred to in the plan. *Id*. (citing *In re Heinzle*, 511 B.R. 69 (Bankr. W.D. Tex. 2014); *In re Hanley*, 575 B.R. 207 (Bankr. E.D.N.Y. 2017); *In re Thornton*, 572 B.R. 738 (Bankr. W.D. Mo. 2017); *In re Evans (Evans I)*,

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notice that the amount required to cure the prepetition default in the claim below has been paid in full and the debtor(s) have completed all payments under the plan."

[3] Pursuant to Rule 3002.1(g) of the Federal Rules of Bankruptcy Procedure the mortgage company shall file a response to the trustee's Rule 3002.1(f) notice. The response is to be filed on Form 4100R, entitled Response to Notice of Final Cure Payment, containing a section in which the mortgage company is to indicate whether the debtor owes postpetition arrears and provide details regarding the arrears, if any.

[4] The debtors did not have pre-petition arrears on their first mortgage. *See Gibson*, 582 B.R. at 16. They kept current with the post-petition payments on their first mortgage, and testified at a hearing that they did not realize the second mortgage payments were to be paid direct. *Id*. at 17.

[5] 11 U.S.C. § 1328(a) provides in relevant part:

> a) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt—
>
> (1) provided for under section 1322(b)(5)[.]

543 B.R. 213 (Bankr. E.D. Va. 2016), aff'd *Evans v. Stackhouse (Evans II)*, 564 B.R. 513 (E.D. Va. 2017)). However, according to the *Gibson* court:

> In this Court's view, whether direct payments are payments "under the plan" for purposes of section § 1328(a) is not discernible from the statutory text. Either interpretation is plausible, meaning the statute is ambiguous. A general policy is recognized favoring resolution of ambiguities in the Bankruptcy Code in favor of debtors and even more so where the provision at issue affects a debtor's right to discharge.

Gibson, 582 B.R. at 18.

The court noted that the 2011 adoption of Bankruptcy Rule 3002.1, which requires a residential mortgage-holder to report whether or not a debtor is current on post-petition payments, has led to the question of what payments should be considered "under the plan." *Id*. Prior to the adoption of the rule, the the trustee would not typically know if a debtor was current on post-petition payments unless the creditor filed a motion for relief from stay. *Id*. The court recognized:

> It is safe to say that from 1978 until very recently, countless Chapter 13 debtors received a discharge despite an uncured default in payments to a creditor made direct by the debtor, either because the trustee was unaware of the default or because a default on direct plan payments was not viewed as a basis to seek dismissal without discharge.

Id. According to the court, Rule 3002.1 was adopted so that debtors and mortgage creditors could resolve disputes regarding post-petition mortgage payments at the end of the case. *Id*. at 19.

> Thus, the recent trend favoring dismissal without discharge as a punitive remedy for a debtor's failure to pay all direct payments is occurring not as a consequence of a statutory amendment reflecting a change in legislative policy, but merely by the happenstance of the introduction of Rule 3002.1, a Rule adopted for an entirely different and debtor-friendly purpose.

Id.

Section 1328(a) references both "all payments under the plan" and "provided for by the plan." *Id*. (citing 11 U.S.C. § 1328(a)). The *Gibson* court explained its view that while the phrases are similar, the meanings are distinct:

> In section 1328(a), "all payments under the plan" is used to define when completion of payments occurs (thus triggering entitlement to a full compliance discharge), while the similar but different alternative phrase "provided for by the plan" is used to describe the scope of the discharge. 11 U.S.C. § 1328(a). The use of different terminology implies an intended distinction. "Provided for by the plan," has been expansively construed to mean that a plan "makes a provision" for, "deals with," or even "refers to" a claim. *Rake v. Wade*, 508 U.S. 464, 474, 113 S.Ct. 2187, 124 L.Ed.2d 424 (1993). Congress could have defined the event of plan completion as "completion by the debtor of all payments provided for by the plan." Instead, Congress chose to use a different phrase. In this Court's view, the alternative phrase "under the plan" was intended to have a narrower effect, allowing for the possibility that not all creditors holding debts *provided for by the plan* are receiving payments *under the plan*.

