5 F.4th 1136
70 Bankr.Ct.Dec. 133
United States Court of Appeals, 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
|
FILED July 23, 2021

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

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Before BACHARACH, EBEL, and EID, Circuit Judges.

Opinion

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 2013.[2] Under

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

[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.

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 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, 110 S.Ct. 2447, 110 L.Ed.2d 359 (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, 131 S.Ct. 716, 178 L.Ed.2d 603 (2011); *Hamilton v. Lanning*, 560 U.S. 505, 513, 130 S.Ct. 2464, 177 L.Ed.2d 23 (2010) (quoting

Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 187, 115 S.Ct. 788, 130 L.Ed.2d 682 (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, 108 S.Ct. 626, 98 L.Ed.2d 740 (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.

(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))

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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).

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, 120 S.Ct. 1331, 146 L.Ed.2d 171 (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 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."

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[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).

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*, ___ U.S. ___, 138 S. Ct. 2105, 2117, 201 L.Ed.2d 433 (2018) ("chameleon"); *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 40-41, 128 S.Ct. 2326, 171 L.Ed.2d 203 (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.

"Under" connects two nouns: "payments" and "plan." 11 U.S.C. § 1128(a). Though "under" bears multiple meanings, a payment "under" a bankruptcy plan

[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, 128 S.Ct. 2326. 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, 128 S.Ct. 2326. We've likewise considered legislative intent, though the concurrence does not. *See* Part 6, below.

is "more natural[ly]" read as something "subject to . . . or under the authority of" the plan. *Piccadilly Cafeterias*, 554 U.S. at 39-41, 128 S.Ct. 2326.

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, 128 S.Ct. 2326. 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, 128 S.Ct. 2326) 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, 128 S.Ct. 2326).

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, 128 S.Ct. 2326. *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. 1142-43, 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.3d 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, 128 S.Ct. 2326, 171 L.Ed.2d 203 (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, 121 S.Ct. 1302, 149 L.Ed.2d 234 (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, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007) (quoting *Grogan v. Garner*, 498 U.S. 279, 286-87, 111 S.Ct.

654, 112 L.Ed.2d 755 (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 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.

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[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.

[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.

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-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

[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).

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

> (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.

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 1140-41, 1145.

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 1141 (citing 11 U.S.C. § 1328(a)). While the majority suggests that the term "under" is automatically ambiguous, *id.* at 1142, the statutory language and context in this case show that the plain meaning of "under" is "subject to." *See Pereira v. Sessions*, ___ U.S. ___, 138 S. Ct. 2105, 2113, 2117, 201 L.Ed.2d 433 (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 1143, 1145. 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]

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[1] In addition to *Pereira*, the majority cites to *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 39-41, 128 S.Ct. 2326, 171 L.Ed.2d 203 (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, 128 S.Ct. 2326.

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 1145. The majority then proceeds to consider the legislative history of the statute, concluding that it too is ambiguous. *Id*. at 1145.

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.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Bankruptcy Judge Elizabeth E. Brown

In re: Margaret L. Kinney, Debtor.	Bankruptcy Case No. 13-27912 EEB Chapter 13

ORDER DISMISSING CASE PRIOR TO ENTRY OF DISCHARGE

(Filed Feb. 27, 2019)

THIS MATTER comes before the Court on the Motion to Dismiss Case Pursuant to 11 U.S.C. § 1307(c), filed by HSBC Bank USA, N.A. (the "Bank") and the Debtor's Response. The Debtor's confirmed chapter 13 plan required her, for a period of sixty months, to make certain payments directly to the chapter 13 trustee (the "Trustee") and to make her post-petition monthly mortgage payments directly to the Bank. The Debtor completed all the required payments to the Trustee. However, she admits that she failed to make the last three mortgage payments to the Bank during the plan period. The Debtor nevertheless asks the Court to deny the Bank's motion and to allow her additional time to cure the arrearage and obtain a chapter 13 discharge. For the reasons set forth below and in this Court's opinion in *In re Humes*, 579 B.R. 557 (Bankr. D. Colo. 2018), expressly incorporated herein, the Court holds that the Bankruptcy Code does not permit the Debtor additional time to cure plan arrearages after the plan has ended. As such, dismissal without entry of discharge is appropriate.

I. BACKGROUND

The Debtor filed her chapter 13 petition and a proposed plan on October 25, 2013. She is an above-median-income debtor and, as such, she was required to and did propose a plan with a five-year applicable commitment period. The proposed plan required her to make her first plan payment to the Trustee by November 25, 2013. This means her final payment was due no later than November 24, 2018. The Debtor's confirmed plan required her to pay the Trustee a total of $26,059 over the five-year period in various monthly amounts, as well as her direct mortgage payments to the Bank.

