No. 06-40127

IN THE

United States Bankruptcy Court

FOR THE NORTHERN DISTRICT OF TEXAS

IN RE HOWARD L. MCCARTHY, JR.

*Debtor.*

On En Banc Hearing by the
Bankruptcy Judges for the
Northern District of Texas

**BRIEF AMICUS CURIAE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS**

CAREY D. EBERT, #11128
State Bar No. 05332500
Principal Attorney for *amicus curiae*
1726 Chadwick Ct., Suite 100
Hurst, Texas 76054
(817)-268-2468
cde@ebertlawoffices.com

On Brief:
Tara Twomey

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## STATEMENT OF INTEREST OF NACBA AS *AMICUS CURIAE*

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 2,500 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 500,000 bankruptcy cases filed each year. NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in various courts seeking to protect the rights of consumer bankruptcy debtors. *See, e.g., Kawaauhau v. Geiger*, 118 S.Ct. 974 (1998); *AT&T University v. Mercer*, 246 F.3d 391 (5th Cir. 2001); *In re Pyatt*, 486 F.3d 423 (8th Cir. 2007).

NACBA members primarily represent individuals, a significant number of whom file chapter 13 bankruptcies. The 2005 amendments significantly altered the disposable income test in section 1325(b)(1) applicable to chapter 13 debtors. However, contrary to the Standing Chapter 13 Trustee's argument, those changes are not relevant to the issue before the court. Instead, this case involves the important issue of the procedure that the debtors must use in order to obtain a discharge upon completion of all payments under the plan. Because uncertainty on this issue may jeopardize a debtor's fresh start the NACBA membership has a vital interest in the outcome of this case.

## FACTUAL BACKGROUND

Howard McCarthy filed a voluntary chapter 13 petition on January 12, 2006. Debtor's Schedule A (Real Property) included Rental Property located at 2411 Palo Alto, Arlington, TX. The debtor valued his one-half undivided interest at $41,700.00. The Rental Property was not claimed as exempt on Schedule C.

The Debtor's chapter 13 plan, which was filed on January 13, 2006, was confirmed on April 13, 2006 without objection. The plan proposed to pay a total of $49,260.00 in variable amounts for 60 months. Under the "best interest of the creditors test," unsecured creditors were entitled to $41,857.00—approximately a 60% dividend. The remainder of the funds to be paid into the plan were presumably allocated to attorney's fees and trustee's administrative expenses.

On June 26, 2006, Debtor filed a motion to sell the real estate located at 2411 Palo Alto, Arlington, TX. The motion specifies that half of the proceeds from the sale—representing the debtor's one-half interest—will be paid to Tim Truman, Standing Chapter 13 Trustee. The debtor's motion to sell was granted without objection on June 8, 2006. On July 6, 2007, eighteen month having filing his petition for relief the debtor completed the payments under the plan.

On September 10, 2007, the Standing Chapter 13 Trustee filed a Notice of Chapter 13 Plan Completion. According the notice, "the Debtor(s) has/have completed all payments under the confirmed chapter 13 plan." Subsequently, on November 28, 2007, nearly twenty-two months after filing his petition for relief, the debtor moved for entry of a discharge pursuant to 11 U.S.C. § 1328(a). The Standing Chapter 13 Trustee objected to the debtor's discharge on the grounds that the "applicable commitment period" had not expired. In his objection the Trustee concedes that the debtor has completed all his payments under the plan and, in turn that the trustee has made all payments due to the creditors under the plan.

## ARGUMENT

### I. The 2005 amendments to the Bankruptcy Code are irrelevant to the question before the court.

The purpose of chapter 13 is "to enable an individual, under court supervision and protection, to develop and perform under a plan for the repayment of his debts over an extended period. In some cases the plan will call for full repayment. In others, it may offer creditors a percentage of their claims in full settlement." House Report No. 95-595, 95th Cong., 2d. Sess. (1978) at 118. Essentially, chapter 13 allows the debtor to rewrite his obligations to his creditors in the form of plan payments. Once a plan is confirmed, creditors are "entitled to receive the amount of payments designated by that confirmed plan." *In re Smith*, 237 B.R. 621, 625 (Bankr. E.D. Tex. 1999), *aff'd* 252 F.3d 1357 (5th Cir. 2001).