Gibson, 582 B.R. at 19.

Pursuant to §§ 1322(b)(2) and 1322(b)(5),[6] a debtor cannot modify a claim secured only by a mortgage in the debtor's principal residence, but can cure a mortgage default per the plan while maintaining regular payments on the long-term debt. *Gibson*, 582 B.R. at 20 (citing 11 U.S.C. §§ 1322(b)(2) and (b)(5)). Citing the Supreme Court case *Rake v. Wade*, 508 U.S. 464, 113 S. Ct. 2187, 124 L. Ed. 2d 424 (1993), the *Gibson* court found "[a] plan utilizing the cure and maintain power essentially splits the creditor's secured claim into two separate claims – the underlying debt and the arrearages." *Gibson*, 582 B.R. at 20 (citing *Rake*, 508 U.S. at 473, 113 S. Ct. at 2192). The court noted that within its district most regular mortgage payments are made direct to the creditor, and that "it is only the funds paid by the debtor to the trustee that are property of the bankruptcy estate. . . . Future earnings of the debtor which are not needed to fund the required

[6] 11 U.S.C. 1322(b)(2) and (b)(5) provide:

(b) Subject to subsections (a) and (c) of this section, the plan may –

. . . .

(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

. . . .

(5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due[.]

payments to the trustee never become property of the estate." *Gibson*, 582 B.R. at 20. As a result, the direct payments are made with funds that are not estate property. *Id*. Furthermore, a creditor receiving direct payments does not have to file a proof of claim to obtain an allowed claim. *Id*. at 20-21. According to the court, these "are factors that weigh in favor of a determination that those direct payments are not 'payments under the plan.'" *Id*. at 21.

The court found further support for not including direct payments in "payments under the plan" in the duties of a trustee and debtor. A trustee's primary duty is to disburse funds to holders of allowed claims and seek dismissal or conversion if the debtor does not pay as required; the trustee does not have a duty to verify that the debtor is making direct payments. *Id*. Section 1328(a) of the Bankruptcy Code requires a debtor to certify all domestic support payments have been made, but it does not require a debtor to certify that all direct payments have been made prior to receiving a discharge. *Id*. at 22. The court concluded that "[t]he absence of such a certification requirement is inconsistent with the view that section 1328(a) imposes an absolute condition to discharge that the debtor has made all direct mortgage payments as well as any other direct payments . . . ." *Id*. Because the unsecured creditors received what they were entitled to, and because the mortgage creditor, the only creditor harmed, chose not to take any action on the second mortgage default until it filed a motion for relief from stay at the end of the case, further supported the conclusion that the debtors should receive a discharge. Perhaps most importantly, the court determined that under the provisions of the Code, a debtor's discharge is denied or revoked when the debtor has engaged in "affirmative misconduct"; to deny a discharge where the debtors had not engaged in misconduct would be imposing "punishment [that] does not fit the crime." *Id*. The court ultimately held that the debtors were entitled to receive a discharge as direct payments were

not "payments under the plan," and thus the debtors fulfilled the requirement of § 1328(a) by making all of the payments due to the trustee. *Id*. at 24.

B. DISCHARGE IS NOT APPROPRIATE

As the *Gibson* court pointed out, in other recent cases courts have declined to grant a discharge when the debtor has a post-petition mortgage arrearage at the end of the case.

In re Heinzle, 511 B.R. 69 (Bankr. W.D. Tex. 2014)

The debtors' confirmed plan provided that pre-petition mortgage arrears would be paid through the Chapter 13 trustee while the debtors would be responsible for making the regular monthly mortgage payments directly to the mortgage creditor. *In re Heinzle*, 511 B.R. 69, 71 (Bankr. W.D. Tex. 2014). A few months after confirmation, the debtors' post-petition mortgage arrears were added to the plan. *Id*. at 72. At the end of the case the trustee filed a Notice of Final Cure Payment pursuant to Bankruptcy Rule 3002.1(f) indicating that both pre- and post-petition arrears had been paid. *Id*. The Response to Notice of Final Cure Payment filed by the mortgage creditor showed that the debtors were behind on post-petition payments in an amount over $30,000. *Id*.