On July 18, 2018, approximately four and one-half months before the end of the Debtor's plan, the Trustee issued a Notice of Final Cure Payment ("Notice") to the Bank pursuant to Fed. R. Bankr. P. 3002.1(f). The Notice required the Bank to file a statement indicating whether the Debtor was current on the monthly mortgage payments required by her plan. On July 27, 2018, the Bank filed a response indicating that the Debtor was current on her mortgage through July. At that point, the Debtor had only four months left in her plan. Had the Debtor made the remaining mortgage payments for those months, she likely would have been eligible for discharge. Unfortunately, the Debtor failed make the payments due in September, October, and November. She also failed to make her December payment, but that payment falls outside of the plan period and, thus, does not impact her eligibility for discharge. Her arrearage for September, October, and November totals $2,978.18.[1] These defaults prompted the Bank to file its Motion to Dismiss. The Bank argues this case should be dismissed under 11 U.S.C. § 1307(c)(6), which permits dismissal upon a finding of a material default of a term of the confirmed plan.[2]

The Debtor objects to dismissal. She acknowledges the arrearage but argues that it is not substantial and that she can cure it over the next few months. At a preliminary hearing on the matter, the Debtor emphasized that, in the past, the Trustee has had a practice of holding chapter 13 cases open past the end of the sixty-month plan term in order to allow debtors to cure arrearages. Debtor also indicated that on February 8, 2019 she paid the Bank three months' worth of past due payments. This means the Debtor has now paid all mortgage payments that were due during the plan, but did so two and one-half months late.

II. *IN RE HUMES* DECISION

This Court previously addressed a chapter 13 debtor's ability to cure a plan arrearage after a sixty-month plan has ended in *In re Humes*, 579 B.R. 557

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[1] Three payments of $1,026.44 = $3,079.32. The Bank indicated in its Motion that it was holding $101.14 in a suspense account, leaving the outstanding arrearage at $2,978.18.

[2] All references to "section" or "s" shall refer to Title 11, United States Code, unless expressly stated otherwise

(Bankr. D. Colo. 2018). In that case, the debtor-husband lost his job during the case. The debtors filed a modified plan that lowered their monthly plan payment but promised to file a modified plan to increase payments once the husband found new employment. When the husband secured new employment, the debtors neglected to modify the plan and instead completed their plan payments at the lower amount. When the chapter 13 trustee realized this fact at the end of the plan, he moved to dismiss the case. The parties then reached a settlement that required the debtors to pay an additional $17,000, which approximated the amount they would have paid during the plan term if they had timely modified the plan to reflect the husband's new income.

This Court refused to approve the settlement and denied the debtors' request for entry of discharge. The Court first held that, because they were above-median income, the debtors were required to propose a plan with a five-year applicable commitment period. Although there is a split of authority on the issue, the Court held that this five-year period runs from the date specified in the plan for the first plan payment, as long as that date meets the requirements of § 1326(a)(1)(A). The applicable commitment period then ends five years after that date.

The Court then went on to analyze whether it had discretion to approve a stipulation that allowed the debtors to make their final plan payments more than seven months after the end of the five-year applicable commitment period. The Court recognized there are two schools of thought on the issue. The Third Circuit, in the case of *In re Klaas*, 858 F.3d 820 (3d Cir. 2017), concluded that a bankruptcy court has the necessary discretion under § 1307 to allow a debtor to cure a plan arrearage after the end of the plan term. Many courts have followed the Third Circuit. Other courts have adopted a more hardline approach and refused to allow a debtor to make payments past the end of the five-year plan term, deeming the end of the term to be a "drop dead date."

This Court ultimately adopted the reasoning of the latter line of cases. The Court found the *Klaas* decision's reliance on § 1307 unpersuasive. Although that section uses permissive language ("may" dismiss or convert as opposed to "shall") that gives bankruptcy courts flexibility in choosing what remedies to invoke whenever "cause" for dismissal or conversion has been established, a court's exercise of that discretion cannot exceed other explicit statutory limits.

Other sections of the Code are more stringent on the required term of a chapter 13 plan. The length of time a debtor must make plan payments is set forth in both § 1322 and § 1325. Section 1325(b)(4) sets the floor and § 1322(d) sets the ceiling. Together these two statutes require a below-median income debtor to make payments for no less than three years and no more than five years. The above-median income debtor must make payments for no more than five years and no less than five years or, put more simply, for exactly five years.

