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THE HARDSHIP DISCHARGE AND HOW IT CAN IMPROVE DEBTOR SUCCESS

ABSTRACT

Chapter 13 bankruptcy has long been heralded as a moral alternative to chapter 7 liquidations. Despite this, success among chapter 13 debtors is limited, and debtors who opt for this route face other challenges. The hardship discharge allows chapter 13 debtors to receive a discharge of their debts without plan completion. While the provision has been a piece of the bankruptcy law for nearly a century, little research on its effects on debtors exists. The struggles that chapter 13 debtors face underlies the need for more research on the hardship discharge as a potential solution. This Comment seeks to utilize empirical analysis to broaden the understanding of the hardship discharge and its use in bankruptcy courts. The data behind chapter 13 debtor outcomes and circumstances for which hardship discharges are granted present a compelling argument that expanding the hardship discharge could improve debtor success.

Part I of this Comment will provide an overview of chapter 13 bankruptcy. Part II will summarize some of the documented problems that debtors who go through chapter 13 face. Part III considers the evolution of the hardship discharge provision, leading to its current form today. Part IV consists of two parts of independent research: a quantitative review of 1100 chapter 13 debtor dispositions and a qualitative review of cases in which courts have granted a hardship discharge. Part V reinforces the need for expanding the hardship discharge.

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INTRODUCTION

Every year, thousands of American households file for bankruptcy. While many of these debtors have few assets and, therefore, must undergo the chapter 7 liquidation process, others pursue a path of repayment through chapter 13 plans. Chapter 13 offers debtors an expanded discharge, along with the opportunity to retain certain assets that they would otherwise have to liquidate under chapter 7. Further, if a debtor fails to make all payments required under their chapter 13 plan, then the hardship discharge provision set forth in Section 1328(b) of the United States Bankruptcy Code (the "Code") shall permit a discharge under circumstances where fulfilling outstanding repayment obligations would be difficult—if not impossible—for the debtor to achieve.[1]

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[1] Section 1328 of the Code provides that:

> 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

Among the set of circumstances that may warrant this type of discharge is the COVID-19 pandemic. Beginning in 2020, COVID-19 imposed grave financial hardship upon millions of Americans when measures to mitigate the virus led to lockdowns, layoffs, and widespread unemployment. While jobs that once provided workers with regular, stable income seemingly vanished. In the bankruptcy context, this unforeseen—yet immensely devastating—situation prompts a reconsideration of when courts should grant debtors' requests for a hardship discharge. Boiled down, this reconsideration points toward one central question: *what changes in circumstance should debtors be held accountable for?*

Consider, for example, a debtor who filed for chapter 13 bankruptcy in late 2016 and has her chapter 13 plan confirmed for five years in early 2017. This debtor's income comes primarily from a serving job at a local restaurant she's held for the past four and a half years. Her hours and income are about as stable as it gets, and her primary goal in filing for bankruptcy is to get rid of some credit card debt without losing her house. This debtor seems like the perfect candidate for a chapter 13, so the bankruptcy judge approves her plan. The first three years of repayment go by without issue.

By early 2020, she has yet to miss a single payment and seems well-positioned to fall within the one-third of chapter 13 debtors who actually receive a standard discharge. However, when the COVID-19 pandemic causes all non-essential businesses to temporarily close that April, the restaurant furloughs her. Fortunately, she is ultimately able to return to work by the end of May when the restaurant reopens under reduced capacity conditions. To balance out the decline in business, the restaurant cuts her hours to half of what they were three months prior, causing her income to fall below the amount she needs to afford a minimal standard of living—let alone make her bankruptcy payments.

Due to this unforeseen change in financial circumstances, she files for a modification, but the payments she can afford are $0, so the court declines. This debtor is left with the option of dropping out of the bankruptcy *without* any of the discharge she has been working towards for three years or requesting a hardship discharge. The hardship discharge—if granted—would absolve her of all outstanding payment obligations.

> under chapter 7 of this title on such date; and (3) modification of the plan under section 1329 of this title is not practicable.

11 U.S.C. § 1328(b)(1)–(3) (2018).

While the hardship discharge may be an effective option here, little data exists to indicate how often courts grant such discharges, or on what grounds.[2] The general wisdom is that hardship discharges are rarely filed for by debtors, and even more rarely approved by courts.[3] However, the effects of the COVID-19 pandemic prompt a reconsideration of what types of debtors chapter 13 is and is not working for; and what, if anything, can courts do about these discrepancies. This Comment explores these questions in hopes of understanding potential effects of an expanded hardship discharge.

Section I of this Comment will review the fundamentals of the chapter 13 bankruptcy process, followed by Section II's summary of the various problems chapter 13 debtors tend to face. After introducing these broader issues for context, Section III contains an examination the hardship discharge provision, as set forth in Section 1328 of the Code. Then, Section IV reviews the debtor's disposition in various chapter 13 cases to assess whether the debtor could have been an ideal hardship discharge candidate. Finally, Section V argues that expanding the scope of the hardship discharge could lead to improved chapter 13 outcomes.

I. CHAPTER 13 BANKRUPTCY

Chapter 13 is also called "the wage earner's plan."[4] When first created, Congress saw this chapter as a "cornerstone" for improving relief for consumer debtors.[5] Chapter 13's primary difference from chapter 7 is that the debtor must complete a repayment plan to obtain a discharge, while the chapter 7 debtor receives a discharge through liquidation.[6] More specifically, over the course of three to five years, the chapter 13 debtor makes payments using all their disposable income, as calculated by a formula created by the Code.[7] Under this system, debtors are subjected to modest budgets, while "as much income as possible goes to creditors."[8] These repayment plans give debtors a chance to directly repay their debts, in part or in full.[9]

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[2] Sara S. Greene et al., *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 MINN. L. REV. 1031, 1089 n.175 (2017).

[3] *See id.* at 1089 n.175.

[4] *Chapter 13–Bankruptcy Basics*, U.S. CTS., http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics (last visited Feb. 28, 2022).

[5] Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103, 105 (2011).

[6] Pamela Foohey et al., *No Money Down Bankruptcy*, 90 S. CAL. L. REV. 1055, 1062 (2017).

[7] *Id.* at 1062.

[8] *Id.* at 1062.

[9] *Chapter 13–Bankruptcy Basics*, U.S. CTS., http://www.uscourts.gov/services-forms/bankruptcy/

The formula used to calculate a debtor's payment obligations under a chapter 13 plan depends on the debtor having regular income.[10] In exchange for payments made on the basis of that income, the debtors may keep their assets.[11] Because of this benefit, many debtors opt for chapter 13 over chapter 7 to save their homes.[12] In fact, "[c]hapter 13 is still probably the most widespread home-saving device in American Law."[13] Specifically, the Code gives chapter 13 debtors the option of stopping foreclosure proceedings during the bankruptcy process, as well as the possibility of curing delinquent mortgage payments through chapter 13 discharge.[14] These provisions allow a chapter 13 debtor who fell behind on mortgage payments to stay in their home, settle their mortgage debts, and, ultimately, avoid foreclosure.

A. Chapter 13 Eligibility Requirements

Generally, chapter 13 eligibility is limited to a specific class of debtors who satisfy three key requirements. First, a chapter 13 debtor *must* have regular income.[15] The Code defines regular income as an income that is "sufficiently stable and regular to enable [a debtor] to make payments" under a chapter 13 plan."[16] Some debtors depend on receiving regular financial assistance from friends or family. Courts typically discourage this practice in most cases—with some exceptions.[17]

When evaluating these situations, courts evaluate a variety of factors surrounding both the non-debtor's ability and likelihood of continued payments.[18] The court's goal in this evaluation is determining whether that

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bankruptcy-basics/chapter-13-bankruptcy-basics (last visited Feb. 28, 2022)

10 11 U.S.C. § 109(e) (2018).

11 *Id*. § 1327(b)–(c).

12 Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103, 136 (2011) ("Saving a home was the main goal of an overwhelming portion of these homeowners' bankruptcies").

13 *Id.* at 136.

14 *Chapter 13–Bankruptcy Basics*, U.S. CTS., http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics (last visited Feb. 28, 2022).

15 11 U.S.C. § 109(e) (2018).

16 *Id*. § 101(30).

17 *In re* Deutsch, 529 B.R. 308, 312 (Bankr. C.D. Cal. 2015) ("Reliance on contributions from family is disfavored, but not prohibited") (citing *In re* Schwalb, 347 B.R. 726, 759 (Bankr. D. Nev. 2006)).

18 *See Id*. at 312–13. The court provides four factors to considers when determining whether a debtor's plan is feasible, which include:

> (1) the nondebtor's relationship to the debtor and motivation in making the contributions; (2) the nondebtor's long and undisputed history of making the contributions or otherwise providing support for the debtor; (3) the unqualified commitment of the nondebtor to make the contributions in a specific amount for the duration of the Chapter 13 plan; and (4) the financial ability of the

individual will continue making those payments if their income decreased.[19] Such decreases in income can happen to anyone at any time, which is likely why courts are reluctant to include financial assistance payments from non-debtors in the calculation of a debtor's regular income. Additionally, while every debtor risks losing income during the lifespan of their chapter 13 plan, that risk increases when the debtor depends on someone else's income in addition to their own. This added risk is likely a primary reason why bankruptcy judges are reluctant to include non-debtor payments in calculating a debtor's regular income. Such reluctance indicates that bankruptcy judges and Congress alike recognize that even regular income can change over the course of a repayment plan. In practice, this keeps some debtors out of chapter 13, or bankruptcy relief entirely.[20]

Second, the Code limits the amount of debt the debtor may have in a chapter 13 case.[21] The limit for noncontingent, liquidated, *unsecured* debts is $250,000, while the limit for noncontingent, liquidated, *secured* debts is $750,000.[22] Debtors with debts exceeding either of these ceilings cannot file for chapter 13 bankruptcy; they must instead choose between chapter 7 and chapter 11.[23] However, a debtor with total debts that exceed these ceilings may have some debts that do not fall under the *noncontingent* or *liquidated* categories—those debts may not count towards the total.[24] For example, some courts have found that, if a debtor would otherwise fall below both chapter 13 ceilings, but for the existence of their student loans, then that debtor's case may proceed.[25] This finding is, in part, a result of the generally nondischargeable nature of student loans,[26] as well as the fact that individuals with large amounts of student loans are not the type of debtors the chapter 13 debt ceilings intend to target.[27]

> nondebtor to make the proposed contributions, including expenses and liabilities that might take precedence over the contributions.

Id. at 312–13.

19 *See In re* Deutsch, 529 B.R. 308, 314 (Bankr. C.D. Cal. 2015).

20 If the court denies a plan with income that includes support from a non-debtor, the debtor may not have sufficient income alone to get the plan confirmed. Additionally, some debtors are prohibited from chapter 7 entirely. *See infra* notes 21–27 and accompanying text.

21 11 U.S.C. § 109(e) (2018).

22 *Id*. § 109(e).

23 Lawrence Ponoroff, *Rethinking Chapter 13*, 59 ARIZ. L. REV. 1, 15–16 (2017).

24 *See* Michael Barnett, *Exceeding Debt Limit of §109(e) Not Basis for Dismissal if Would be Eligible Except for Student Loan Debt*, AM. BANKR. INST., https://www.abi.org/feed-item/exceeding-debt-limit-of-%C2%A7109e-not-basis-for-dismissal-if-would-be-eligible-except-for (last visited Oct 28, 2020).

25 *E.g. id.* (discussing *In re* Pratola, 578 B.R. 414 (Bankr. N.D. Ill. 2017).

26 11 U.S.C. § 523(a)(8) (2018). Student loans are generally nondischargeable unless the continued obligation to repay will impose an "undue hardship" on the debtor. *Id.*

27 Michael Barnett, *Exceeding Debt Limit of §109(e) Not Basis for Dismissal if Would be Eligible Except*

Regardless of this exception, however, the existence of debt ceilings still limits the class of debtors that can opt for chapter 13 bankruptcies in the first place.