After receiving the creditor's response, the trustee filed a Motion to Deny Discharge and Dismiss Case, arguing that the direct payments due to the mortgage creditor were payments "under the plan" and thus the debtors could not receive a discharge pursuant to § 1328(a) despite having made all payments due to the trustee for 60 months. *Id*. In response to the trustee's motion, the debtors argued that the phrase "payments under the plan" referred only to payments made to the Chapter 13 trustee pursuant to the plan. *Id*. at 73 (citing 8 Collier on Bankruptcy, ¶ 1328.2 (16th ed. 2013)). The parties stipulated that, had the debtors been current on their direct post-petition mortgage payments, they would have been eligible for a discharge under § 1328(a). *Id.* at 73.

The court identified the primary question at issue as whether or not "payments pursuant to § 1322(b)(5) constitute 'payments under the plan,'" the answer to which would determine whether the debtors would receive a discharge despite the arrears on their post-petition mortgage payments. *Id*. at 75. The court noted that in *In re Foster*, 670 F.2d 478 (5th Cir. 1982), the Fifth Circuit Court of Appeals had concluded that mortgage payments paid direct were "plan payments," reasoning "'we find no warrant in the Bankruptcy Code for labelling [sic] part of the treatment of a claim "outside the plan" and part of it "under the plan" where the entire treatment is that which has been made available to the debtor through the provisions of Chapter 13.'" *Heinzle*, 511 B.R. at 77 (quoting *Foster*, 670 F.2d at 492-93) (alteration in original). The court also looked to *In re Perez*, 339 B.R. 385 (Bankr. S.D. Tex. 2006), in which that court determined "'[e]very Chapter 13 plan which this Court has reviewed reflects which claims will be paid through the trustee and which claims will be paid directly by the debtor; therefore . . . all payments that are referenced in the plan, regardless of whether they are made by the trustee or directly by the debtor, are payments 'under the plan.'" *Heinzle*, 511 B.R. at 77 (quoting *Perez*, 339 B.R. at 390 n.4) (emphasis added) (citations omitted). The *Heinzle* court concluded that the debtors' direct-pay, post-petition mortgage payments constituted "payments under the plan," and thus the debtors had not complied with all the requirements of Chapter 13. *Heinzle*, 511 B.R. at 78.

In the Motion to Deny Discharge and Dismiss Case the trustee asserted that the debtors materially defaulted under the plan due to their failure to make the post-petition direct mortgage payments. *Id*. at 81-82. Pursuant to § 1307(c)(6), a material default of the plan terms is possible grounds for conversion or dismissal of the case. *Heinzle*, 511 B.R at 82 (citing 11 U.S.C. § 1307(c)). To address this issue, the court looked to *Roberts v. Boyajian*, 279 B.R. 396 (1st Cir. BAP 2000), in which that court concluded that the debtors were bound by the plan terms and thus

materially defaulted on their plan, which warranted dismissal, when the debtors failed to pay a post-petition tax claim that "had been provided for in the plan." *Heinzle,* 511 B.R. at 82 (citing *Roberts v. Boyajian*, 279 B.R. 396, 399-400 (1st Cir. BAP 2000)). The *Heinzle* court "[found] that the failure to make direct payments to a mortgage creditor is no different." *Heinzle*, 511 B.R. at 82. The court gave the debtors fourteen days from the entry of its opinion to convert the case or the case would be dismissed. The court did not deny the debtors' discharge, concluding that such a denial "would require creditors to determine the legal effect of a denial of discharge on future bankruptcy filings." *Id*. at 83.

***In re Hanley*, 575 B.R. 207 (Bankr. E.D.N.Y. 2017)**

At the end of the debtors' case, the Chapter 13 trustee filed the required notice pursuant to Rule 3002.1 indicating that debtors' pre-petition arrears had been paid, and the mortgage claimant subsequently filed a response indicating that the debtors had not made all of the direct post-petition mortgage payments that had come due. *In re Hanley*, 575 B.R. 207, 211 (Bankr. E.D.N.Y. 2017). When the Chapter 13 trustee received the mortgagee's response to the trustee's notice, the trustee moved to dismiss and close the bankruptcy case without a discharge. *Id*. at 210.