The Code allows a debtor to modify the plan during that period. However, it does not allow modification to take place after the completion of payments. 11 U.S.C. § 1329(a). Thus, the trustee or a creditor cannot request an increase in payments or a longer plan term after the debtor makes the last payment due under the existing plan. And it does not allow a modification to extend the length of the plan beyond five years. 11 U.S.C. § 1329(c). Thus, § 1329 reinforces the five-year limitation by forbidding a debtor from doing through modification what it could not do at plan confirmation.

Given these specific instructions in the Code, the Court concluded that a debtor cannot extend plan payments beyond the five-year period. This Court rejected the notion that Fed. R. Bankr. P. Rule 3002.1 required a different result. The main purpose behind that rule is to force mortgage lenders to give timely notice to a debtor of any postpetition changes in their mortgage payment. It allows chapter 13 debtors to obtain what amounts to essentially a "comfort order," verifying that they are now current on their mortgage obligations at the end of the plan. However, there is nothing in Rule 3002.1 that authorizes a debtor to make a cure payment after the plan term has ended. Nor could it because the Federal Rules of Bankruptcy Procedure cannot override any of the substantive provisions in the Bankruptcy Code.

The Court explained that it is sympathetic to the difficulties chapter 13 debtors face in trying to live on the stringent budget imposed by their plans for sixty months. In addition, there are practical efficiencies that would favor giving chapter 13 debtors greater flexibility in completing their plan payments. Nevertheless, the Court felt constrained by the clear dictates of the Code to prohibit debtors from extending their plan beyond five years.

III. APPLICATION TO THIS CASE

The Court sees no reason why the *Humes* decision should not apply in this case. The same sections of the Code apply to prohibit the Debtor from extending her plan payments beyond the five-year period. The Debtor argues her case is different from *Humes* because she only missed three payments and the amount of the arrearage is relatively small. If the Court had adopted the *Klaas* approach, these facts might have relevance. *See In re Klaas*, 858 F.3d 820, 832 (3d Cir. 2017) (adopting non-exclusive factors a court should consider in deciding whether to allow a post-term grace period to cure a plan default, including the length of time needed to cure and amount of arrearage due). However, this Court holds it lacks discretion to consider these factors or to allow the Debtor an additional cure period.

The Debtor also emphasizes that the Trustee has had a long-standing practice of leaving chapter 13 cases open past the five-year period to permit a debtor to cure an arrearage, especially where the amount is small or due to circumstances beyond the debtor's control. Prior to issuance of the *Humes* decision, the Court was unaware of this practice and its pervasiveness. The practice was not sanctioned by this Court, nor is it, as discussed above, authorized by the Code. After *Humes*, both chapter 13 trustees in this district have adopted a new practice of giving chapter 13 debtors notice of potential deficiencies several months prior to the end of their plan period. This permits debtors an opportunity to cure any deficiencies before their plan ends, and thereby to avoid the issues raised in *Humes.*

In this case, the Trustee seems to have followed this new practice by issuing a Notice of Final Cure Payment to the Bank several months *before* the end of the Debtor's plan. Up to the point that the Bank responded to the Notice in July, the Debtor had remained current on her mortgage. Yet for some unknown reason, the Debtor suddenly stopped making payments after almost five years of making them on time. Perhaps she was unaware that her discharge depended on her making all her plan payments, or that she would not have a chance to cure a default after her plan ended. Bankruptcy counsel practicing in in this district would be well advised to emphasize these requirements with their clients and to implement procedures to ensure that clients have cured any payment defaults *before* the end of the plan.

Unfortunately, it is too late for the Debtor in this case. Her failure to timely pay her mortgage payments during the five-year applicable commitment period constitutes a material default of the plan and is cause for dismissal. 11 U.S.C. § 1307(c)(6). The failure to make all her plan payments also prevents the entry of a chapter 13 discharge. 11 U.S.C. § 1328(a) (requiring the court to grant a discharge only after "completion by the debtor of all payments under the plan.").[3] The Debtor could still obtain a discharge by converting to chapter 7. And if she has caught up on her mortgages payments after the plan ended, then she is not likely to lose her home to foreclosure due to these missed payments. Thus, this Debtor may end up in much the same position as if she had obtained her chapter 13 discharge. The difference is that this Court needs to put a stop to this extrajudicial practice of extending plans beyond sixty months. To allow the Debtor an opportunity to exercise a conversion option, the Court will delay dismissal of this case for two weeks. If Debtor does not convert within that time frame, this case will be dismissed.

IV. CONCLUSION

For these reasons, the Bank's Motion to Dismiss is GRANTED. If Debtor wishes to convert to chapter 7, she shall file a notice of conversion on or before **March 13, 2019**. If no such notice is filed, the Clerk shall DISMISS this case.