Third, a variety of factors push debtors into chapter 13. For example, the chapter 7 means test often sends debtors who are ineligible for chapter 7 discharge into chapter 13. In an effort to have debtors repay their debts, Congress created the means test to dismiss (otherwise valid) chapter 7 cases for abuse.[28] Since 2005, any party in interest of the bankruptcy in question may file an abuse dismissal motion.[29] Under the means test, debtors with incomes at or above the median must shift to a chapter 13 bankruptcy if they wish to proceed with the bankruptcy at all.[30] Thus, courts regularly use the chapter 7 means test to push debtors seeking discharge through liquidation directly into chapter 13 repayment plans.

At the crux of means test is the debtor's "current monthly income" ("CMI").[31] Courts calculate CMI by determining the debtor's total income from the previous six months and dividing that number by six.[32] The court then multiplies this CMI by twelve to determine yearly income.[33] After performing these preliminary calculations, the court compares the debtor's CMI to the median household income in the debtor's state.[34] The Bureau of the Census calculates the median income used in this analysis,[35] and the relevant point of comparison is the median income "for households with the same or fewer individuals" as the debtor's household.[36] Debtors with above median income will have their chapter 7 cases dismissed for abuse and are thus pushed into

for Student Loan Debt, AM. BANKR. INST., https://www.abi.org/feed-item/exceeding-debt-limit-of-%C2%A7109e-not-basis-for-dismissal-if-would-be-eligible-except-for (last visited Oct 28, 2020).

28 David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 251 (2007).

29 *Id.* at 251.

30 1 COLLIER ON BANKRUPTCY ¶ 20.04 (16th 2022) ("if the means test is not met–in the sense that the debtor has the requisite means to provide for creditors–then there is presumed abuse and the court may dismiss the debtor's chapter 7 case, or the debtor has to attempt to convert to chapter 13").

31 *See* David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 232 (2007) ("current monthly income is a key concept in BAPCPA means test").

32 *Id*. at 259 ("To find this average, we are to take a six month period stretching backward from the last day of the month preceding the bankruptcy petition").

33 *Id.* at 259.

34 *Id.* at 259.

35 11 U.S.C. § 101(39A)(B) (2018) (defining "median family income").

36 David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 265 (2007) (noting that, if the debtor lives alone, then the relevant point of comparison is the median income for one-person household in the debtor's state, but if the debtor lives in a multi-person household, then the relevant point of comparison is the median income "for households with the same or fewer individuals").

chapter 13.[37] The calculation of the means test—including the compilation of assets required for chapter 7 in general—can be difficult for debtors to complete. This difficulty is one of many obstacles in the bankruptcy process that poses challenges for debtors filing for bankruptcy pro se.[38]

While the means test pushes some debtors into chapter 13, attorney persuasion also drives debtors toward repayment. Some attorneys view chapter 13 bankruptcy as the morally right course of action,[39] because the debtor commits to repaying their debts directly over time. In practice, this viewpoint can lead to bankruptcy attorneys encouraging their debtors to file under chapter 13, even when filing under chapter 7 is the better financial option for a specific debtor.[40] Similarly, this chapter 13 preference also reflects Congress' view that chapter 13 is the "more responsible way" to repay debts[41]—a viewpoint largely based on the principle that debtors should pay back as much of their debts as possible in order to receive a discharge.[42] Thus, between the requirements for regular income, limits on the amount of debt a debtor may have, and the various reasons debtors get pushed into chapter 13, there is a unique cohort of people that find themselves in a repayment plan.

B. Chapter 13 Procedures

To receive relief through chapter 13, the debtor must start by filing a petition with a bankruptcy court that serves the area of the debtor's domicile.[43] Generally, the filing of this petition must also include a statement of the debtor's finances, and a series of schedules reflecting the debtor's assets and liabilities, current income and expenditures, and executory contracts and unexpired leases.[44] When completing these forms, the debtor discloses all currently held creditors and claims, income, and property, along with a detailed list of their

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[37] Courts sometimes refer to these debtors as "can-pay" debtors; because they have above-median income, they can potentially pay off their debts. *See, e.g. In re* Chovev, 559 B.R. 339 (N.Y.E.D. Bankr. 2016) ("The 'means test,' as codified in § 707(b), is intended to keep the 'can-pay' bankruptcy filer with primarily consumer debts out of a chapter 7 case").

[38] David R. Jones, *Savings: The Missing Element in Chapter 13 Bankruptcy Cases*, 26 AM. BANKR. INST. L. REV. 243, 252 n.62 (2018).

[39] Pamela Foohey et al., *No Money Down Bankruptcy*, 90 S. CAL. L. REV. 1055, 1064 (2017).

[40] *Id.* at 1064.

[41] Iain Ramsay, *Comparative Consumer Bankruptcy*, 2007 U. ILL. L. REV. 241, 266 (2007).

[42] David R. Jones, *Savings: The Missing Element in Chapter 13 Bankruptcy Cases*, 26 AM. BANKR. INST. L. REV. 243, 244 (2018).

[43] *Chapter 13–Bankruptcy Basics*, U.S. CTS., http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics (last visited Feb. 28, 2022).

[44] Fed. R. Bankr. P. 1007(b).

monthly living expenses.[45] Unless the court grants an extension, the debtor has fourteen days from the filing of their petition, to submit a plan.[46] Once submitted, the court must determine whether the debtor's plan is feasible, and confirms (or denies) according to that standard. Additionally, within thirty days of filing for chapter 13 bankruptcy, the debtor must start making payments to the trustee,[47] even if the debtor's plan has yet to obtain approval from the court.[48] Thus, compared to a chapter 7 debtor who, on average, receives a discharge within four months of filing for bankruptcy, a chapter 13 debtor who discharges their debts under a multi-year repayment plan must be much more involved with the bankruptcy process, from the start.[49]

Courts must only confirm plans that are feasible—meaning, plans that allow the debtor to make all payments under the plan.[50] Once the court confirms the debtor's plan, however, the debtor and their creditors are immediately bound by its terms.[51] In many cases, the court will not confirm a plan that does not consume all of the debtor's projected disposable income.[52] This limitation is triggered when the trustee rejects the plan.[53] In addition, an alternative to this limitation listed in subsection (A) requires the value of the property distributed is "not less than the amount of the claim."[54] When read together, these subsections suggest that, if the trustee rejects a plan, then the court may only approve an alternative plan that either: pays the claims in full, or uses *all* of the debtor's discretionary income. Most debtors file for bankruptcy because of insolvency. The irony behind this statement is that, if an insolvent debtor had enough money to repay their claims in full, they probably would not be in bankruptcy in the first place. Consequently, because the full repayment of claims is rarely feasible in insolvency, most chapter 13 plans must account for all disposable monthly income. However, when a debtor's cost of living exceeds their monthly income, the court is unlikely to confirm their plan.[55]

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45 *Chapter 13–Bankruptcy Basics*, U.S. CTS., http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics (last visited Feb. 28, 2022).

46 Fed. R. Bankr. P. 3015(b).

47 11 U.S.C. § 1326(a)(1) (2018).

48 *Chapter 13–Bankruptcy Basics*, U.S. CTS., http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics (last visited Feb. 28, 2022).

49 Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103, 108 (2011).

50 Sara S. Greene et al., *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 MINN. L. REV. 1031, 1092 (2017).

51 11 U.S.C. § 1327(a) (2018).

52 *Id.* § 1325(b)(1)(B).

53 *Id.* § 1325(b)(1).

54 *Id.* § 1325(b)(1)(A).

55 *E.g.*, *In re* Deutsch, 529 B.R. 308, 315 (Bankr. C.D. Cal. 2015) (finding that the debtor's bills exceed

If a chapter 13 debtor completes all of their payments over the course of three or five years, then they will receive a standard discharge.[56] Under chapter 13, a standard discharge generally includes all of the debts provided for or disallowed by the plan.[57] If a debtor misses a payment under their plan, then the court may dismiss the debtor's case altogether.[58] Failing out of a chapter 13 repayment plan subjects a debtor to *two* major hits to their credit report.[59] To avoid this, a debtor who has trouble making payments under their plan has the option of requesting a payment modification after confirmation;[60] such modifications are subject to court approval.[61] This leaves the debtor with limited options for decreasing payments. If a debtor's income falls below their basic living expenses, then the court *can* approve a modification requiring future payments of $0, but will likely just deny the debtor's request altogether.[62] This scenario causes debtors to fail out of their chapter 13 repayment plans without ever receiving a final discharge.

II. PROBLEMS WITH CHAPTER 13 BANKRUPTCIES

While chapter 13 was heralded by lawmakers as the moral alternative to a liquidation bankruptcy,[63] it does not come without downsides. For this conversation, there are four major downsides. First, multiple studies reveal that only about one-third of chapter 13 debtors receive a discharge of their debt.[64] The other two-thirds of debtors crash out of their bankruptcies entirely, with the exception of a small minority of debtors who convert their cases to chapter 7 liquidations.[65]

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her income by $210 per month and rejecting her plan for this lack of disposable income).

56 11 U.S.C. § 1328 (2018).

57 *Chapter 13–Bankruptcy Basics*, U.S. CTS., http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics (last visited Feb. 28, 2022).

58 David R. Jones, *Savings: The Missing Element in Chapter 13 Bankruptcy Cases*, 26 AM. BANKR. INST. L. REV. 243, 244 (2018).

59 Tony Mecia, *Beyond Bankruptcy: What Happens When You Fail Chapter 13*, YAHOO FIN. (Oct. 29, 2015), https://finance.yahoo.com/news/beyond-bankruptcy-happens-fail-chapter-120000040.html (stating that these two hits come from (1) initiating the bankruptcy and (2) not completing it).

60 11 U.S.C. § 1329(a) (2018).

61 *Id.* § 1329(b).

62 Alan M. Ahart, *Whether to Grant a Hardship Discharge*, 87 AM. BANKR. L.J. 559, 575–76 (2013).

63 Pamela Foohey et al., *No Money Down Bankruptcy*, 90 S. CAL. L. REV. 1055, 1064 (2017).

64 *E.g.,* Sara S. Greene et al., *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 MINN. L. REV. 1031, 1032 (2017).

65 Pamela Foohey et al., *No Money Down Bankruptcy*, 90 S. CAL. L. REV. 1055, 1062–63 (2017).

Second, the attorney steering mentioned above appears to drive debtors who would be better suited in a different bankruptcy to chapter 13.[66] Attorney steering is grounded in two main underlying principles. The first principle is based on the understanding that chapter 13 is the morally right thing to do.[67] This understanding leads attorneys to push their clients to file under chapter 13 because repayment it would make them "do the right thing"– even if the clients' best interests might lie outside of chapter 13.[68] This phenomenon is exhibited by the fact that, even though the means test may push some debtors into chapter 13, "90% of debtors who file under chapter 13 have so little income they could file under chapter 7."[69] The second principle underlying the push to chapter 13 is the fact that attorneys make more money assisting clients through a chapter 13 than a chapter 7.[70] On average, attorneys make over double in representing debtors in chapter 13 compared to what they would make representing debtors in chapter 7 liquidations.[71] This is, in part, due to the fact that chapter 7 requires upfront payments to an attorney.[72] Chapter 13, on the other hand, allows lawyers to work their attorney fees into the debtor's repayment plan.[73]

Third, households that are more likely to have financial burdens arise during their repayment plans are generally less likely to make it to a chapter 13 standard discharge.[74] For example, households with children are less likely to reach a chapter 13 discharge.[75] This correlation is taken a step further when considering that each dependent a debtor has decreases the debtor's chances of reaching the completion of plan payments.[76] While the living expenses are based on national standards, those standards do not encompass the costs of medical emergencies, school-related expenses, or other unforeseen financial payments that children often require. Thus, as a debtor has more children, such uncertainties are more

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66 *Id.* at 1069, 1070, 1078.