At the outset, the court noted "[a]s this and other courts have held, a debtor's failure to make post-petition mortgage payments directly to a mortgagee constitutes a default of the plan." *Id*. at 210 (citing *In re Coughlin*, 568 B.R. 461, 463 (Bankr. E.D.N.Y. 2017)).[7] The debtors

[7] In *In re Coughlin*, the court addressed the potential inequitable result if direct-pay, post-petition mortgage payments were not considered to be payments "under the plan." *Coughlin*, 568 B.R. at 474. The court noted that if post-petition mortgage payments were being paid through the Chapter 13 trustee, the trustee would know of the default and could bring the issue before the court if the debtor did not modify his plan. *Id*. Furthermore, the trustee would not certify that plan payments had been completed and the debtor would not receive a discharge. *Id*. However, in a direct-pay case, the trustee would not necessarily know if post-petition mortgage payments were being made; in such instance, the trustee would certify that plan payments were complete and the debtor would receive a discharge. *Id*. According to the *Coughlin* court, "[t]he Bankruptcy Code should not be read to allow the anomalous result which would ensue" if a debtor who made direct payments received a discharge while the debtor whose payments were being made through the trustee did not. *Id*. Therefore, the *Coughlin* court held that "direct post-petition mortgage payments are payments under the plan for purposes of § 1328(a) . . . ." *Id*.

proposed to cure the default by entering into a loan modification that would add the post-petition arrears into the principal balance, even though the debtors had already been in the case more than 60 months. *Hanley*, 575 B.R. at 210. With regard to this proposal, the court determined "while debtors may be able to cure a default in post-petition mortgage payments, the cure must be accomplished by a consensual loan modification approved by the court, or through a modification of the debtor's chapter 13 plan pursuant to 11 U.S.C. § 1329, and *either of these options must be approved by the Court prior to the expiration of the chapter 13 plan term.*" *Id*.

The debtors had argued that with a permanent loan modification the post-petition default would be cured, and thus all payments would have been made "under the plan," allowing the debtors to receive their discharge. *Id*. at 213. The court disagreed. While the court did conclude that post-petition defaults in direct-pay mortgage payments could be cured, it identified only two ways to do so, and "either must occur prior to the expiration of the 60th month" of the case. *Id*. at 213-14, 217.

First, a debtor may enter into a loan modification that includes the arrears into the modified loan amount. *Id*. at 213. According to the court, "[b]ecause the Bankruptcy Code requires a finding that the debtor made all payments under the plan, a loan modification that cures any missed post-petition payments can and should be approved by the Court in order to find that payments are complete under the plan." *Hanley*, 575 B.R. at 213-14 (citing 11 U.S.C. § 1328(a).) *See also Coughlin*, 568 B.R. at 474. Second, a debtor may seek a plan modification to cure the default through the plan; however, all plan payments must be complete before the plan term ends. *Hanley*, 575 B.R. at 214. The court noted that while the Bankruptcy Code does not allow a debtor to change the terms of a mortgage, "a modified plan which allows a debtor to catch up on post-petition mortgage payments is not a change in the treatment of the secured creditor . . . ." *Id*. at 215.

The *Hanley* court recognized that "[t]he majority of courts have held that a default in plan payments may be cured within a reasonable time after the 60 months have expired" on the grounds that the debtors were only attempting to cure the default and not extend the plan, or on equitable grounds. *Hanley*, 575 B.R. at 217 (citing *Shovlin v. Klass*, 539 B.R. 465, 473 (W.D. Penn. 2015); *Marshall v. Henry*, 368 B.R. 696, 701 (N.D. Ill. 2007); *In re Aubain*, 296 B.R. 624, 634 (Bankr. E.D.N.Y. 2003); *In re Harter*, 279 B.R. 284, 288 (Bankr. S.D. Cal. 2002); *In re Hill*, 374 B.R. 745 (Bankr. S.D. Cal. 2007); *Green Tree Acceptance, Inc. v. Hoggle (In re Hoggle)*, 12 F.3d 1008, 102 (11th Cir. 1994)). The court disagreed with the conclusion of the majority of courts, finding that the plain language of the Bankruptcy Code does not allow for payments beyond a five-year period. *Hanley*, 575 B.R. at 217-18 (citing 11 U.S.C. §§ 1322(a)(4), (d)(1), (d)(2), § 1325(b)(1)(B) and § 1329(c)). Thus, once the plan term has expired a debtor cannot modify the plan, and arrears may not be cured after that time. *Hanley*, 575 B.R. at 218.