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[3] A direct payment to the lender on a mortgage that is provided for in the plan is a plan payment, despite the fact that it is paid directly rather than through the trustee as a conduit. *See In re Hoyt-Kieckhaben*, 546 B.R. 868 (Bankr. D. Colo. 2016); *In re Formaneck*, 534 B.R. 29 (Bankr. D. Colo. 2015); *In re Gonzales*, 532 B.R. 828 (Bankr. D. Colo. 2015); *In re Furuiye*, Case No. 10-15854 SBB, Docket No. 85 (Bankr. D. Colo. April 7, 2014); In re Daggs, Case No. 10-16518 HRT, Docket No. 49 (Bankr. D. Colo. January 6, 2014). Thus, failure to make a direct payment during the life of the plan constitutes a default under the plan.

DATED this 27th day of February, 2019.

BY THE COURT:

/s/ Elizabeth E. Brown

Elizabeth E. Brown,
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Bankruptcy Judge Elizabeth E. Brown

In re: Margaret L. Kinney, Debtor.	Bankruptcy Case No. 13-27912 EEB Chapter 13

ORDER DISMISSING CASE
PRIOR TO ENTRY OF DISCHARGE

(Filed Nov. 22, 2019)

THIS MATTER comes before the Court on the Motion to Dismiss Case Pursuant to 11 U.S.C. § 1307(c), filed by HSBC Bank USA, N.A. ("Motion") and the Debtor's Response. For the reasons set forth in the Court's February 27, 2019 Order Dismissing Case and November 22, 2019 Order Denying Motion to Reconsider, the Court hereby

ORDERS that the Motion is GRANTED and this case is DISMISSED

DATED this 22nd day of November, 2019.

BY THE COURT:

/s/ Elizabeth E. Brown
Elizabeth E. Brown,
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Bankruptcy Judge Elizabeth E. Brown

In re: Margaret L. Kinney, Debtor.	Bankruptcy Case No. 13-27912 EEB Chapter 13

JUDGMENT

(Filed Nov. 22, 2019)

Pursuant to and in accordance with the Order Dismissing Case Prior to Entry of Discharge entered by the Honorable Elizabeth E. Brown, Bankruptcy Judge, and entered on the record in the above-entitled matter on even date herewith, it is hereby

ORDERED that the Motion to Dismiss Case Pursuant to 11 U.S.C. § 1307(c), filed by HSBC Bank USA, N.A. is GRANTED and this case is hereby DISMISSED.

DATED: November 22, 2019.

APPROVED BY THE COURT	FOR THE COURT:
/s/ Elizabeth E. Brown Elizabeth E. Brown United States Bankruptcy Judge	/s/ [Illegible] Deputy Clerk

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Bankruptcy Judge Elizabeth E. Brown

In re: Margaret L. Kinney, Debtor.	Bankruptcy Case No. 13-27912 EEB Chapter 13

ORDER DENYING MOTION TO RECONSIDER

(Filed Nov. 22, 2019)

THIS MATTER comes before the Court on the Debtor's Verified Motion to Reconsider Order Dismissing Case. On February 27, 2019, the Court entered an order dismissing the Debtor's bankruptcy case ("Dismissal Order"), but delayed actual dismissal to allow the Debtor time to elect to convert her case to chapter 7. The present motion asks this Court to reconsider its Dismissal Order. Since dismissal has not yet occurred, the Dismissal Order is not final. Thus, the standards of review applicable to Rule 59 and Rule 60(b) motions do not apply. *Trujillo v. Bd. of Educ. of Albuquerque Pub. Sch.*, 212 Fed. App'x. 760, 765 (10th Cir. 2007). A court "can use whatever standard it wants to review a motion to reconsider an interlocutory order." *Patterson v. Nine Energy Serv., LLC*, 355 F.Supp.3d 1065, 1110 (D. N.M. 2018) (noting that the "law of the case" doctrine does not limit a court's review of its own prior non-final order).

At issue in this case is whether a debtor can cure plan payment defaults beyond the end of her five-year plan term. In the Dismissal Order, the Court held that post-plan arrangements, such as the one that occurred in this case, violate the Bankruptcy Code's prohibition against plans exceeding five years in length. *See* 11 U.S.C. §§ 1322(d), 1325(b)(4), and 1329(c). The present motion does not add new arguments or legal theories to support reconsideration, but it does add factual background for why the Debtor failed to make all the mortgage payments required during her sixty-month plan. And it explains why she has not elected to convert her case to a chapter 7 proceeding to obtain her discharge under that chapter.