67 *Id.* at 1064.

68 *Id.* at 1064.

69 *Id.* at 1063.

70 Pamela Foohey, *Access to Consumer Bankruptcy*, 24 EMORY BANKR. DEVS. J. 341, 360 (2018); Pamela Foohey et al., *No Money Down Bankruptcy*, 90 S. CAL. L. REV. 1055, 1066 (2017).

71 Pamela Foohey et al., *No Money Down Bankruptcy*, 90 S. CAL. L. REV. 1055, 1066 (2017) ("Bankruptcy attorneys charge much less to file and represent the debtor in a chapter 7 case–on average $1,229– than to file and represent the debtor in a chapter 13 case–on average, $3,217.").

72 Lamie v. U.S. Tr., 540 U.S. 526, 537–39 (2004) (holding that attorneys of debtors cannot not be compensated with estate funds).

73 Pamela Foohey et al., *No Money Down Bankruptcy*, 90 S. CAL. L. REV. 1055, 1068 (2017).

74 *See generally* Sara S. Greene et al., *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 MINN. L. REV. 1031 (2017) (describing factors that reduce a debtor's likelihood to reach discharge).

75 *Id.* at 1036.

76 *Id.* at 1036.

likely to arise. However, there is no provision of the Code that accounts for these risks—except for the national standards on which the debtor's expenses and plan are based.

The risk of financial emergencies does not only exist with the presence of children. In one study of chapter 13 outcomes, researchers found that the presence of health insurance also correlated strongly with whether a debtor found success through chapter 13.[77] Debtors may have medical emergencies arise during their repayment plans. Health insurance exists to mitigate some of the costs of a medical emergency. It follows that debtors without health insurance who experience a medical emergency over the course of their repayment plan may not be able to complete the plan and receive a discharge.

Fourth, failed bankruptcies can leave debtors in worse financial positions than they were in before filing. As mentioned above, debtors who do not complete their payment plans take two hits to their credit.[78] Despite the fact that the chapter 13 debtor may have paid their debts for years, they may end up worse off for choosing chapter 13 if they do not complete their payment plan. In cases where debtors opt for chapter 13 to cure their mortgages, they may lose housing. Additionally, the credit hit can make it difficult for debtors to find a place to live.

Going back to the debtor in the example described above, she has gone through this entire chapter 13 process prior to getting to the point where she loses some of her income. She had a regular income that the court found sufficiently stable to approve her plan and her debts were within the type and amount parameters the Code requires. Maybe she was better suited to a chapter 7 but was talked into chapter 13 by an attorney, or maybe she thought chapter 13 would offer her better bankruptcy outcomes. Either way, three years into payments her income—which was once stable—plummets. What are her options? She can apply for a modification with the court, convert the case to a chapter 7, crash out of her bankruptcy entirely, or she can motion for a hardship discharge.

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[77] *Id.* at 1036, 1084 (2017) (finding, in a study of 770 chapter 13 cases, that households with no insurance are 29% less likely to successfully complete a chapter 13 than those with insurance).

[78] Mecia, *supra* note 52.

III. THE HARDSHIP DISCHARGE

The concept of the hardship discharge comes from bankruptcy law that predates the current code.[79] The historical standard was later expanded to the interpretation courts use today. For debtors who were within three years of confirmation of their plans, but had yet to complete their plans, the original standard was that courts could still grant discharges in cases where debtors could not complete payments for reasons they could not have been held accountable for.[80] Congress enacted this provision in 1938.[81] Over time, the hardship discharge has not undergone many changes; however, the Bankruptcy Reform Act of 1978 liberalized these requirements were liberalized in six ways.[82] The following subsections will summarize those changes, examine the provision in its current form, and outline circumstances in which it is used.

A. *Summary of Hardship Discharge Changes in the Bankruptcy Reform Act of 1978*

First, the Reform Act removed the objection to discharge that the debtor was previously subjected to.[83] Second, the original hardship discharge required that three years pass after the confirmation of a plan before the court could grant the discharge.[84] The third change removed the requirement that the debtor is the only one who can request a discharge.[85] Fourth, the standard in which the court determines whether to hold the debtor accountable changed from *could* not to *should* not be held justly accountable.[86] Fifth, the unsecured creditors must have already received at least the amount they would have received under a chapter 7 liquidation.[87] Finally, Congress added the requirement of showing that modification of the plan is not practicable.[88] These major modifications led to the hardship discharge in its statutory form today.

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79 Alan M. Ahart, *Whether to Grant a Hardship Discharge*, 87 AM. BANKR. L.J. 559, 560 (2013).
80 *Id.* at 560.
81 *Id.* at 560.
82 *Id.* at 562.
83 *Id.* at 562.
84 *Id.* at 562.
85 *Id.* at 562.
86 *Id.* at 562.
87 *Id.* at 562.
88 *Id.* at 562.

B. The Hardship Discharge in its Current Statutory Form

Today, the Bankruptcy Code requires three elements for a court to grant a hardship discharge. The first is that "the debtor's failure to complete such payments is due to circumstances for which the debtor should not be justly held accountable."[89] The second is the requirement that unsecured creditors must have received at least the amount of property that they would have had the debtor gone through a chapter 7 liquidation.[90] The third element requires a showing that "modification of the plan under section 1329 of this title [11 USCS § 1329] is not practicable."[91] Each requirement will be discussed in detail below.

The first requirement has significant precedent. Courts' determination of this accountability provision is largely dependent on what are known as the *Bandilli* criteria. In *Bandilli*, the joint debtors sought a hardship discharge because the wife suffered from a medical condition which deteriorated after confirmation.[92] The court listed six considerations in determining whether the debtor should be held accountable, which include:

> a) whether the debtor has presented substantial evidence that he or she had the ability and intention to perform under the plan at the time of confirmation;
> b) whether the debtor did materially perform under the plan from the date of confirmation until the date of the intervening event or events;
> c) whether the intervening event or events were reasonably foreseeable at the time of confirmation of the [c]hapter 13 plan;
> d) whether the intervening event or events are expected to continue in the reasonably foreseeable future;
> e) whether the debtor had control, direct or indirect, of the intervening event or events; and
> f) whether the intervening event or events constituted a sufficient and proximate cause for the failure to make the required payments.[93]

Using these factors, the court determined that the debtors failed to provide sufficient justification for granting a hardship discharge because the wife's medical condition was foreseeable at the time of confirmation.[94] In addition, the court opined that the debtors failed to show a correlation between the debtor's medical condition and the couple's overall decrease in income.[95] In proving

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89 11 U.S.C. § 1328(b)(1) (2018).

90 *Id.* § 1328(b)(2).

91 *Id.* § 1328(b)(3) (2018).

92 Bandilli v. Boyajian (*In re* Bandilli), 231 B.R. 836, 838 (B.A.P. 1st Cir. 1999).

93 *Id.*at 840.

94 *Id.* at 840–41.

95 *Id.* at 841.

whether this element is satisfied, the debtor does not need to show catastrophic circumstances.[96] However, at a minimum the circumstances must make the plan impossible for the debtor to complete.[97] In practice, courts have found some debtors satisfied this element of the hardship discharge in the case of death.[98] The granting of a hardship discharge upon death can be especially important in the lives of the deceased debtor's co-debtors and heirs.[99] In these cases, the hardship discharge frees up the decedent's assets from pre-petition claims.[100]

The second element of section 1328(b) is that:

> [T]he 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 [c]hapter 7 of this title.[101]

For this element, the court considers the amount that has already been paid at the time the debtor is requesting the hardship discharge. Because "[m]ost chapter 7 cases do not provide any distribution to unsecured creditors," this element is relatively easy to satisfy.[102] This element is both objective and relatively easy to determine, in comparison to the other two elements.[103]

The third and final requirement of the hardship discharge is that "modification of the plan under section 1329 of this title is not practicable."[104] A request to modify the plan after confirmation may be made the debtor, trustee, or the holder of an allowed secured claim.[105] The Bankruptcy Code allows for wide types of modification, including altering the amount and time of payments.[106] In some cases, debtors subjected to a permanent decrease in income

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96 HENRY J. SOMMER, COLLIER CONSUMER BANKRUPTCY PRACTICE GUIDE ¶ 29.03 (Matthew Bender ed., 2020) (citing *In re* Bandilli, 231 B.R. 836 (B.A.P. 1st Cir. 1999)).

97 *Id.* (citing *In re* Bandilli, 231 B.R. 836 (B.A.P. 1st Cir. 1999)).

98 *See In re* Inyard, 532 B.R. 364, 372–73 (Bankr. D. Kan. 2015) (holding that deceased debtor met all the elements for a hardship discharge); *see also* Laura B. Bartell, *Bankruptcy and the Deceased Debtor: Rule 1016 in Practice*, 94 AM. BANKR. L.J. 523, 543–44 (2020) ("[N]o [c]hapter 13 debtor is more eligible for a hardship discharge under § 1328(b) than one who is deceased.").

99 *See* Laura B. Bartell, *Bankruptcy and the Deceased Debtor: Rule 1016 in Practice*, 94 AM. BANKR. L.J. 523, 543 (2020).

100 *Id.* at 543.

101 11 U.S.C. § 1328(b)(2) (2018).

102 Laura B. Bartell, *Bankruptcy and the Deceased Debtor: Rule 1016 in Practice*, 94 AM. BANKR. L.J. 523, 544 (2020).

103 Alan M. Ahart, *Whether to Grant a Hardship Discharge*, 87 AM. BANKR. L.J. 559, 580 (2013).

104 11 U.S.C. § 1328(b)(3) (2018).

105 *Id.* § 1329(a).

106 *Id.* § 1329(a)(1)–(2).

seek to modify their plans to shorten the repayment period by offering to pay the remainder of the plan in one lump sum.[107] In such cases, the debtor may have friends or family members help with the funds for the lump sum payment.[108] Of course, such repayment depends on having family members or friends who are in the financial shape to be able to help.

Further, courts disagree on whether a debtor falling below median income can reduce the timeline of the plan.[109] Debtors above median income may not have a plan that takes less than five years to complete.[110] Some debtors who experience a decrease in income over the course of their repayment plan that pushes them below median seek to reduce their plan to a period under five years.[111] This deviation among courts means that whether a modification is practicable to a debtor with a loss of income varies on the jurisdiction.

Typically, plan modification is impracticable when a debtor's income has dropped and there is not sufficient income to continue repayment.[112] When a debtor's income is less than their basic expenses, the debtor can ask for a modification where they would not be required to make more plan payments.[113] However, courts almost always deny such requests.[114] To prove that a modification is impracticable, a debtor should make a motion for modification and wait for denial from the court. This process is advised because debtors would likely have trouble proving that modification is impracticable without a modification denial in hand.[115]

A debtor with a confirmed chapter 13 plan may convert that plan to a liquidation under chapter 7.[116] A conversion to chapter 7 may be as most chapter 7 cases successfully end in discharge.[117] As previously mentioned, the majority

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[107] Michael P. Maloney, *Retiring a Chapter 13 Plan: An Analysis of Post-Confirmation Plan Modification and the Applicable Commitment Period*, 90 AM. BANKR. L.J. 399, 411–12 (2016).

[108] *Id.* at 412.

[109] *Id.* at 412–13 (2016) (citing *In re* Childers, No. 10-10405-RLJ-13, 2015 WL 360120, at *3 (Bankr. N.D. Tex. Jan. 27, 2015) and *In re* Barnes, 506 B.R. 777, 779 (Bankr. E.D. Wis. 2014)).

[110] 11 U.S.C. § 1322(d) (2018) (providing that a plan may not provide for payments over a period that is longer than five years for above median debtors).