"Because the Debtors failed to (a) modify their plan before the 60th month to catch up on these missed payments, or (b) obtain approval of a consensual loan modification prior to the expiration of the 60th month," the Court concluded that the debtors could not receive a discharge under § 1328, and dismissed the case for material default pursuant to § 1307(c)(6). *Hanley*, 575 B.R. at 219 (citing 11 U.S.C. §§ 1307(c)(6), 1328).

***In re Thornton*, 572 B.R. 738 (Bankr. W.D. Mo. 2017)**

The debtor was current on her mortgage payments at the time she filed her bankruptcy case. *In re Thornton*, 572 B.R. 738, 739 (Bankr. W.D. Mo. 2017). Applicable local rules provided that if a debtor had no mortgage arrears the debtor could propose to make the monthly mortgage payment directly to the mortgage company, but if a debtor had arrears, monthly mortgage payments must be paid through the Chapter 13 trustee. *Id.* Although the holder of the first

mortgage filed a proof of claim indicating that the debtor owed one monthly payment and escrow advances, the parties nonetheless agreed that the debtor was current on mortgage payments when she filed the case; thus, the debtor proposed in her plan to pay her monthly mortgage payments direct. *Id*. The plan was confirmed. *Id*. The debtor subsequently fell behind on her post-petition mortgage payments. *Id*. at 739-40.

At the end of the case the trustee filed a notice indicating the debtor had made all payments due to the trustee, as well as a Notice of Final Cure Payment as to the mortgage company indicating that while the pre-petition arrears had been cured, the trustee had no knowledge as to the direct-pay post-petition mortgage payments.[8] *Id*. at 39. The mortgage company's response indicated that the debtor owed over $30,000 in post-petition payments. *Id*. at 739-40. In between the trustee's notices and the mortgage company's response, the debtor filed a motion requesting that her discharge be entered. *Id*. at 740. Due to the mortgagee's response, the trustee objected to the motion for entry of discharge in part on the ground that the debtor did not "make 'all payments under the plan.'" *Id*. (citing 11 U.S.C. § 1328(a)).

In addressing whether the post-petition mortgage payments were considered payments "under the plan," the court recognized that "courts are uniform in concluding that, when a plan contains a cure and maintain provision [pursuant to 11 U.S.C. § 1322(b)(5)], the mortgage is 'provided for by the plan' and the postpetition mortgage payments are made 'under the plan,' even if the debtor makes the postpetition payments directly to the mortgageholder." *Thornton*, 572 B.R. at 740 (citing *In re Kessler*, 655 F. App'x 242 (5th Cir. 2016); *Evans II*, 564 B.R. at 525-28;

[8] The debtor had defaulted on her ongoing mortgage payments and the default was to be cured pursuant to a consent order directing the debtor to make payments. *Id*. at 739. "Soon" after entry of the consent order the debtor defaulted on those payments as well, but the mortgage creditor did not file anything regarding the breach until four years after entry of the consent order. *Id*. at 739-40.

Coughlin, 568 B.R. 461; *Evans I*, 543 B.R. 213; *In re Doggett*, 2015 WL 4099806, at *3 (Bankr. D. Colo. July 6, 2015)).[9]

The *Thornton* court recognized that the case before it differed from other cases because the debtor did not have pre-petition arrears to be cured. *Thornton*, 572 B.R. at 741. The court nonetheless concluded that, since the plan had to indicate how mortgage payments would be made, the debtor's direct payments to the mortgage company were "under the plan." *Id*. at 742-43. The court held that the debtor was not entitled to a discharge, but since the mortgage creditor "allowed the debt to grow without taking any action" the court gave the debtor the choice of conversion to Chapter 7 or dismissal. *Id*. at 743.