The Court surmises that the Debtor is wisely creating a fuller record on this matter for purposes of appeal. This is a matter that should be appealed. It is an issue that affects many chapter 13 cases in this district and the Court's ruling threatens the efficacy of chapter 13 for debtors who make honest attempts to fulfill their plans but who fall short of perfection in doing so. This Court would be pleased to follow a binding precedent that allows greater flexibility, but it does not believe that it has the authority to judicially create an exception to the statutory prohibitions. To obtain a binding precedent, that will control more than this one particular case, it will require a circuit court level ruling. A ruling by the Tenth Circuit Bankruptcy Appellate Panel ("BAP") is not binding because the BAP is not an Article III court. The ruling of one federal district court judge is not binding because one district court judge cannot bind other district court judges in the same district. Thus, this is a matter the Court believes is best suited for a direct appeal to the Tenth Circuit. The BAP has already ruled on this issue in *Christensen v. Black (In re Black)*, 292 B.R. 693 (10th Cir. BAP 2003). If the Debtor elects to appeal this ruling (and the underlying ruling), then this Court will certify this matter for direct appeal *sua sponte* in accordance with Fed. R. Bankr. P. 8006.

Just as the Debtor filed the present motion to create a fuller record for appellate purposes, so does the Court wish to provide more background and context for appellate consideration. Thus, the Court will briefly summarize the legal analysis from its prior rulings on this issue. Then it will add the additional background regarding chapter 13 practice in this district.

There are two schools of thought on this issue. The first is best exemplified by the case of *In re Klaas*, 858 F.3d 820 (3d Cir. 2017). Presently, this decision is also the only decision rendered on this issue by a circuit court. In holding that the bankruptcy court has the discretion to allow a debtor to cure a plan-payment default after the sixty-month-plan term has ended, the court relied on four arguments. First, it said that § 1307 permits, but does not mandate, dismissal due to a material plan default. *Id.* at 829. Second, § 1328(a) mandates the entry of discharge (of all dischargeable debts) "after completion by the debtor of all payments under the plan. . . ." 11 U.S.C. § 1328(a). It noted that § 1328(a) does not say "timely" completion of payments. *Klaas*, 858 F.3d at 829. And when it refers to "payments *under the plan*," it does not mean "under the time table set forth in the plan," but means only "under the authority conferred by the plan." *Id.* at 830. Third, legislative history demonstrates that Congress intended to limit the length of a chapter 13 plan to five years so that debtors could not be forced into involuntary servitude. Thus, the court concluded term limits were meant to serve as a "shield" for debtors, not as a "sword" for creditors seeking dismissal. *Id.* And finally, the court considered another alternative remedy, the "hardship" discharge offered by § 1328(b), and held that it would only apply to debtors who are unable to make all the required plan payments and, with that remedy, the debtor does not have to make any additional payments to creditors. In contrast, when debtors have the ability to promptly cure a default, the hardship discharge would not apply. Moreover, by allowing debtors to cure post-plan, creditors would receive the additional payment to which they were entitled under the plan. *Id.* Thus, both debtors and creditors would benefit from a more flexible approach.

This Court agrees with the *Klaas* court's analysis on these four points. Yet in this Court's opinion in *In re Humes*, 579 B.R. 557 (Bankr. D. Colo. 2018), which is incorporated by reference herein, the Court disagreed with any interpretation that would permit debtors to extend their plan terms beyond five years. While the Code allows bankruptcy judges discretion in terms of the remedies they may employ when a debtor defaults on her plan, they may not exercise that discretion to permit what is explicitly prohibited by the Code. No less than three statutes prohibit a plan term that exceeds five years. The most pertinent one, § 1329(c) provides:

> A plan modified under this section may not provide for payments over a period that expires after the applicable commitment period under section 1325(b)(1)(B) after the time that the first payment under the original plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time.

11 U.S.C. § 1329(c). And the *Klaas* court agrees that a bankruptcy court could not confirm a plan or approve of a plan modification that proposed longer than a five-year repayment arrangement. *Klaas*, 858 F.3d at 828.