[111] Michael P. Maloney, *Retiring a Chapter 13 Plan: An Analysis of Post-Confirmation Plan Modification and the Applicable Commitment Period*, 90 AM. BANKR. L.J. 399, 412 (2016).

[112] HENRY J. SOMMER, COLLIER CONSUMER BANKRUPTCY PRACTICE GUIDE ¶ 29.03[3][c] (Matthew Bender ed., 2020).

[113] Alan M. Ahart, *Whether to Grant a Hardship Discharge*, 87 AM. BANKR. L.J. 559, 575-76 (2013).

[114] *Id.* at 576.

[115] *See* Lawrence Ponoroff, *Rethinking Chapter 13*, 59 ARIZ. L. REV. 1, 33 (2017).

[116] 11 U.S.C. § 1307(a) (2018) ("The debtor may convert a case under this chapter to a case under chapter 7 of this title at any time. Any waiver of the right to convert under this subsection is unenforceable").

[117] Sara S. Greene et al., *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*,

of households that file under chapter 13 have too little money to be restricted by the means test in the first place.[118] This fact indicates that most chapter 13 debtors would be successful in a conversion. However, this inference does not account for the cost of conversion. Converting from a chapter 13 to a chapter 7 is more time consuming and expensive than filing under chapter 7 case from the start.[119] Moreover, when a debtor files under chapter 13 for the purpose of retaining a particular asset—such as a house—but later converts their filing to a chapter 7 case, the asset they intended to protect under chapter 13 will likely be liquidated under chapter 7, which ultimately prevents the debtor from satisfying bankruptcy goals.

C. *When the Hardship Discharge is Necessary*

There are some situations in which the debtor's only option is to motion for a hardship discharge before falling out of the bankruptcy entirely. The following subsection provides an example of such a situations. The examples are followed by an analysis of how courts have interpreted the hardship discharge.

First, consider a debtor with above-median income for his household size in his state.[120] In addition, he has primarily consumer debts.[121] If the debtor satisfies both of those qualifications, he is subjected to the means test which could result in his case being dismissed entirely.[122] If converting and modification are not options, that leaves the debtor with the hardship discharge as his only option for bankruptcy relief.

This debtor may not be eligible for relief under chapter 7, which entirely precludes him from converting from a chapter 13. More specifically, a debtor might be ineligible for a chapter 7 discharge because of previous discharges. Congress has made multiple attempts over the years at limiting repeat filers.[123] One result of such attempts is a limit on how soon a debtor can file again after a previous bankruptcy discharge. A debtor will not be granted a chapter 13

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101 MINN. L. REV. 1031, 1043 (2017).

[118] Pamela Foohey et al., *No Money Down Bankruptcy*, 90 S. CAL. L. REV. 1055, 1063–64 (2017).

[119] Sara S. Greene et al., *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 MINN. L. REV. 1031, 1043 (2017). The fee for converting a Chapter 13 case to Chapter 7 is $25. *Chapter 13–Bankruptcy Basics*, U.S. CTS., http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics (last visited Oct. 24, 2020).

[120] Alan M. Ahart, *Whether to Grant a Hardship Discharge*, 87 AM. BANKR. L.J. 559, 576 (2013).

[121] *Id.* at 576.

[122] *Id.* at 576.

[123] *See generally* Sara S. Greene, *The Failed Reform: Congressional Crackdown on Repeat Chapter 13 Bankruptcy Filers*, 89 AM. BANKR. L.J. 241, 242 (2015) ("While bankruptcy law has undergone significant changes since the late-nineteenth century, the problem of repeat filers has been raised many times since 1898.").

discharge if the debtor received a discharge under chapters 7, 11, or 12 within a four-year period preceding the order of relief in the chapter 13 case.[124] Additionally, that debtor will not be granted a discharge if they received a chapter 13 discharge within a two-year period preceding the date of order for relief.[125] They will also not be granted a chapter 7 discharge if they received a discharge within eight years of the date of filing the petition.[126]

Together, these two provisions can potentially affect chapter 13 debtors looking to convert their cases to a chapter 7 liquidation. For example, a debtor who previously obtained a chapter 7 discharge between four and eight years prior to bringing a new chapter 13 case would be eligible to receive a chapter 13 discharge, but would also remain ineligible for a chapter 7 discharge for another four years.[127] If a chapter 13 debtor who falls into this grouping suddenly loses their source of income and cannot find success in modifying their plan, then they have no remaining options for successfully completing the bankruptcy process, other than the hardship discharge.

When Congress first enacted the hardship discharge, courts initially interpreted the first element[128] as requiring "catastrophic circumstances."[129] An example of such circumstances cases arose in *In re Schleppi*, when the debtor's employer ceased operations about a year after the debtor's plan was confirmed, resulting in a significant reduction of the debtor's income.[130] Relying on a number of other cases, the court held that courts typically limit granting of the hardship discharge to "catastrophic circumstances."[131] However, despite this statement and an admission that the debtor's income reduction did not come from catastrophic circumstances, the *In re Schleppi* court ultimately agreed that the debtor's failure to complete plan payments was the result of circumstances for which he should not be held accountable.[132] However, it is possible that the court admitted this because it was not dispositive of the hardship discharge issue. Ultimately, the court denied the hardship discharge on the modification element.[133]

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124 11 U.S.C. § 1328(f)(1) (2018).

125 11 U.S.C. § 1328(f)(2) (2018).

126 11 U.S.C. § 727(a)(8) (2018).

127 Alan M. Ahart, *Whether to Grant a Hardship Discharge*, 87 AM. BANKR. L.J. 559, 577 (2013).

128 11 U.S.C. § 1328(b)(1) (2018) ("The debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable.").

129 *See* Alan M. Ahart, *Whether to Grant a Hardship Discharge*, 87 AM. BANKR. L.J. 559, 565-68 (2013).

130 *In re* Schleppi, 103 B.R. 901, 902–03 (Bankr. S.D. Ohio 1989).

131 *Id.* at 903–04.

132 *Id.*at 904.

133 *Id*. at 904–05 ("Despite debtor's assertions to the contrary, the record indicates that modification of the

Over time, courts loosened the standard for what a debtor should be held accountable for.[134] In a 2004 case, the debtor began experiencing serious medical problems, including a cancer diagnosis, after the confirmation of her plan.[135] When the debtor's employer insisted she retire from her job as a school bus driver; she obliged.[136] In determining whether the debtor met the standard for the accountability element of the hardship discharge, the court acknowledged the previous tests for "catastrophic circumstances" and "special vigilance or gravity," but ultimately concluded that the statute "simply does not set the bar so high."[137] In its analysis, the court focused on accountability—stressing that there is no reason to heighten the standard written in the statute—before finding that the debtor met the hardship discharge requirements.[138]

More recently, a bankruptcy court contemplated whether a debtor should be held accountable for his loss of employment in *In re Schmitt*.[139] In that case, the debtor was a senior project engineer who lost his job.[140] His termination from that position reduced he and his wife's monthly income by over $5,000, which ultimately sent the couple into a negative net monthly income.[141] The court cited the debtor's unsuccessful attempts at gaining employment after his termination as circumstances for which he should not have been held accountable.[142]

Today, the application of the hardship discharge varies among courts. While some courts have said that a showing of catastrophic circumstances is not necessary,[143] other courts continue to apply this historical standard, or something similar. Nonetheless, courts have generally moved away from requiring a debtor who seeks a hardship discharge to have circumstances above and beyond those faced by any other debtor who fails to make payments under their plan.

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plan is a viable option for the debtor.").

134 *See generally* Alan M. Ahart, *Whether to Grant a Hardship Discharge*, 87 AM. BANKR. L.J. 559, 568–75 (2013).

135 *In re* Grice, 319 B.R. 141, 142 (Bankr. E.D. Mich. 2004).

136 *Id.* at 142.

137 *Id.* at 146.

138 *Id.* at 146.

139 *In re* Schmitt, No. 09-02238, 2011 Bankr. LEXIS 3985, at *1-3 (Bankr. N.D. Iowa Oct. 20, 2011).

140 *Id.* at *1.

141 *See Id.* at *2.

142 *See Id.* at *5-6.

143 6 COLLIER BANKRUPTCY PRACTICE GUIDE ¶ 101.04 (Richard Levin & Henry J. Sommer eds. 2021) (citing *In re* Bandilli, 231 B.R. 836, 840–41 (B.A.P. 1st Cir. 1999)).

IV. EMPIRICAL ANALYSIS ON HARDSHIP DISCHARGES

Bankruptcy represents the fundamental principle of exchanging assets or future income for a "fresh start" for the honest but unfortunate debtor.[144] However, when two-thirds of these debtors crash out of bankruptcy after working to pay off their debts,[145] this bargain begins to seem unfair. Further data is necessary to understand how debtors can avoid crashing out of bankruptcy.

One tool to avoid this crash is the hardship discharge. While there is limited data available on when or how courts grant hardship discharges, scholars generally concur that their use is rare.[146] A recent analytical study contemplated what happened when debtors die during their bankruptcies—examining many hardship discharges in the process.[147] However, while death may be a common reason for granting a hardship discharge, limiting the sample of hardship discharge cases analyzed to those involving the death of a debtor likely paints an incomplete picture of when and why courts grant such a discharge. This incomplete picture prompts an examination of the opportunity for change—namely, an analysis identifying the percentage of chapter 13 cases that *could* have improve outcomes if a hardship discharge was granted.

This analysis has two components. The first component tested the frequency of cases where a hardship discharge could help the debtor find relief. To test this, a general study of chapter 13 outcomes needed to be conducted. The intent of this component was to identify the cases where a debtor could potentially benefit from a hardship discharge. Further, because chapter 13 plans can last up to five years and do not always begin immediately upon filing, the study began in 2014 to account for the time it takes to complete a chapter 13 case. After removing holiday and short weeks, a one-week period in 2014 was randomly selected. The week chosen was October 6-10, 2014. One hundred cases were pulled from each circuit. Because most circuits had over 100 cases on October 6th alone, the sample primarily included a random selection of 100 cases from that date. Each case was coded for debtor disposition, date terminated, whether the plan was confirmed, and whether the debtor made a motion for modification. Coding for these factors allowed for a characterization of cases that could potentially benefit

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144 Harris v. Viegelahn, 575 U.S. 510 (2015) (noting that the Bankruptcy Code aims to facilitate a fresh start to the honest but unfortunate debtor) (citing Marrama v. Citizens Bank, 549 U.S. 365 (2007)).

145 Greene, *supra* note 64.

146 *E.g.,* Sara S. Greene et al., *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 MINN. L. REV. 1031, 1089 n.175 (2017) ("We believe hardship discharges are rare but we are not aware of any data.").

147 *See* Laura B. Bartell, *Bankruptcy and the Deceased Debtor: Rule 1016 in Practice*, 94 AM. BANKR. L.J. 523, 524 (2020).

from a hardship discharge. In addition to this coding, this study also noted other abnormalities, such as cases converted to chapter 7.

The second component identified cases where a hardship discharge was granted to examine the debtors' circumstances. The debtors' general reasons for requesting hardship discharges were recorded for each case. If the court published an opinion explaining the decision to grant the hardship discharge, the opinion was examined. Such a qualitative analysis offers the opportunity to explore the circumstances in cases where courts did grant hardship discharges.

A. Results of Part I

After setting up the parameters of the cases to be looked at, each case was coded. The results were then compiled and reported below in Table 1 and Table 2.[148] Because the use of chapter 13 varies greatly throughout the country, the analysis examined 100 cases filed in each circuit on October 6, 2014. If the circuit had less than 100 cases filed on October 6th, the cases from the next day were pulled, and so on, until 100 cases for that circuit had been examined and coded. If the circuit had more than 100 cases filed on the same day, a random number generator was used to create a random sample. Some circuits, such as the Eleventh Circuit, had as many as 400+ chapter 13 cases filed on the selected day, while others had as few as twenty. After pulling this data, cases with certain abnormalities were removed from the analysis. These cases were put into a miscellaneous category.