***In re Evans (Evans I)*, 543 B.R. 213 (Bankr. E.D. Va. 2016), aff'd *Evans v. Stackhouse (Evans II)*, 564 B.R. 513 (E.D. Va. 2017)**

The debtor's confirmed plan provided that she would make direct post-petition payments to her mortgage creditor while curing pre-petition arrears through the Chapter 13 trustee. *Evans I*, 543 B.R. at 217. At the conclusion of the case the Chapter 13 trustee filed a Notice of Final Cure Payment indicating that the mortgage arrearage claim had been paid. *Id*. at 217-18. The mortgage creditor's response indicated its agreement that the arrears had been paid, but that the debtor had not made all of her direct, post-petition mortgage payments. *Id.* at 218. The trustee subsequently filed a Motion to Close Case Without Entry of Discharge, arguing that due to the debtor's failure to make the direct mortgage payments to the creditor, the debtor had not made "all payments under the plan" as required by § 1328(a). *Id*. at 215, 219. Although the debtor

[9] According to *In re Kessler*, a Chapter 13 plan need not "provide for curing default on § 1322(b)(5) debts, but if it does, then it must also provide for maintenance of the post-petition payments." *Kessler*, 655 F. App'x at 244 (citing *Foster*, 670 F.2d at 488-89). "Both the payments toward curing pre-petition mortgage arrears and the post-petition maintenance payments fall under a Chapter 13 plan because both payments concern the same claim." *Kessler*, 655 F. App'x at 244 (citing *Foster*, 670 F.2d at 493).

acknowledged she was behind on the direct payments, she disagreed with the trustee's conclusion that she should not receive a discharge. *Id*. at 219.

The debtor argued that the phrase "under the plan" was used in other Bankruptcy Code sections and in Bankruptcy Rules which should be considered when determining the meaning of the phrase. *Id*. According to the court, statutory interpretation must begin by first considering the plain language of the statute. *Id*. at 220.

> "In its examination of statutory language, a court construes the language in a manner that gives effect to all provisions 'so that no part will be inoperative or superfluous, void or insignificant.' A court's inquiry often ends begins and ends with plain language because when 'the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'"

Id. at 220-21 (quoting *S. Bank & Tr. Co. v. Alexander (In re Alexander)*, AP No. 13–07146–SCS, 2014 WL 3511499, at *9 (Bankr. E.D. Va. July 16, 2014), aff'd, 524 B.R. 82 (E.D.Va.2014)) (citations omitted). After noting that § 1328(a) provides that a discharge should be granted "as soon as practicable after completion by the debtor of all payments under the plan," the court identified "[t]he specific phrase at the heart of the controversy here is 'after completion by the debtor of all payments under the plan.'" *Evans I*, 543 B.R. at 221 (quoting 11 U.S.C. § 1328(a)). The opinion went on to provide:

> "After completion by the debtor of all payments under the plan" contemplates completion of all amounts set forth to be paid under the relevant Chapter 13 plan. Had Congress intended to offer a discharge to a debtor for simply completing the payments made directly to the Chapter 13 trustee, the drafters surely could and would have crafted language narrowing the range of required payments. The omission points toward the plain notion that Congress intended the requirement that all payments contemplated by a Chapter 13 plan must be completed in order to obtain a discharge. Congress plainly made completion of all payments the requirement for discharge, not simply a specific subset of payments contemplated by the confirmed plan.[10]

[10] The court's conclusion that "'all payments under the plan'" means "all amounts set forth to be paid under the . . . plan" begs the question, what are "all amounts set forth to be paid under the . . . plan"? The court merely substitutes the phrase "amounts set forth to be paid" for the word "payments." Aside from its reasoning that Congress would

Id. at 221. The Court determined there was no need to examine the phrase with regard to any other section since the plain language of § 1328 was clear. *Id*.