But this is where the two schools of thought diverge. The *Klaas* court viewed cure payments after the five-year term has ended as a mere completion of the five-year plan rather than a proposal for a new plan or a modification of an existing one. *Id.* at 831. It rejected the creditor's argument that cure or "catch-up" payments are in essence an "informal modification." *Id.*

Section 1329(a) sets forth the type of changes that constitute permitted plan modifications. Subsection (a)(2) states that a request to "extend or reduce the time for [plan] payments" is a request for a plan modification. Based on this, other courts have steadfastly held that payments made after the five-year mark are prohibited, reasoning that, if a debtor cannot confirm a plan if it exceeds five years, then a debtor cannot be allowed to make plan payments beyond that five-year period. *In re Grant*, 428 B.R. 504, 507-08 (Bankr. N.D. Ill. 2010). In *Christensen v. Black (In re Black)*, 292 B.R. 693 (10th Cir. BAP 2003), the Tenth Circuit BAP held that bankruptcy courts cannot fashion a way to circumvent this statutory prohibition by calling the cure arrangement something other than a modification. Whether it is an informal agreement between the parties, a formal "stipulation for cure," a "settlement," or something else that allows for a modified payment arrangement to fulfill the debtor's plan obligations, it is still a plan modification. In *Humes*, this Court agreed with this second line of interpretation.

When the Court rendered its ruling in *Humes*, it was operating under a false assumption. It assumed that this issue was arising as an isolated instance. It arose in an unusual context. The debtors had promised to modify their plan as soon as the husband obtained a new job. They timely informed their counsel of the new employment but the attorney had forgotten the promise to modify and took no further action. At the end of the plan, the Trustee discovered the husband had been reemployed but the debtors continued to pay only $10 per month. The Trustee then moved to dismiss. Later the Trustee and the debtors entered into a settlement that permitted the debtors to cure the default by paying what they would otherwise have been required to pay if they had timely modified their plan to reflect the husband's new job. Over the course of five months, the debtors paid the arrearage to the Trustee. Then both sides sought the entry of the Debtors' chapter 13 discharge.

The Court acknowledged in its decision that, whatever interpretation it followed, it could potentially apply to many cases in which debtors fall behind in their mortgage payments when those payments are made directly to their lenders. But what it had no way of knowing was that the chapter 13 trustees in this district had a long-established and widely followed practice of allowing debtors to cure plan defaults after the five-year plan term ended – with such arrangements often extending over many months. In fact, the trustees did not audit their cases before the end of the plan. Debtors often fell behind and caught up over the course of the five years, but no one checked to see where the debtors stood until the plan term had ended. The trustees' main concern was to ensure full payment came in. No doubt they concluded that creditors were better off receiving delayed payments rather than no more payments with a dismissal. So the parties established this flexible, informal arrangement for a post-plan cure and never sought court approval of it. Had the Trustee not filed his motion to dismiss in *Humes* and then later his motion to approve a settlement, the Court would never have known of the informal arrangement in that case.

The Court could have discerned this practice earlier than it did. It could have and should have noticed in many cases a lengthy delay had occurred between the end of the plan term and the much later filing of a trustee's certificate indicating that the debtors had fulfilled their plans and were eligible for a chapter 13 discharge. But in this district, court staff have been permitted to enter standard chapter 13 discharge orders when uncontested requests are made. And the court staff had no way to appreciate this legal quagmire. Thus, literally the left hand did not know what the right hand was doing.

Once the *Humes* decision entered, the parties in many cases made the Court aware of the extent of this informal practice. In literally dozens of cases pending before the Court, debtors were in the process of completing these informal post-plan arrangements with the trustees. Faced with this dilemma, the Court held a hearing in those cases to explain that it could not in good conscience deny these debtors a discharge when they were only following what had been a supposedly acceptable arrangement. Acknowledging that doing so was contrary to its *Humes* decision, the Court exercised its discretion to allow cases caught in this predicament to continue their arrangements over the next six months, but indicated that after January 1, 2019 the Court would enforce its *Humes* interpretation.

During this interim, the trustees began conducting their audits for plan compliance six months prior to the scheduled plan completion date. This allowed debtors to become aware of any defaults with six months left to cure them. As a result, this issue has arisen with much less frequency. But it does still arise. Sometimes the debtor makes the final plan payment one or two days after the end of the five-year term. Sometimes, as in the present case, the debtors have missed several mortgage payments and then cured them two to three months post-plan. Sometimes they have sought a longer period to effectuate a cure.

This Court does not want to deny debtors a discharge when they simply make the final payment two days late. Nor would the Court want to deny the *Klaas* debtors a discharge for being unaware of an increase in the trustee's fee that they paid sixteen days post-plan. But is there a principled way to enforce the Code's five-year restriction on plan length and still exercise some amount of discretion for these innocuous offenses?

The *Klaas* court reconciles the two by calling the post-plan cure something other than a modification. As applied to its facts, this Court would agree. In *Klaas*, there was no new payment arrangement. The parties discovered an unpaid, undisclosed fee. It was an insubstantial sum, immediately paid, and the debtors bore no responsibility for its tardiness. The debtors were not trying to extend the time to make the known plan payments. All of the known payments had been made by the end of the five years. And the *Klaas* court adopted a test that, if applied narrowly and cautiously, would not threaten to undercut the statutory prohibition against extending plan arrangements beyond five years.