This miscellaneous category included a handful of cases that were still open. An open case would mean either a five-year plan confirmed after October 2015, or a three-year plan confirmed after October 2017. Further, while one of chapter 13's goals is to move forward with repayment quickly,[149] some debtors still find themselves spending a significant amount of time and resources litigating the details of the plan. The presence of open cases over six years after the initial filing date highlights this fact. Moreover, while most miscellaneous cases were open cases, the category also included various cases where courts denied a discharge.

Aside from the miscellaneous category, there were eight categories for debtor disposition. Each of these categories shall be discussed, in greater detail, in the analysis below. The first debtor disposition was a standard discharge. The

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[148] *Infra* Table 1 & Table 2.

[149] 11 U.S.C. § 1326(a)(1) (2018).

standard discharge is the primary goal of chapter 13 bankruptcy. Only about a third of debtors typically reach this disposition through chapter 13.[150]

The second debtor disposition was "dismissed for other reason." There are several reasons that a court may dismiss a case under this category. If a debtor chooses to drop out of the bankruptcy proceedings, he might fall under this category.

The third debtor disposition was "dismissed for failure to make plan payments." Debtors who elect to drop out of the bankruptcy proceeding may also do it in this way. A debtor could drop out of bankruptcy under this category by ceasing to make payments altogether. However, the cohort of debtors dropped out of chapter 13 in this manner is not the only group that falls under this third category. If a change in circumstances prevents a debtor from making payments in accordance with the terms of their confirmed plan, then that debtor is also at risk of falling into this category. As discussed above, the code allows for chapter 13 debtors to request a modification of their plan if they have a change in circumstances.[151] While this provision suggests Congress anticipated that debtors may experience job, income, or other related changes, its language does not explicitly encompass these changes. In some cases, modifications are denied, and the debtor is left to drop out of the bankruptcy entirely.

For example, consider a debtor whose income fell below the amount required to cover the costs of their modest standard of living. If the debtor asks the court for modification to a $0 payment, the court will likely decline their request—leaving the debtor unable to complete their remaining plan payments.[152] This is the primary category of debtors who do not reach a final discharge in their bankruptcies but may have been eligible for a hardship discharge. Consequently, this group likely encompasses the primary beneficiaries of an expanded hardship discharge. However, there is also a subset of debtors within this group who never reached plan confirmation. These situations arose because the Bankruptcy Code requires the debtor to begin paying payments within thirty days of the petition, and this requirement applies in all cases, regardless of whether the debtor's plan has been confirmed. Thus, if a debtor gets stuck in the process of plan confirmation and, ultimately, does

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[150] Sara S. Greene et al., *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 MINN. L. REV. 1031, 1032 (2017).

[151] 11 U.S.C. § 1329; *see supra* notes 112–115 and accompanying text.

[152] *See* Alan M. Ahart, *Whether to Grant a Hardship Discharge in Chapter 13*, 87 AM. BANKR. L.J. 559, 576 (2013).

not make the necessary payments, then they will end up crashing out of the bankruptcy before ever really starting on the path to discharge.

The fourth, fifth, and eighth debtor dispositions had similar results. The fourth debtor disposition was "dismissed for failure to pay the filing fee." The fifth debtor disposition was "dismissed for failure to file information," and the eighth disposition was "dismissed for failure to file documents." None of the debtors that fell under these dispositions reached plan confirmation, as they either: (1) never paid the filing fee stipulated by the Code; or (2) failed to deliver information necessitated by the court. Consequently, an expanded use of the hardship discharge is unlikely to benefit debtors in these groups, as they presumably paid $0 in plan payments. Thus, unless a debtor in one of these categories has no assets, they will probably fail to satisfy the Section 1328(b)(2) element requiring creditors receive at least what they would have in a liquidation.[153]

The sixth debtor disposition was "dismissed for abuse." This disposition happens when the bankruptcy court makes a finding that the debtor had abused the bankruptcy system in some way. This scenario can arise when a debtor files for bankruptcy for a second time, after already receiving a discharge in a previous bankruptcy. Further, while a prior discharge does not necessarily bar a debtor from seeking bankruptcy relief again, but there are statutory limitations on how quickly a debtor can file for a second bankruptcy.

Finally, the seventh disposition includes debtors who had a discharge "withheld for various reasons." Of the debtors who fell into this category, many had their discharge withheld for failure to file proof that they took a financial management course—which is required by the Code.[154] Congress implemented this requirement to prevent debtors from resorting to bankruptcy—either altogether or after discharge.[155] The logic behind making such courses mandatory is that, if debtors receive financial counseling, then they are less likely to find themselves in the position that led to their bankruptcy again in the

153 11 U.S.C. § 1328(b)(2) (2018).

154 11 U.S.C. § 1328(g)(1) (2018); *see also* 11 U.S.C. § 111 (2018). The Code makes some exceptions to this requirement, notably requiring incapacity. *See* 11 U.S.C. § 1328(g)(2) (2018); 11 U.S.C. § 109(h)(4) (2018) (noting that the financial management course shall not apply to a debtor the court determines is incapacitated, disabled, or active-duty military in a military combat zone).

155 Michael D. Sousa, *Just Punch My Bankruptcy Ticket: A Qualitative Study of Mandatory Debtor Financial Education*, 97 MARQ. L. REV. 391, 398 (2013) ("Congress wanted debtors who utilized the bankruptcy system to learn effective financial management techniques to employ after the closing of their bankruptcy cases, such as utilizing a budget and using credit wisely.").

future.[156] Accordingly, when a debtor does not receive this counseling, the court can bar the debtor from receiving a final discharge—even if they made every payment required under their plan. Thus, because a failure to comply, rather than a failure to pay, prevents such a debtor from receiving a discharge, they are unlikely to benefit from an expanded hardship discharge. However, this assessment ultimately depends on *how* the discharge would be expanded. An interpretation that gives the court discretion to waive certain bankruptcy requirements for a hardship discharge could potentially include waiving the financial counseling requirement. For, if the expansion allowed courts to exercise this type of discretion, then it would, undoubtably, benefit any debtor who failed to file proof of financial counseling.

Finally, the distributions of the debtor dispositions discussed in this section are outlined below in Table 1:

Table 1

Debtor Disposition	**Total Number**	**Percentage of Total**
(1) Standard Discharge	296	34.22%
(2) Dismissed for Other Reason	182	21.04%
(3) Dismissed for failure to make plan payments	278	32.14%
(4) Dismissed for failure to pay filing fee	21	2.43%
(5) Dismissed for failure to file information	68	7.86%
(6) Dismissed for abuse	2	.23%
(7) Withheld for various reasons	4	.46%
(8) Failure to file documents	2	.23%
(9) Other	12	1.39%
Total	N=865	100%

Based on these distributions, most debtors fell into the first three categories. The finding that only 34.22% of debtors reached a standard discharge is consistent with other research stating that only about one-third of chapter 13 debtors successfully complete their bankruptcies.[157] Cases dismissed on account of the

156 *But see id.* at 462 (noting that the Congressional goal of steering debtors out of bankruptcy through the financial management course has "proven to be a failure").

157 *E.g.,* Sara S. Greene et al., *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 MINN. L. REV. 1031, 1032 (2017).

debtor's "failure to make plan payments" represented the second highest distribution, at 32.14%. While the final of these three main categories encompassed the 21.04% of cases dismissed "for other reasons."

The category of debtors most likely to benefit from an expanded use of the hardship discharge would be those that were dismissed for failure to make plan payments. Because nearly one-third of debtors fell into this category, debtor success outcomes could dramatically improve with an expanded hardship discharge, based on the size of this group alone. For example, if just 50% of the debtors within this category saw success from the hardship discharge, then the proportion of debtors who reach a chapter 13 discharge would increase to roughly 50% of all chapter 13 debtors.

One glaring absence among debtor dispositions was the hardship discharge. In the 865 cases examined, no debtor requested a hardship discharge. Because no debtor requested a discharge, no court could grant it and therefore, no debtor found relief through the hardship discharge. This finding may indicate that many debtors are not taking full advantage of every option the Code has to offer. And, if this is the case, then a new question demands consideration: *why?*

There may be multiple reasons for why hardship discharge requests are so infrequent among chapter 13 debtors. One answer is pro se litigants. Generally, pro se litigants face more difficulties than litigants represented by attorneys, and these difficulties might be amplified in the bankruptcy context. One such difficulty could be not knowing about the hardship discharge provision. However, when clients have legal representation, attorney preferences and biases can also deter hardship discharge requests. For instance, some attorneys may not encourage their clients to pursue hardship discharges because they anticipate low chances of success. Alternatively, other attorneys might view requesting a hardship discharge as an additional litigation expense—as the hardship discharge usually warrants a hearing, requiring notice to all the debtor's creditors. Another explanation is the moral value some people place on chapter 13 bankruptcies, which require debtors to pay their debts.[158] If a debtor chooses to file under chapter 13 route for this reason, they may not feel inclined to ask the court for forgiveness on debts they feel morally obliged to repay– even if they cannot afford to make their payments. However, despite these proposed explanations, the reasons why so few debtors request hardship discharges remain unclear. It likely varies among debtors and each of the reasons described above could apply to different debtors.

[158] Foohey, *supra* note 39, at 1064.

The 32.14% of debtors that found themselves failing out of bankruptcy for being unable, or unwilling, to continue making plan payments seem to have the most to gain from an expanded hardship discharge. However, assuming that all debtors in this category *could* receive a hardship discharge is unrealistic. Some debtors may decide not to continue with their chapter 13 plan—for one reason or another—and drop out of the bankruptcy by ceasing payments. Such a situation presents no evidence that the debtor could qualify for a hardship discharge. However, this is not to discount the entire group that falls under this category—as there are likely many debtors who cease making payments because they simply cannot afford to do so. Because the chapter 13 plan is created, and then confirmed based on the debtor's income, it follows that, if the debtor cannot afford to continue to make payments, then they were likely subject to a change in circumstances affecting his income or cost of living. Debtors that fall under this group may be eligible for a hardship discharge. This analysis prompts the question of how to tell how many debtors are in such a situation within the larger cohort.

During the examination, each case was coded for: (1) whether the plan was confirmed in the first place; and (2) whether the debtor, or another party, requested an amendment or modification of the plan. Table 2 outlines these results below:

Table 2

Debtor Disposition	**Total number of cases**	**Cases where the plan was confirmed**	**Percentage of plan confirmation of total disposition**	**Cases where the debtor requested modification**	**Percentage of debtor requesting modification of total disposition**
Standard Discharge	296	296	100%	99	33.45%
Dismissed for other reason	182	65	35.71%	22	12.09%
Dismissed for failure to make plan payments	278	198	71.22%	55	19.78%

If a debtor's plan is never confirmed, then they are unable to receive a standard discharge. Table 2 illustrates this principle by showing that the court confirmed the debtor's plan in 100% of cases where the debtor received a standard discharge. Further, while Section 1328(b) does not explicitly bar debtors with unconfirmed plans from receiving a discharge , it bars the discharge in application.[159] Cases were coded to include whether the debtor had requested modification because of the third hardship discharge requirement that the modification of the plan is impracticable.[160] A debtor is unlikely to receive a hardship discharge without first requesting a plan modification. And, to request plan modification, the plan must have been approved by the court in the first place.

Additionally, the second hardship discharge element requires that the creditors receive at least what they would have under a chapter 7 liquidation. Chapter 13 debtors with minimal to no assets have a lower bar to satisfy than those with more assets. Regardless, the equivalent of a minimal liquidation would still require at least *some* payments under a chapter 13 plan. Thus, although the Code does not explicitly bar unconfirmed chapter 13 debtors from a hardship discharge, courts are unlikely to grant a discharge to such debtors. Because of this requirement, the first consideration after disposition frequency should be the presence of plan confirmation *within* each disposition.