According to the court, "'[c]ourts agree with the interpretation . . . that a payment is under the plan when the debt is provided for in the plan.'" *Id*. at 231 (quoting *In re Kessler*, No. 09-60247-RLJ-13, 2015 WL 4726794, at *3 (Bankr. N.D. Tex. June 9, 2015), *aff'd* 655 F. App'x 242 (5th Cir. 2016); *see also Heinzle*, 511 B.R. at 78. To determine if the mortgage debt was "provided for in the plan," the court looked to *Rake*, in which the Supreme Court reasoned:

> "[Section] 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)." . . . [I]f claims that are subject to § 1322(b)(5) were not 'provided for by the plan,' there would be no reason to make an exception for them in § 1328(a)(1)."

Evans I, 543 B.R. at 222 (quoting *Rake*, 508 U.S. at 474, 475, 113 S. Ct. at 2193).[11]

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have said so if intended for payments "under the plan" to be only those made to the trustee, the court cited no support for its conclusion.

[11] In *Rake*, the Supreme Court addressed the question of whether a debtor must pay post-petition interest on arrearage being paid to an oversecured mortgage creditor. *Id*., 508 U.S. at 465-66, 113 S. Ct. at 2189. The Court stated:

> Section 1325(a)(5) applies by its terms to "each allowed secured claim provided for by the plan." The most natural reading of the phrase to "provid[e] for by the plan" is to "make a provision for" or "stipulate to" something in a plan. . . . Petitioners' plans clearly "provided for" respondent's home mortgage claims by establishing repayment schedules for the satisfaction of the arrearages portion of those claims. As authorized by § 1322(b)(5), the plans essentially split each of respondent's secured claims into two separate claims—the underlying debt and the arrearages. While payments of principal and interest on the underlying debts were simply "maintained" according to the terms of the mortgage documents during the pendency of petitioners' cases, each plan treated the arrearages as a distinct claim to be paid off within the life of the plan pursuant to repayment schedules established by the plans. Thus, the arrearages, which are a part of respondent's home mortgage claims, were "provided for" by the plans . . . .

Rake, 508 U.S. at 473, 113 S. Ct. at 2192-93 (alteration in original). While the Court specifically concluded that arrearages were "provided for" by a plan, it never directly said that payments being maintained pursuant to § 1322(b)(5) were "provided for" by a plan, or that a debt being "provided for" by a plan is necessarily "under the plan."

The court in *Evans I* considered whether requiring "all payments contemplated to be made in the confirmed plan must be completed to obtain a Chapter 13 discharge" is contrary to Congressional intent, and ultimately concluded it is not. *Evans I*, 543 B.R. at 221. In support, the court cited *In re Heinzle*, in which that court determined that Congressional intent, as reflected in the Bankruptcy Act of 1898 and subsequent cases, was that debtors should have flexibility in proposing plans, including paying post-petition mortgage payments direct. *Id*. at 221 (quoting *Heinzle*, 511 B.R. at 83). The court noted that in turn, the *Heinzle* court looked to *Foster v. Heitkamp (In re Foster)* in which that court determined whether a payment is "under the plan" should not depend on who hands over the payment to the creditor. *Evans I*, 543 B.R. at 221-22 (citing *Foster*, 670 F.2d at 486.

After concluding that direct payments are considered to be under the plan for purposes of § 1328(a), the court held that the debtor should not get a Chapter 13 discharge. *Evans I*, 543 B.R. at 223-24 (citing *In re Gonzales*, 532 B.R. 828 (Bankr. D. Colo. 2015)). The court explained that "there are three ways to conclude a Chapter 13 case: 'discharge pursuant to § 1328, conversion to a Chapter 7 case pursuant to § 1307(c) or dismissal of a Chapter 13 case "for cause" under § 1307(c).'" *Evans I*, 543 B.R. at 235 (quoting *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1223 (9th Cir. 1999)). Since the debtor could not receive a discharge, only conversion to Chapter 7 or dismissal pursuant to § 1307 were available. *Evans I*, 543 B.R. at 235. In his motion the trustee requested only that the case be converted or closed without a discharge, an option that the court said was not sufficiently authorized by the Bankruptcy Code where the debtor's ineligibility for a discharge is due to failing to make all payments under the plan. *Id*. The court directed the trustee to file an amended motion requesting conversion or dismissal and gave the debtor fourteen days to respond, after which time the court would schedule a hearing. *Id*.