However, as the present case demonstrates, parties will advocate for application of that test to allow debtors additional months to complete known plan payments. That creates a very slippery slope. Soon the five-year term limit is no more than a guideline.

The temptation is to rescue a debtor who has made an honest effort to comply with a five-year plan but has fallen short of absolute perfection. The present case provides a great example. This Debtor filed for bankruptcy on October 25, 2013. Her first plan payment was due thirty days later or by November 24, 2013. That meant her five-year term would end on November 23, 2018. While her final Trustee payment would be due October 25, 2018, her last mortgage payment under the plan was the November 1, 2018 payment. The Debtor made all of her required Trustee payments by the end of the five years, but she failed to make the September through November mortgage payments until she cured them on February 8, 2019, almost two and one-half months beyond the end of the five years.

The Debtor has asserted that her lapse in paying the mortgage was due to a car accident that caused her to undergo several surgeries and to incur unreimbursed medical expenses. The Court has no reason to doubt the accident, the surgeries, or the medical expenses. But the causal connection between those and her failure to pay the mortgage is suspect. The accident occurred on March 27, 2018. Approximately four months later, the Trustee filed his Notice of Final Cure on July 18, 2018, asking the mortgage lender to confirm that the Debtor was current on her mortgage payments. On July 27, 2018, the lender indicated that she was current. It was not until September of 2018 that the Debtor stopped making the mortgage payments, about six months after the accident.

But giving the Debtor the benefit of the doubt, the facts of this case present the perfect test case for this issue. If a debtor has "substantially" complied with her plan but, due to unexpected events, she has been unable to complete her plan by the end of the five years, may she extend the time to complete the plan? Although it is difficult to articulate why, to this Court, this situation is different from the undisclosed fee paid sixteen days after the plan ended or the receipt of a final payment two days after the end of the plan. It is an attempt to extend the time for payments. It is a new payment arrangement made to complete known plan payments. That is a plan modification pursuant to § 1329(a). And it is an attempt to extend the plan beyond five years in direct contravention of § 1329(c).

It is a fair question to ask, "what is the harm?" Why can't we be flexible and help debtors make it through what is already a very arduous journey of living on an extremely strict budget for five years. There is never any money built into a chapter 13 budget for a vacation or car repairs. Who can live like that for five years without some flexibility? The answer is that most debtors cannot. And the Bankruptcy Code recognizes this. It allows debtors to come back to the court to modify the plan when life's unexpected events upset the carefully crafted repayment plan that seemed so "do-able" at the time of confirmation. Section 1329 was Congress' answer to this problem.

Why then did Congress draw a hard line in the sand when it comes to the five-year term limit? Why does § 1329(c) say that the one modification a debtor cannot do is to extend the time for payment beyond five years? I cannot say for sure. As applied in individual cases, like the present case, it is harsh and unforgiving.

Perhaps the answer lies in the legislative history, which indicates that Congress was concerned that chapter 13 not become a form of involuntary servitude. In its view, any time frame beyond five years was encroaching on this constitutional prohibition. It had to set some time limit and in its wisdom five years was the outside limit. The problem is that, in 2005, it added § 1325(b)(4) as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). This is the statute that required above-median income debtors to contribute their projected disposable income to repay creditors for *no less than five years.* Prior to this, § 1322(d) provided that all debtors had to propose a three-year plan, unless the court "for cause" approved a longer term, but one that could not exceed five years. 11 U.S.C. § 1322(d) (2000) (amended 2005). Thus, prior to BAPCPA, there was greater flexibility. A debtor could propose a three-year plan and then, if the debtor needed additional time to make plan payments, she could move to modify her plan to extend it up to five years. Now an above-median income debtor must propose a five-year plan and has to complete it within five years. Whether consciously done or not, Congress eliminated any grace period to extend the plan to catch-up on missed payments for above-median income debtors. This situation cries out for a legislative fix. But this Court does not believe it can use its discretion or equitable powers to supersede express statutory limitations.

Until Congress addresses this problem or the Tenth Circuit provides a binding precedent to the contrary, this Court will enforce the five-year term limit. While this may work a hardship in this and other individual cases, the five-year limit benefits debtors as a whole. As the adage goes, every job takes as long as you have to do it. In other words, if you tell debtors that five years means five years, then those who are financially capable of fulfilling their plans will do so within five years. If you tell them they can expect some grace period of six or so months after the end of the five years, then they will take five and one-half years to pay the obligations. This likely explains why so many debtors were entering into informal cure arrangements with the chapter 13 trustees post-plan. Setting a firm limit and enforcing it helps all debtors to get out of bankruptcy and start rebuilding their financial lives as soon as possible.