As shown in Table 2, 100% of debtors who received a standard discharge had their plans confirmed. Of the debtors who were dismissed for another reason, sixty five had confirmed plans. This 35.71% of debtors is the portion of "dismissed for other reason" debtors who might be eligible for a hardship discharge, depending on their reasons for dismissal. Furthermore, twenty-two of those sixty-five debtors asked for a modification at some point in their bankruptcy process.

The issue of whether a hardship discharge will be granted is typically fact-dependent on each individual case. However, the data may give an indicator as to which debtors *could* potentially receive a hardship discharge—especially under an expanded interpretation. Thus, the sixty-five debtors who had their cases dismissed after confirmation "for other reasons" could be eligible—depending on the facts of their cases. While the twenty-two debtors who asked for plan modification are most likely eligible, as they have satisfied another element.

The debtors who had their cases dismissed for failure to make plan payments are the most likely group to benefit from an expanded discharge. The results show that a large portion of debtors end up in this category, at 32.14%. This number alone should not imply that *all* of these debtors are eligible for a hardship

159 Without plan confirmation, debtors are unable to make plan payments and either pay off their debts or complete five years of payments.

160 11 U.S.C. § 1328(b)(3) (2018).

discharge. First, there must be a plan confirmation. Adding this qualification cuts almost a quarter of these debtors. This still leaves 198 debtors who may have been eligible for a hardship discharge and would likely benefit if a hardship discharge was expanded. These 198 debtors represent nearly 25% of all debtors in the entire sample.

If an expanded hardship discharge included this cohort, the rate of debtors who reach success would rise to around 60%. This 60% chance of success would not only strengthen the appeal of chapter 13 to debtors torn between repayment and liquidation, but may also eliminate some of the discrepancies surrounding *who* actually receives a chapter 13 discharge. However, this assertion assumes that the discrepancies fall evenly among the various groups, or otherwise falls disproportionately into the "failure to make payments" disposition group. Importantly, many of the indicators that show decreased prospects of success occur because of unknown costs. For example, debtors with children are less likely to find success in chapter 13.[161] This indicator likely exists because of the unknown costs that having children in the household presents. Another example is that debtors without medical insurance are less likely to reach a standard discharge in Chapter 13.[162] Medical issues, accompanied by medical *expenses*, may arise over the course of repayment. Unexpected costs leave the debtor unable to make plan payments as scheduled. While there is no data to back up this assertion, these debtors are likely within this disposition group because unforeseen costs lead to the debtor being unable to make plan payments. It follows that many of the discrepancies that exist in chapter 13 outcomes are likely to fall within this group. This group is the most likely beneficiary of an expanded hardship discharge because the debtors within it are most apt to face circumstances that courts could sympathize with.

The requirement that debtors should make a modification request *before* requesting a hardship discharge to show that the modification is impracticable could be a roadblock for debtors facing dismissal for failure to make plan payments. In this sample, only fifty-five of the 198 debtors had petitioned the court for a modification. If the modification request indicates a greater chance of receiving a hardship discharge, then this positive indicator would only net an additional 6.59% to the overall discharge rate of 34.22%. There are two caveats to this assertion. The first is that, with only about one-third of debtors receiving discharge any increase, even a small increase of 6.59% would be an

[161] *See* Sara S. Greene et al., *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 MINN. L. REV. 1031, 1036, 1064 (2017).

[162] *See id.* at 1077.

improvement. The second is that, if the hardship discharge were expanded and, as a result, more debtors and attorneys saw the hardship discharge as a reasonable option, the proportion of debtors who request modification would likely go up. Nonetheless, because the issue of granting a hardship discharge is so fact-dependent, this analysis is not a strong indicator of what changes would improve chapter 13 outcomes at large, but rather a demonstration of what role an expanded hardship discharge could play in facilitating such improvements.

B. *Results of Part II*

The second analysis required examining the cases in which a court granted a hardship discharge. The goal of this part of the analysis was to contextualize *why* courts granted hardship discharges. The circumstances under which courts opted to grant such discharges could then be compared to the reasons why individuals dropped out of chapter 13 bankruptcies to determine whether any correlations existed between. A correlation among these two issues could suggest that the hardship discharge is currently being underutilized in the bankruptcy courts.

Compared to Part I, this analysis had fewer available cases to examine. This fact underscores scholars' views that courts rarely grant hardship discharges. Bloomberg Law lists seventy-nine cases ending with the debtor disposition identified as "hardship discharge."[163] Of these cases, seven provided insufficient information for examination., while the remaining seventy-two cases were spread out throughout all circuits across the country. However, the plurality of cases came from the First Circuit—particularly in Puerto Rico. Further, the circumstances under which debtors requested hardship discharges fell into four categories. The first category contained cases where the debtor, or one of the joint debtors, passed away. The second category included cases in which the debtor, or joint debtors, experienced medical problems that rendered them unable to complete payments. The third category involved debtors who faced employment or other problems that resulted in a lack of income. Finally, cases that fell into the fourth category were the result of spousal separation, or the debtor losing some sort of family support. Table 3 lists the distributions of cases within each category, and the following analysis will delve further into each category.

[163] There may be additional hardship discharge cases, but Bloomberg does not keep an up-to-date record, unless a user requests that Bloomberg update the docket.

Table 3

Category	Total Number	Percentage of Total
1. Debtor death	22	30.56%
2. Medical problems	33	45.83%
3. Income problems	11	15.28%
4. Family change in circumstances	6	8.33%
Total	N=72	100%

Cases in the first category involved debtors that pass away in the process of making their chapter 13 plan payments. This category was to be expected, as there are hundreds of thousands of bankruptcies filed every year by consumers—creating the high statistical probability that a portion of those debtors will not live through their bankruptcies.[164] Additionally, chapter 13 bankruptcies tend to take longer to complete compared to chapter 7 liquidations, as is the nature of a three-to-five-year payment plan. As a result, chapter 13 debtors have a higher likelihood of not living to see a successful discharge than chapter 7 debtors. Moreover, the age demographics of debtors in consumer bankruptcies has consistently risen over the past few decades.[165]

While a chapter 7 debtor who passes away during the administration of his case may have his case conclude liquidation without him,[166] a chapter 13 debtor who passes away is no longer able to make payments pursuant to the confirmed plan. Further, although some chapter 13 debtors who die during their plans end up having their cases dismissed,[167] others qualify as hardship discharge candidates. The court in *In re Inyard* analyzed Rule 1016 of the Federal Rules of Bankruptcy Procedure and concluded that deceased debtors are eligible for hardship discharges.[168] In addition, deceased debtors are excellent candidates for a hardship discharge based on the statutory requirements, while the families of deceased chapter 13 debtors also have an interest in a chapter 13 case being

[164] Laura B. Bartell, *Bankruptcy and the Deceased Debtor: Rule 1016 in Practice*, 94 AM. BANKR. L.J. 523, 523 (2020).

[165] *See id*. at 523 ("One in seven consumer bankruptcy cases are filed by someone 65 or older.") (citing Deborah Thorne et al., *Graying of U.S. Bankruptcy: Fallout from Life in a Risk Society* 10 (Ind. Legal Stud. Rsch. Paper No. 406, 2018)).

[166] *See* Fed. R. Bankr. P. 1016 ("Death or incompetency of the debtor shall not abate a liquidation case under chapter 7 of the Code.").

[167] *See* Laura B. Bartell, *Bankruptcy and the Deceased Debtor: Rule 1016 in Practice*, 94 AM. BANKR. L.J. 523, 536 (2020) (In the chapter 13 context, "the Advisory Committee Note to Rule 1016, and many commentators, have taken the position that dismissal is the likely outcome of the debtor's death.").

[168] *In re* Inyard, 532 B.R. 364, 373 (Bankr. D. Kan. 2015).

resolved through a hardship discharge—as opposed to a dismissal depending on the debts of the debtor. Consider the court's reasoning:

> To deny a discharge under the facts of this case, when a deceased debtor is unable to complete his plan but has paid in more to his unsecured creditors than had he filed a [c]hapter 7, would discourage debtors from filing [c]hapter 13 proceedings because it would allow pre-petition creditors to seek additional recovery against his probate estate.[169]

This application is limited to debtors to a class of debtors who fit two criteria: (1) the debtors have pre-petition unsecured creditors; and (2) they have already paid those creditors what they would have received in a liquidation. Due to this estate interest, it follows that such a large portion of the hardship discharge approved cases exist because of a debtor's death.

The interest in avoiding paying out pre-petition creditors is not the only reason a deceased debtor's family might want their case to be discharged—as opposed to dismissed. In the cases of joint debtors, the death of one debtor may put the other in a financial bind. In one case involving a husband and wife as joint debtors, the wife passed away and the husband found that, without the help of his wife's income, he could not complete the payment on his own.[170] Additionally, many of the debtors in such situation find modification impracticable because their reduced incomes fall to or below a minimal standard of living. These debtors have no disposable income, thereby making their only possible plan payments $0. When there is no source of income to fund a modification, courts have indicated that this could satisfy the modification requirement.[171]

The second category consisted of debtors who face significant medical problems that render them unable to complete their plans. This category was the largest, making up nearly half of all granted hardship discharges. Within this category, debtors generally fell into two sub-categories; (1) debtors who suffered severe health problems that rendered them unable to work; and (2) debtors whose health problems indirectly led to financial problems.

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169 *Id.* at 372.

170 Motion for Post Confirmation Modification and Request for Discharge at 3, *In re* Barbosa, No. 06-04577-BKT (Bankr. D.P.R. Dec. 20, 2007), ECF No. 28.

171 *In re* Musgrave, No. 05-31246, 2016 Bankr. LEXIS 4152, at *9 (Bankr. S.D. W. Va. Dec. 5, 2016) ("[W]here debtors are in the 'early stages' of their bankruptcy case, and they have not shown that there is no source of income to fund a modification of the plan, courts have found that they have not satisfied the third prong of [S]ection 1328.").

Thirty-three debtors found themselves facing medical issues that made continuing chapter 13 plans nearly impossible. Many of these debtors suffered severe health problems that directly led to a loss of income. For example, in one case, the debtor suffered from chronic cervical radiculopathy,[172] a condition that required future surgery and, ultimately caused the debtor to lose their employment.[173] Further, although the debtor was a joint debtor, her loss of income prevented the debtor and her husband from completing plan payments.[174] In another case, the debtor required surgery that would result in three months without pay.[175] Even though the debtor expected to return to work after the three month recovery period, modification for the time period in question was impracticable.[176] Some of the medical issues faced by hardship discharged debtors were more long-term. In one case, the debtor suffered a stroke and was unable to even request the discharge on his own.[177] In another case, a debtor had relied on family members for financial support after a medical problem rendered him unable to work.[178] In that case, the debtor's nephew had been paying his mortgage, but would not be able to help much longer. [179] In these cases, the debtors had serious health problems that left them unable to work, and their inability to work made finishing their bankruptcy plans impossible.

Other debtors found themselves motioning for hardship discharges due to medical conditions that indirectly reduced their disposable incomes. In one case, joint debtors agreed to pay $1,500 in monthly payments for seventeen months and, thereafter, they were to pay $8,949 per month for the final twenty four months of the plan.[180] The plan was based on the understanding that the husband's income would rise over the course of the plan for the couple to afford

[172] Affidavit in Support at 2, *In re* Gray, No. 10-21023 (Bankr. W.D.N.Y. Nov. 29, 2012), ECF No. 82-1. Cervical radiculopathy, also known as a pinched nerve, "describes a compressed nerve root in the neck (cervical spine)." *Radiculopathy*, JOHNS HOPKINS MED., https://www.hopkinsmedicine.org/health/conditions-and-diseases/radiculopathy (last visited Feb. 24, 2022).