The question of whether the debtor may complete a chapter 13 plan early by paying in full the amounts due under his plan is not new is the post-BAPCPA era. Courts have been considering the issue for more than twenty years. *See, e.g., In re Chancellor*, 78 B.R. 529 (Bankr. N.D. Ill 1987). The guiding statutory provisions for this inquiry are sections 1328 and 1329. Section 1328(a) provides for a discharge to be entered "as soon as practicable after the completion by the debtor of all payments under the plan." 11 U.S.C. § 1328(a). The discharge provided by section 1328 is the key to a "fresh start" for chapter 13 debtors. Recognizing, however, that a debtor's financial circumstances may unexpectedly change, for better or worse, after confirmation but before the completion of payments under the plan, Congress allowed debtors, trustees and unsecured creditor to seek modification of the confirmed plan. 11 U.S.C. § 1329(a). As a result, debtors suffering post-petition adverse events, such as loss of a job, may

reduce the amount of payments to creditors. Conversely, if the debtor's income increases significantly or the debtor wins the lottery, the trustee or unsecured creditors could seek modification of the confirmed plan to increase payments.

Neither of the "completion" of plan payment provisions in sections 1328(a) and 1329(a) was amended in 2005. While the 2005 amendments did substitute "applicable commitment period" in lieu of "three-year period" in section 1325(b)(1), that change does not significantly affect the long-established precedent on this issue. *See In re Fridley*, 380 B.R. 538 (B.A.P. 9th Cir. 2007) ("From the standpoint of the structure of the Bankruptcy Code, our answer to the question whether 'completion' connotes a temporal requirement is largely dictated by long-established precedent that continues to apply after the enactment of BAPCPA"). Under pre-BAPCPA law, a large majority of courts held that debtors were permitted to complete a plan even if the debtor had not made at least thirty-six months of payments. *See Mass. Housing Fin. Agency v. Evora*, 255 B.R. 336 (D. Mass. 2000); *Matter of Casper*, 154 B.R. 243 (N.D. Ill. 1993); *In re Murphy*, 327 B.R. 760 (Bankr. E.D. Va. 2005); *In re Golek*, 308 B.R. 332 (Bankr. N.D. Ill. 2004); *In re Richardson*, 283 B.R. 783 (Bankr. D. Kan. 2002); *In re Sounakhene*, 249 B.R. 801 (Bankr. S.D. Cal. 2000); *In re Smith*, 237 B.R. 621 (Bankr. E.D. Tex. 1999); *In re Bergolia*, 232 B.R. 515 (Bankr. S.D. Fla. 1999); *In re Martin*, 232 B.R. 29 (Bankr. D. Mass. 1999); *In re Phelps*, 149 B.R. 534 (Bankr. N.D. Ill. 1993); *In re Moss*, 91 B.R. 563 (Bankr. C.D. Cal. 1988); *In re Chancellor*, 78 B.R. 529 (Bankr. N.D. Ill. 1987).

In this case, the debtor completed the payments under his plan eighteen months after filing his petition for relief. Debtor filed his motion for a discharge in the twenty-first month of his plan. The fact that the debtor's applicable commitment period is sixty months is not relevant to the inquiry before the court. If the same facts had applied pre-BAPCPA or the debtor's

applicable commitment period had been thirty-six months the analysis would nevertheless have been the same.

## II. A majority of courts have concluded that the "completion of payments" under a plan for purposes of section 1328 and 1329 does not require a minimum number of payments.

The Bankruptcy Court for the Eastern District of Louisiana recently considered the same issue before this court. In reviewing the relevant case law the court noted that "[t]he majority support the payment of a lump sum to complete a plan even when the Debtor has not previously made at least 36 months of payments." *See In re McCollum*, 348 B.R. 377, 389-90, *aff'd* 363 B.R. 789 (E.D. La. 2007). The court aptly described the differing analyses applied by the courts:

> One line of cases reasons that nothing in the Code prohibits the early payment of a debtor's obligations under a confirmed plan. These courts hold that a confirmed plan defines the obligations and rights of the parties. Since the early payment does not change the substantive terms of the plan, i.e., claimants receive exactly what was bargained for in the plan as confirmed, an acceleration is not a modification under § 1329. Therefore, once all plan payments have been made, the debtor is entitled to a discharge under 11 U.S.C. § 1328 regardless of when completion occurs. *See, In re Smith*, 237 B.R. 621 (Bankr E.D. Tex. 199), *aff'd* 252 F.3d 1357 (5th Cir. 2001); *In re Murphy,* 327 B.R. 760 (Bankr. E.D. Va. 2005); *In re Bergolia*, 232 B.R. 515 (Bankr. S.D. Fla. 1999); and *In re Casper*, 154 B.R. 243 (N.D. Ill. 1993)(Since § 1329 only allows modification before completion, once the debtor tenders an amount sufficient to buyout the plan, a discharge is due).
>
> Other courts hold that the accelerated payment of plan obligations is a modification of the plan's terms. As such, the provisions of 11 U.S.C. § 1329 must be satisfied. However, this does not require the application of the disposable income test contained in § 1325(b). Section 1329 adopts, by specific reference, the application of § 1325(a). Section 1325(a) provides in relevant part, that the plan (modification) must be proposed in good faith and must meet the best interests of creditors test. Noticeably absent from § 1325(a) are the provisions requiring payment of disposable income for 36 months which are contained in § 1325(b). As a result, these courts reason that a lump sum payment in satisfaction of a confirmed plan, while a modification, is not prohibited by a strict reading of § 1329. *See In re Sounakhene*, 249 B.R. 801 (Bankr. S.D. Cal. 2000); *In re Golek*, 308 B.R. 332 (Bankr. N.D. Ill. 2004); *In re Richardson*,

283 B.R. 783 (Bankr. Kan. 2002); and *In re Moss*, 91 B.R. 563 (Bankr. C.D. Cal. 1988).

A minority of courts hold that the lump sum payment of the amounts due on a confirmed plan is a modification which must satisfy both the provisions of §§ 1325 and 1329 in their entirety. These jurists will not allow the early satisfaction of a plan through a lump sum payment unless the debtor has paid a minimum of 36 months of disposable income into the plan. *See, In re Powers*, 140 B.R. 476 (Bankr. N.D. Ill. 1992) *cf: In re Casper*, 154 B.R. 243 (N.D. Ill. 1993) and *In re Golek*, 208 B.R. 332 (Bankr. N.D. Ill. 2004); *In re Nahat*, 315 B.R. 368 (Bankr. N.D, Tex. 2004) (disposable income test applies but may be satisfied if total payments, including accelerated payment, equal or exceed 36 months of disposable income, therefore not a bar to early completion); *In re Guentert*, 206 B.R. 958 (Bankr. W.D. Mo. 1997). Thus, only two cases found, *Guentert*, *supra*, and *Powers*, *supra*, actually stand for the proposition that a plan may never be completed in less than 36 months if less than full payment of claimants is offered.

**A. The Fifth Circuit Court of Appeals has endorsed the proposition that "completion of payments" means payment of the total amount due under the plan without regard to the actual number of payments.**

Contrary to the Trustee's suggestion, the Fifth Circuit Court of Appeals decisions in *Bankshore Nat. Bank of Laporte v. Smith*, 252 F.3d 1357 (5th Cir. 2001), and *In re Meza,* 467 F.3d 874 (5th Cir. 2006), are relevant and should continue to guide this court. In *Smith*, the debtor tendered a lump sum payment in the twenty-seventh month of her 54-month plan. A creditor objected to the debtor's discharge, arguing that the debtor was required to make payments for 36 months, that the lump sum did not "complete" the debtor's chapter 13 plan obligations, and that the lump sum payment constituted a modification of the debtor's chapter 13 plan. *See Smith*, 252 B.R. 107, 109 (E.D. Tex. 2000). First the bankruptcy court, then the district court, and finally the Fifth Circuit Court of Appeals rejected all of the creditors arguments. *See In re Smith*, 237 B.R. 621 (Bankr. E.D. Tex. 1999), *aff'd* 252 B.R. 107 (E.D. Tex. 2000), *aff'd* 252 F.3d 1357 (5th Cir. 2001). In *In re Meza*, the issue involved the timing of the trustee's motion for modification. The court held that the trustee's motion filed before the

completion of payments under the plan was timely even though a hearing on the motion was not held until after the completion of the payments. While ruling against the debtor on the narrow timing question presented, the Fifth Circuit nevertheless cited *Smith* with approval and stated that "a Chapter 13 debtor may tender all the payments due and owing under a confirmed plan on an accelerated basis and thereby create an entitlement to discharge." *Meza*, 467 F.3d at 879, *citing In re Smith*, 237 B.R. 621, 625 n.7 (Bankr. E.D. Tex. 1999).