What then does this mean for chapter 13 debtors appearing before this Court? It means that debtors with five-year plans will need to complete all plan payments, including direct mortgage payments that come due during the plan, before the end of the five years. Debtors in this case have failed to do so and the statutory constraints discussed above prevent this Court from modifying their plan term from sixty months to sixty-two and one-half months.

The Court recognizes, however, that there may be cases with circumstances more akin to the situation described in *Klaas*, where debtors are unable to complete plan payments due to circumstances beyond their control and subsequently cure a small arrearage in one payment, very shortly after the end of the plan. Although such circumstances are not present here, this Court leaves open the possibility that it will allow such a cure without construing it as a plan modification to extend the time for payment.

For the reasons set forth above, the Debtor's Motion to Reconsider is DENIED. An unconditional dismissal order and separate judgment will enter immediately.

DATED this 22nd day of November, 2019.

BY THE COURT:

/s/ Elizabeth E. Brown
Elizabeth E. Brown,
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Bankruptcy Judge Elizabeth E. Brown

In re: Margaret L. Kinney, Debtor.	Bankruptcy Case No. 13-27912 EEB Chapter 13

JUDGMENT

(Filed Nov. 22, 2019)

Pursuant to and in accordance with the Order Denying Motion to Reconsider entered by the Honorable Elizabeth E. Brown, Bankruptcy Judge, and entered on the record in the above-entitled matter on even date herewith, it is hereby

ORDERED that the Debtor's Verified Motion to Reconsider Order Dismissing Case is DENIED.

DATED: November 22, 2019.

APPROVED BY THE COURT

/s/ Elizabeth E. Brown
Elizabeth E. Brown
United States Bankruptcy Judge

FOR THE COURT:

/s/ [Illegible]
Deputy Clerk

RELEVANT STATUTES AND RULES INVOLVED

In relevant part:

11 U.S.C. § 1307. Conversion or dismissal.

. . .

(c) Except as provided in subsection (f) of this section, on 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, including –

(1) unreasonable delay by the debtor that is prejudicial to creditors;

. . .

(3) failure to file a plan timely under section 1321 of this title;

(4) failure to commence making timely payments under section 1325 of this title;

. . .

(6) material default by the debtor with respect to a term of a confirmed plan;

. . .

In relevant part:

11 U.S.C. § 1322. Contents of plan.

(a) The plan –

(1) shall provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan; . . .

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

(3) provide for the curing or waiving of any default;

. . .

(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; . . .

(c) Notwithstanding subsection (b)(2) and applicable nonbankruptcy law –

(1) a default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured under paragraph (3) or (5) of subsection (b) until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law; and

. . .

(d)(1) If the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than –

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

. . .

the plan may not provide for payments over a period that is longer than 5 years. . . .

In relevant part:

11 U.S.C. § 1325. Confirmation of Plan.

(a) Except as provided in subsection (b), the court shall confirm a plan if –

(1) The plan complies with the provisions of this chapter and with the other applicable provisions of this title;

. . .

(6) the debtor will be able to make all payments under the plan and to comply with the plan;

. . .

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan –

. . .

(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period 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.

(2) For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor . . . less amounts reasonably necessary to be expended[.]

. . .

(3) Amounts reasonably necessary to be expended under paragraph (2), other than subparagraph (A)(ii) of paragraph (2), shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income [above the applicable median income.]

. . .

(4) For purposes of this subsection, the "applicable commitment period" –

(A) subject to subparagraph (B), shall be –

(i) 3 years; or

(ii) not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, . . . is [above the applicable median income.]

. . .

(B) may be less than 3 or 5 years, whichever is applicable under subparagraph (A), but only if the plan provides for payment in full of all allowed unsecured claims over a shorter period.

. . .

In relevant part:

11 U.S.C. § 1328. Discharge.

(a) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, . . . the court shall grant the debtor a discharge

. . .

(b) Subject to subsection (d), at any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if –

(1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;

(2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and

(3) modification of the plan under section 1329 of this title is not practicable.

. . .

In relevant part:

11 U.S.C. § 1329. Modification of Plan After Confirmation.

(a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to –

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

(2) extend or reduce the time for such payments;

. . .

(b)(1) Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section.

(2) The plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved.

(c) A plan modified under this section may not provide for payments over a period that expires after the applicable commitment period under section

1325(b)(1)(B) after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time.