[173] Affidavit in Support at 2, *In re* Gray, No. 10-21023 (Bankr. W.D.N.Y. Nov. 29, 2012), ECF No. 82-1.

[174] *Id.* at 2.

[175] Motion Requesting Discharge Pursuant to 11 U.S.C. § 1328(b) at 2, *In re* Collazo Rodriguez, No. 05-01964 (Bankr. D.P.R. Jan. 8, 2010), ECF No. 70.

[176] *Id.* at 2.

[177] Debtor's Motion Requestin [sic] Hard[ship] Discharge at 1, *In re* Gonzalez Figeroa, No. 07-06801 (Bankr. D.P.R. Apr. 8, 2011), ECF No. 56 ("[T]he debtor's daughter has provided the . . . attorney with documents and testimony related to her father, that having suffered a stroke . . . is unable to move, with very limited intellectual capacities and actually under her personal care.").

[178] Motion for Hardship Discharge Under 11 U.S.C. 1328(b) at 1–2, *In re* Najmabadi, No. 12-12267 (Bankr. N.D. Cal. June 2, 2017), ECF No. 52.

[179] *Id.* at 1–2.

[180] Motion for Hardship Discharge Under 11 U.S.C. § 1328(b) and Debtor's Certification of Compliance with 11 U.S.C. Section 1328 at 2, *In re* Brown, No. 09-27844 (Bankr. M.D. Fla. Feb. 16, 2013), ECF No. 103.

the higher payments.[181] However, the husband had medical ailments which "makes it impossible for him to work the hours necessary" to make the payments.[182] The debtor was still able to work, but he could not produce the disposable income that would allow him to complete his plan successfully.[183] In another case of joint debtors, the husband's medical conditions led to his placement in a nursing home.[184] The additional nursing home expenses were substantial, and thus the debtors could not continue making payments.[185] Another debtor in this sub-category was a couple who, when the wife fell ill with cancer, the husband had to take off from work to care for the wife and their five children.[186] Each of these situations presented the debtors with various health problems that caused extra expenses that made it difficult for debtors to continue to make plan payments.

The third category of debtors who received hardship discharges were debtors whose loss of employment led to reduced income. Many of the debtors in the second category also had reduced income due to loss of employment. However, the debtors in this third category did not experience changes in employment or income because of medical problems. This category was smaller—at only15.28% of the granted hardship discharges. In some cases, the debtors simply never obtained the gainful employment they were expecting in their plan confirmations. For example, one couple in California decided to sell their house and move to Nevada in order to lower their cost of living.[187] Upon moving to Nevada, the debtors' income was also reduced significantly, and were thus unable to keep up with the payments while supporting their family.[188] In another case, the debtors had previously received income due to renting out a room in their home.[189] Those debtors ended up losing their home and the rental income that came with it.[190] In another case, the debtor was disabled at confirmation and was also employed part-time at Walmart.[191] Upon termination of his part-time

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181 *Id.* at 1.

182 *Id.* at 1.

183 *Id.* at 1.

184 Motion for Hardship Discharge Under Section 1328(b) and Notice of Deadline and Opportunity to Object at 1, *In re* McGuire, No. 06-60054 (Bankr. W.D. Mo. Nov. 12, 2009), ECF No. 69.

185 *Id.* at 1.

186 Motion for Hardship Discharge at 1, *In re* Barnett, No. 12-45488 (Bankr. N.D. Cal. Jan. 11, 2017), ECF No. 63.

187 Debtors' Motion for Hardship Discharge at 2, *In re* Criswell, No. 12-33616 (Bankr. N.D. Cal. Feb. 6, 2017), ECF No. 39.

188 *Id.* at 2.

189 Motion for Hardship Discharge at 1–2, *In re* Winn, No. 12-56707 (Bankr. N.D. Cal. Jan. 19, 2018), ECF No. 89.

190 *Id.* at 2.

191 Debtor's Application for a Chapter 13 Hardship Discharge at 1, *In re* Reyes Alvarez, No. 07-00793

job, he could not keep a minimal standard of living and make payment plans while only receiving his disability.[192] In many of these cases, the debtors made admirable attempts at increasing their income to afford the bankruptcy. However, simple changes of circumstances left them all unable to generate an income that complied with their payment plans.

The final category was debtors who could not continue making payment plans because of spousal separation or other family support dissipating. That was the smallest category, with only six cases, or 8.33%, of the total. Although this is albeit a small sample size, these households fell into generally similar circumstances. For example, one couple could not continue payments after separation because the wife had a mental breakdown and lost her employment while the husband moved from Washington to Colorado to take care of his children and invalid father.[193] While spousal separation is not the clear hardship discharge candidate that death may be, in some instances it creates ideal circumstances. For a debtor who was married, but filed for bankruptcy alone, a divorce means increased living expenses.[194] Increased living expenses leave the debtor with little to no disposable income. Since a chapter 13 payment plan is based on disposable income, it is understandable that such a situation would warrant a motion for a discharge. In another case, the debtor was already divorced upon plan confirmation, however, her income at that time included alimony.[195] When the debtor's ex-spouse lost his job and stopped paying her alimony, she could no longer continue her payments.[196] Finally, not all debtors in this category lose support from a partner. In another case, the court granted a hardship discharge to a debtor who previously had an adult-dependent mother.[197] When the mother passed away, the Relative Adult Foster Care income the debtor was receiving stopped.[198] In these cases, the loss of additional family support, whether it be from caring for a dependent relative or the joint incomes of a couple, can render the debtors unable to make payments.

(Bankr. D.P.R. Dec. 19, 2011), ECF No. 62.

192 *Id.* at 1.

193 Memorandum in Support of Motion at 1-2, *In re* Smith, 07-43853 (Bankr. W.D. Wash. Dec. 1, 2011), ECF No. 114.

194 Motion for Hardship Discharge at 1, *In re* Jewell, No. 08-11034 (Bankr. W.D. Ky. May 20, 2011), ECF No. 44.

195 Motion for Hardship Discharge at 1, *In re* Bullock, No. 17-40088 (Bankr. N.D. Ga. July 20, 2018), ECF No. 57.

196 *Id.* at 1.

197 Motion for Hardship Discharge at 1, *In re* Berge, No. 09-61563 (Bankr. D. Or. Mar. 20, 2012), ECF No. 51; Order Granting Hardship Discharge at 1, *In re* Berge, No. 09-61563 (Bankr. D. Or. Mar. 20, 2012), ECF No. 51.

198 Motion for Hardship Discharge at 1, *In re* Berge, No. 09-61563 (Bankr. D. Or. Mar. 20, 2012), ECF No. 51.

Many of the cases described in this analysis show a fundamental problem with chapter 13 bankruptcies: most debtors are one emergency away from not being able to complete their bankruptcy. Because each payment plan requires all of the debtors' disposable income, debtors are unable to build an emergency savings that would prevent dropping out of the bankruptcy once the debtors are unable to make a payment. The cost of medical bills from a surgery or cancer treatment will quickly leave debtors unable to make their plan payments, without pushing themselves into further financial turmoil. While the debtors in these cases were able to successfully reach a discharge, many do not. As described in the Part I analysis, in 1100 cases, no debtor requested a hardship discharge from the court—let alone had a hardship discharge granted. This is true, even though nearly two-thirds of the debtors ultimately failed to discharge their debts. Such circumstances show why the hardship discharge should be both expanded both by courts usage and statutorily.

V. EXPANDING THE HARDSHIP DISCHARGE WOULD LEAD TO MORE SUCCESSFUL DEBTORS

The argument that the hardship discharge should be expanded begins with the comparison of indicators of unsuccessful bankruptcies with the themes found in successful hardship discharges. Additionally, an examination of how a statutory expansion of the hardship discharge could most effectively help more debtors. Finally, an argument for expanding the hardship discharge needs to consider the positive effects on debtors lives outside bankruptcy.

A. The Connections Between Crashing Out of Bankruptcy and Successful Hardship Discharges

As discussed previously, there are certain indicators that show a reduced likelihood of successfully completing a chapter 13 bankruptcy.[199] One finding of this analysis is that there are similar themes in these indicators and the circumstances in the granted hardship discharges. For example, the authors in *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes* found that debtors without health insurance were more likely to crash out of bankruptcy.[200] Likewise, medical problems were found to be a significant factor in nearly half of all approved hardship discharges. The connection between these

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[199] *See* Sara S. Greene et al., *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 MINN. L. REV. 1031, 1060 (2017).

[200] *Id.* at 1036 (finding, in a study of 770 chapter 13 cases, that households with no health insurance are 29% less likely to successfully complete a chapter 13 than those with insurance).

two factors is clear: when people are not able to absorb the costs of their medical problems, they cannot complete all of their plan payments.

The Part II analysis shows that courts see the debtor's medical problems as circumstances for which they should not be held accountable. This fact was demonstrated through the granting of hardship discharges to debtors who faced medical conditions that left them unable to make plan payments, because one of the requirements is that the debtor must be facing circumstances that he should not be held accountable for.[201] The fact that debtors without health insurance were more likely to crash out of a chapter 13 bankruptcy shows how valuable the hardship discharge could be if it were requested more often. Of course, this assertion does not take into account how many hardship discharges are requested by parties with medical conditions and that courts do not end up granting. Regardless, the fact that debtors without health insurance are more likely to drop out of bankruptcy indicates—at least in some instances—that substantial medical costs keep debtors from making all of their plan payments. If those debtors were able to receive discharges, despite not making all plan payments, they could receive the discharges they have spent years working for. These circumstances are the same ones courts have granted hardship discharges for already.

One problem with this connection is that one of the factors the court in *Bandilli* listed is that the problem cannot be reasonably foreseeable at the time of plan confirmation.[202] Many debtors file for bankruptcy because of medical bills.[203] The presence of medical bills presents the likelihood of a lingering medical condition. If there was a medical condition, or even the threat of a medical condition returning, at the time of plan confirmation courts may be more inclined to find that the circumstances are reasonably foreseeable. Such an assertion is not an argument against the hardship discharge as a whole, but rather an argument in favor of opting for a more favorable reading of the statute. Take the waitress debtor from the introduction and imagine that she also has a history of breast cancer. If she is in remission at the time of plan confirmation, should she be barred from a hardship discharge if the cancer comes back and prevents her from working again? Such a conclusion seems like punishment for having a medical history. Perhaps a more just approach would be abstaining from reading the "reasonable foreseeability" factor into the statutory requirements in the first

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201 11 U.S.C. § 1328(b)(1) (2018).

202 *In re* Bandilli, 231 B.R. 836, 840 (B.A.P. 1st Cir. 1999).

203 Jared C. Quinn, *Congress Should Have an Interest in This Interest*, 16 PITT. TAX REV. 285, 290, 313 (2019).

place. While such an interpretation could come from a change in precedent, it could also be altered by congress in the statutory language itself.

B. Statutory Expansion of the Hardship Discharge

Instead of asking courts to change binding precedent, a more satisfactory approach to allowing more debtors to reach discharge in chapter 13 would be altering the statutory language of the Code itself. As previously discussed, there are three requirements of the hardship discharge. While alteration of each provision has the potential to grant more debtors success in bankruptcy, the more effective route would likely be targeting the first two provisions. The following subsection will consider each provision's relevance and potential changes.

The first provision requires the debtor show a change in circumstances for which the debtor should not be held accountable.[204] This provision is broad, and courts have ended up following the *Bandilli* criteria to determine whether debtors satisfy the element.[205] This criterion potentially leaves out a large number of debtors who could fall into the circumstances described above, or similar ones. For example, the *Bandilli* criteria requires a consideration of "whether the intervening event or events are expected to continue in the reasonably foreseeable future."[206] Thus, this consideration may ultimately exclude a large group of debtors.