In the more recent case of In re *McCollum*, 363 B.R. 789 (E.D. La. 2007), the District Court for the Eastern District of Louisiana concluded that under Fifth Circuit precedent "accelerated payment of the full amount due under the plan does not constitute a modification of a confirmed plan, and that such early termination is not therefore subject to the requirements of 11 U.S.C. § 1329." *Id*. at 797. Again citing *Smith*, the *McCollum* court stated that "it was the amount of the payments under the plan, not the number of payments that was the relevant inquiry as to whether the payment requirement was satisfied." *Id.*

The focus on the amount of payments made rather than the number of payments is proper. The Trustee seeks to equate "completion of payments" with "applicable commitment period." Under the Trustee's view section 1329 says: "At any time after confirmation of the plan but before the expiration of the commitment period, the plan may be modified." Such an interpretation is not supported by the plain language of section 1328 or 1329. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 1030 (2004). If Congress had meant to prohibit debtors from paying the amounts due under the plan early, it could easily have done by incorporating the applicable commitment period into section 1328 and 1329. It did not do so. *See Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 300 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same

Act, it is presumed that Congress acted intentionally and purposely in the disparate inclusion or exclusion.") Judicially imposing a "number of payments" requirement would also make the "completion of payments" language in section 1329 meaningless and redundant. There is simply no need for the "completion of payments" language unless it referred to an earlier point in time when the amounts due under the plan had been paid in full.

This case is similar to *McCollum* and *Smith*. By selling an asset, the debtor was able to fulfill his obligations under the plan and provide earlier payments to the creditors. The early completion of the plan did not constitute a modification of the plan because the debtor simply accelerated the payment of the amount due under the plan.[1] Unsecured creditors did not receive less money than they would have if the debtor had stretched payments out over 60 months. In fact, unsecured creditors benefit because they have their payments in hand now as opposed to later (i.e., the present value of the delayed payments is less).

Nor can the trustee argue that he was somehow caught unaware by the debtor's early completion of payments. Here, unlike in *Meza*, the trustee and other creditors had clear notice that the debtor intended to sell real estate and that half of the proceeds from the sale (representing the debtor's interest in the property) would be provided to the trustee. *Cf. Meza*, 467 F.3d at 880 n.* (debtor should have sought court approval for refinancing and had they done so would have given the trustee an opportunity, before the refinancing, to object). The logical result of such a motion was that the debtor's payments under the plan would be completed earlier than if the property had not been sold. In this case, there was no income increase or other "windfall" that sent the debtor "racing" to complete his plan payments'. *In re Fridley*, 380 B.R. 528, 542 (B.A.P. 9th Cir. 2007) (describing the interplay between 1328(a) and 1329(a) as a race

[1] Under the Trustee's position, a debtor who made the last two payment due under the plan early could be punished and required to make more payments, rather than rewarded with an early discharge.

whenever debtor's income increases during the plan). Here, the debtor has not violated any rules of the race. To the contrary, he has played by the rules, he has paid all the amounts due under his confirmed plan, and he is entitled to a discharge under section 1328(a).

### B. Artificially extending chapter 13 plans to 60 months where no further payments are due to unsecured creditors benefits no one.

There is simply no benefit to be gained by artificially extending chapter 13 plans. Secured creditors must wait longer to receive payments due to them and suffer a greater risk of nonpayment. Trustees must administer cases for a longer period of time. Debtors must pay more interest to secured creditors under the present value calculation required by section 1325(a)(5)(B)(ii). Even unsecured creditors must wait longer to receive payment. And the risk that debtors will fail to complete their plans increases significantly because there is additional time in which the debtors may suffer a loss of income or unexpected expenses. Bankruptcy policy should avoid, not require, such consequences.

Bankruptcy is not punishment. Debtors should not be required to "run the gauntlet"[2] for a fixed period of time as suggested by the Bankruptcy Appellate Panel from the Ninth Circuit. *See In re Fridley*, 380 B.R. 538, 544 (B.A.P. 9th Cir. 2007). The plain language of the Bankruptcy Code does not require such a trial. *See* 11 U.S.C. §§ 1328(a), 1329(a); *see Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 1030 (2004). Rather bankruptcy is an adjustment of debt between the honest, but unfortunate debtor and his creditors. Its founding principle is the "fresh start," which permits such debtor build a new life "with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." *Grogan v.*

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[2] "Running the gauntlet…is a form of physical punishment by which a person is compelled to run through a double line of soldiers who attempt to strike them as they pass." Wikipedia, *available at* http://en.wikipedia.org/wiki/Run_the_gauntlet. While the Ninth Circuit BAP does not suggest debtors must withstand physical punishment, the idea that debtors are hostages to a 60-month plan is inconsistent with the fundamental purpose of bankruptcy.

*Garner*, 498 U.S. 279, 286 (1991), citing *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). Once the debtor had paid his creditors what they are owed (i.e., completed the payments under the plan), he is entitled to a discharge.

**C. The Ninth Circuit cases cited by the Trustee do not support a minimum number of payments view.**

In *In re Sunahara*, a pre-BAPCPA case, the Bankruptcy Appellate Panel adopted the position that the disposable income test of section 1325(b)(1) was not applicable to modifications under section 1329. 326 B.R. 768, 781 (B.A.P. 9th Cir. 2005) ("Simply put, the plan language of 1329(b) does not mandate satisfaction of the disposable income test of 1325(b)(1)(B) with respect to modified plan"). Instead, the BAP directed the bankruptcy court to rely on the good faith requirement of section 1325(a)(3) in determining whether to permit the debtor to reduce his plan term to less than 36 months. *Id*. at 782. The court stated that such a determination

> "necessarily requires an assessment of a debtor's overall financial condition including, without limitation, the debtor's current disposable income, the likelihood that the debtor's disposable income will significantly increase due to increased income or decreased expenses over the remaining term of the original plan, the proximity of time between confirmation of the original plan and the filing of the modification motion, and the risk of default over the remaining term of the plan versus the certainty of immediate payment to creditors."

*Id.* at 782; *see also McCollum*, 348 B.R. 377, 391 (Bankr. E.D. La. 2006) (evaluating early discharge and good faith of lump sum payment resulting from the sale of property).

Subsequently, in *In re Fridley*, a post-BAPCPA case, the BAP held that debtors could not "complete" their plan early by prepaying amounts due under the plan ***in the absence of a modification order***. 380 B.R. at 545-46. The court acknowledges that the result sought by the debtors "could be achieved through a plan modification in light of our holding in *Sunahara* that § 1325(b) does not apply to § 1329 modifications." *Id.* at 545. In *Fridley*, the BAP's holding

turns on the process used by the debtor rather than the substance of the debtor's request. In essence the Ninth Circuit BAP has adopted the line of reasoning set forth in *McCollum* in which courts hold that the accelerated payment of plan obligations is a modification of the plan's terms, subject to the requirements of section 1329. *See McCollum*, 348 B.R. at 390; *see also In re Sounakhene*, 249 B.R. 801 (Bankr. S.D. Cal. 2000); *In re Golek*, 308 B.R. 332 (Bankr. N.D. Ill. 2004); *In re Richardson*, 283 B.R. 783 (Bankr. Kan. 2002). However, as the vast majority of courts have held the disposable income test of 1325(b)(1), and consequently the applicable commitment period, are irrelevant to the analysis under section 1329. *See McCollum*, 348 B.R. 389-90 (collecting cases).

## CONCLUSION

For all the foregoing reasons, the objection of the Standing Chapter 13 Trustee should be overruled and the Debtor's Motion for Entry of a Discharge should be granted.

Respectfully submitted,

/s/ Carey D. Ebert
Carey D. Ebert
State Bar No. 05332500
1726 Chadwick Ct.
Suite 100
Hurst, TX 76054
817-268-2468
cde@ebertlawoffices.com

On Brief:
Tara Twomey, Esq.
National Association of Consumer Bankruptcy
Attorneys

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