Consider, again, the waitress from the introduction. She may find a new place to work within a few months, or her hours may go back to normal. A court may even reject a hardship discharge based on those facts. However, even a month at reduced income can cause financial stress for a debtor. Considering the fact that the repayment plan typically eats up all of the debtor's disposable income, the debtor's reduction in income either come from the payment plan itself or her living expenses. Defaulting on either option can cause immense financial hardship for the debtor, and if she defaults on her bankruptcy payment, then her entire bankruptcy could be dismissed. Further, if she defaults on her living expenses, then she could miss out on basic necessities—such as food, electricity, or running water.

The unknown timeline of economic recovery from the COVID-19 pandemic serves as an example of this problem. Many people lost their jobs or had their

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204 11 U.S.C. § 1328(b)(1) (2018).

205 *See, e.g.*, *In re* Brown, 2022 Bankr. LEXIS 167 (Bankr. M.D. Fla. 2022) (citing *Bandilli* factors); *In re* Quintyne, 610 B.R. 462 (Bankr. S.D.N.Y. 2020) (citing *Bandilli* factors).

206 *In re* Bandilli, 231 B.R. 836, 840 (B.A.P. 1st Cir. 1999).

hours reduced, with no indication of a time frame for when they could return.[207] The additional unemployment also makes it difficult for these individuals to find another job. It is possible that some of the circumstances debtors have faced in recent years were not anticipated by the court in *Bandilli*, or even Congress when it enacted the hardship discharge. This fact should not keep debtors who have fallen into such circumstances from receiving the fresh start they have been working for.

One example of possibly expanding this first provision would be changing the language to mirror the fifth *Bandilli* factor.[208] Instead of leaving courts to make a moral determination on whether the debtor should be held accountable for something that prevents her from completing payments—which would likely be subjected to the bankruptcy judge's biases—the statutory language could, instead, require that the debtor had circumstances out of her control that caused her inability to make plan payments. Such a standard would be more forgiving for debtors who made their best efforts to comply with the provisions of their plans but were hit with circumstances that made it difficult to continue, and the language would not punish debtors who opted for chapter 13 to try and pay back their debts. In addition, it would not be subjected to as much judicial biases, because it is a more straightforward requirement.

The second provision requires that unsecured creditors have already received at least what they would have if the debtor had opted for a chapter 13 liquidation.[209] Altering this element could potentially lead the highest proportion of unsuccessful debtors to discharge. Some debtors meet this requirement easily, if they have $0 in non-exempted assets with some secured debts when the file for relief. Others, particularly those with assets, might have more trouble meeting the requirements. Debtors who fall under this category are likely the same debtors who opted for chapter 13 to save their houses.[210] This fact creates the irony that some debtors are kept from a hardship discharge for the same reason they opted for chapter 13 in the first place. This feels like a statutory oversight—*did Congress intend for debtors to be kept from a fresh start for doing exactly as the Bankruptcy Code intended?*

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207 Sam Gringlas, '*Why Us?': A Year After Being Laid Off, Millions Are Still Unemployed* NAT'L PUB. RADIO (Mar. 7, 2021, 5:00 AM) https://www.npr.org/2021/03/07/974079769/why-us-a-year-after-being-laid-off-millions-are-still-unemployed.

208 *In re* Bandilli, 231 B.R. 836, 840 (B.A.P. 1st Cir. 1999) ("Whether the debtor had control, direct or indirect, of the intervening event or events.").

209 11 U.S.C. § 1328(b)(2) (2018).

210 Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103, 136 (2011) ("Saving a home was the main goal of an overwhelming portion of these homeowners' bankruptcies.").

A solution for this problem described above could be eliminating the requirement entirely. However, this would come at the expense of the rights of unsecured creditors. Perhaps a compromising solution would be keeping this requirement, but with an alternative for debtors who would not meet it. A time requirement, such as completing at least 25% of the plan, could be a valuable solution. This compromise would give debtors with high unsecured debts who chose chapter 13 to cure a delinquent mortgage and keep the equity in their homes the safeguards that other chapter 13 debtors have.

Previous versions of the hardship discharge have had a time requirement; courts could only grant a hardship discharge if the debtor was over three years post-confirmation.[211] A set timeframe, such as the historical standard required, would not be as effective because chapter 13 plans take on varying timelines. While one debtor may reach the end at only three years, another debtor could take up to five years. An arbitrary requirement based on a set amount of time would categorically leave out debtors with no real reason why. However, a percentage of time following confirmation would give flexibility to the varying time frames chapter 13 debtors are subjected to. More specifically, 25% would bar debtors from immediately requesting a hardship discharge. For example, a debtor on a three-year plan would still have to have completed nine months of payments before being eligible for requesting. This alternative bears in mind the rights of unsecured creditors, while also respecting the debtor's right to a fresh start.

Thus, while an increase in the use of the hardship discharge could lead to more results on its own, expanding the statutory language would also be effective in giving more debtors the fresh start that consumer bankruptcy promises. In particular, altering the language of the first and second elements of the code could give more debtors a higher chance of success.

C. The Necessity of Expanding the Hardship Discharge

The hardship discharge should be used in bankruptcy cases at higher rates than it is currently being used at. An expanded use through judicial discretion or statutory expansion would lead to more successful outcomes for debtors. Other than increasing overall bankruptcy success, one may ask why the expansion is necessary. The final subsection of this comment considers why the hardship discharge should be expanded. The first reason is that it could be seen as a new

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[211] *See* Alan M. Ahart, *Whether to Grant a Hardship Discharge in Chapter 14*, 87 AM. BANKR. L. J. 559, 562 (2013) (citing H.R. REP. No. 95-595, at 125, 431 (1977), reprinted in 1978 U.S.C.C.A.N. 6086, 6386).

way to encourage debtors to choose chapter 13, while also mitigating some of the drive that puts consumers into chapter 13 who would have preferred a different route. A second reason considers the housing instability associated with failed bankruptcies.

A debtor who opts for chapter 13 does not receive a lesser hit to her credit than what she would receive if she had chosen a chapter 7.[212] This fact is true despite the fact that chapter 13 typically requires more work, time, and expense than chapter 7.[213] Attorneys push clients into chapter 13, even when it is not in their best interests.[214] While there is much more that could be said about attorney steering, one idea to consider is that an expansion of the hardship discharge could mitigate some of it. For clients who are pushed into chapter 13 and find themselves the victims of layoffs or other problems, the hardship discharge can mitigate the problems that could have been avoided by the debtor choosing a different path in the first place.

Another argument in favor of an expanded use of the hardship discharge is that it would allow more people to stay in their homes. As discussed above, debtors often opt for chapter 13 in order to stay in their homes and keep the equity that they have paid into them.[215] The low success rate of chapter 13 suggests that nearly two-thirds of debtors are unsuccessful at this. This fact indicates that some of the unsuccessful chapter 13 cases lead to housing instability.[216] Housing instability can have disastrous effects on debtors. For example, losing a home can cause negative health impacts on the person.[217] The documented health problems are expansive and linked to housing insecurity present the ironic fact that denying debtors a discharge could actually lead to the development of health problems that have led courts to grant a hardship discharge. Additionally, if the debtor has children, housing instability can cause problems on them too. Changes in routine, family time, and even school attendance can have disparaging effects on children. Consequently, these

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212 *See* Tony Mecia, *Beyond Bankruptcy: What Happens When You Fail Chapter 13*, YAHOO FINANCE (Oct. 29, 2015), https://finance.yahoo.com/news/beyond-bankruptcy-happens-fail-chapter-120000040.html.

213 Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?*, 18 Bankr. Devs. J. 1, 32 (2001) (describing chapter 13 as "much more expensive" to consumer debtors than chapter 7).

214 Pamela Foohey et al., *No Money Down Bankruptcy*, 90 S. CAL. L. REV. 1055, 1064 (2017).

215 *See* Porter, *supra* note 13, at 136.

216 *See generally How Housing Instability Impacts Individual and Family Well-Being*, DEP'T OF HOUS. & URBAN DEV.: PD&R EDGE (Feb. 4, 2019), huduser.gov/portal/pdredge/pdr-edge-featd-article-020419.html, (providing examples of housing instability as "couch hopping, homelessness, and frequent moves").

217 Frances Gill, *The Severe Health Consequences of Housing Instability* PEOPLE'S POL'Y PROJECT (July 9, 2018), peoplespolicyproject.org/2018/07/09/the-severe-health-consequences-of-housing-instability/.

various factors prove that failed bankruptcies causing housing instability can have far-reaching negative consequences.

Housing problems are not limited to homeowning debtors. Renters may have trouble with finding housing after their bankruptcies due to the two strikes credit hit of debtors who crash out of chapter 13. Most rental agreements are contingent on a credit check. Any bankruptcy will certainly have a disparaging impact on the debtor's credit. In addition, even though chapter 13 debtors choose to work on their debts over a period of time, the hit to their credit is the same as it would be if they had filed for chapter 7.[218] Furthermore, debtors who are unable to complete their payment plans and reach a standard discharge face a second credit hit.[219] Many landlords— along with other creditors in general—are weary of working with post-discharge debtors, and this weariness is likely heightened with a debtor who has two bankruptcy hits to their credit.

The reasons described in this subsection show that the hardship discharge should be expanded to avoid some of the far-reaching effects on debtors. In different cases, chapter 13 is caused by attorney steering and can lead to health problems, housing problems, and more. While the expansion of the hardship discharge is not a perfect solution to all of the problems that consumer bankruptcies present, it could mitigate some of the negative effects.

CONCLUSION

Chapter 13 bankruptcy represents the bargain of exchanging future income for a bankruptcy discharge, while also retaining assets that would otherwise have to go. Unfortunately, the results of chapter 13 debtors shows that the method of bankruptcy is not as helpful in practice as Congress may have intended. The debtors most at risk of having a large bill come up, such as a medical bill or a surprise school-related expense for a child, have an increased risk of failing out of chapter 13 entirely. Once the debtor is out of chapter 13 bankruptcy, they risk losing their home or other assets they may have. In some cases, debtors who crash out of a chapter 13 bankruptcy may be in worse positions than they started in. The data shows that expanding a hardship discharge would help *these* debtors. The debtors who lose their job and suddenly do not have the income to repay debts *and* support a modest standard of living. The language of the statute

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[218] *See* Tony Mecia, *Beyond Bankruptcy: What Happens When You Fail Chapter 13*, YAHOO FINANCE (Oct. 29, 2015), https://finance.yahoo.com/news/beyond-bankruptcy-happens-fail-chapter-120000040.html.

[219] *See* Tony Mecia, *Beyond Bankruptcy: What Happens When You Fail Chapter 13*, YAHOO FINANCE (Oct. 29, 2015), https://finance.yahoo.com/news/beyond-bankruptcy-happens-fail-chapter-120000040.html.

alone does not require exceptional circumstances, it just requires circumstances the debtor should not be held accountable for.

This Comment found that hardship discharges are granted for everyday circumstances, such as medical problems, or lost employment. It is likely that many debtors face circumstances that make it difficult for them to pay their payment plan. Further research could explore the cases where hardship discharges are requested, but not granted. Yet virtually no chapter 13 debtors even motion for a hardship discharge in the first place. Expansion of the provision could lead to a more widespread use, which could help thousands of debtors actually attain the fresh start they have been working for. One way to combat some of the troubles certain populations find with success in chapter 13 bankruptcy is by expanding the hardship discharge to include everyday problems that the debtors should still not be held accountable for. In addition, altering the provision that requires debtors have already paid at least what they would have to unsecured creditors in a chapter 7 liquidation. The data suggests that expanding the hardship discharge could help up to 25% of debtors. Additionally, specific changes to the statutory language of the provision increases the potential of helping more debtors. Increasing access to a fresh start should be a top priority and expanding on the provisions that already exist is an efficient way to do so.

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