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## Comment

**\*575 PUBLIC POLICY IS NEVER A SUBSTITUTE FOR STATUTORY CLARITY: REJECTING THE NOTION THAT PRE-PETITION ATTORNEY-FEE DEBTS ARE NONDISCHARGEABLE IN CHAPTER 7 BANKRUPTCIES**

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## I. Introduction

Bankruptcy filings in the United States reached record numbers in 1998 and still show no sign of substantially decreasing. [FN1] For the twelve-month period ending June 30, 1999, federal bankruptcy filings topped 1.39 million, the second highest number of filings ever for a one-year period. [FN2] Nationally, a trend of increasing bankruptcy filings, especially consumer Chapter 7 filings, persists. [FN3] Such bankruptcy filings have risen steadily since 1994, when there were approximately 845,000 filings for the one-year period ending June 30, 1994. [FN4]

The dramatic increase in consumer bankruptcy filings continues to fuel congressional debate regarding attempts to limit access to Chapter 7 bankruptcy through means testing. [FN5] \*576 A recent decision from the Bankruptcy Court for the District of Colorado, [FN6] considered in light of the increase in Chapter 7 debtors seeking legal representation, makes it essential that Congress address the issue of attorney-fee debt dischargeability.

Depending on the profession, the increase in bankruptcy filings nationwide means very different things. Economists may interpret increased filings as an indication of a potential downturn in national economic stability. Social psychologists might interpret an increase in levels of debt as a percentage of disposable income as a change in spending patterns. However, attorneys practicing bankruptcy law interpret the figures in an entirely different manner. To bankruptcy attorneys, greater bankruptcy filings generally translate into increased business and a greater number of billable hours, hopefully resulting in an increased bottom line. Nevertheless, in light of the bankruptcy court's opinion in *In re Perry*, [FN7] it is unclear whether attorneys representing Chapter 7 debtors may receive any form of payment post-petition. [FN8]

This comment analyzes the ability of bankruptcy attorneys who represent Chapter 7 debtors to collect fees post-petition. The analysis focuses on how the *Perry* court disregarded the plain language of the Bankruptcy Code [FN9] (the "Code") and relevant case law, adjudicating solely on public policy grounds. [FN10]

Part II examines the operation and purposes of Chapter 7 of the Code, [FN11] recent findings from a study on reaffirmation \*577 agreements, [FN12] case law reviewing dischargeability of attorney-fee credit, [FN13] and the use of reaffirmation agreements to avoid dischargeability. [FN14] Part III identifies the potential problems with not allowing dischargeable post-petition attorney-fee debts in Chapter 7 bankruptcies. [FN15] Part IV analyzes the unpredictability that exists in light of the *Perry* [FN16] decision. [FN17] Specifically, Part IV discusses how the *Perry* court focused on public policy concerns, lost sight of its duty to interpret the law, and in effect, invented law at odds

with the Code. [FN18] Finally, the analysis in Part IV identifies a dangerous conflict of interest created by the Perry decision. [FN19] Part V calls on Congress to clear up the confusion regarding dischargeability of attorney-fee debts. [FN20] Decisive action by Congress will diminish confusion on this issue and provide Chapter 7 debtors access to legal representation.

## II. Background

### A. Chapter 7 Liquidation

As more consumers become entrenched in financial troubles, the United States bankruptcy system attempts to provide relief to debtors unable to meet their financial burdens. The act of filing a bankruptcy petition gives a consumer debtor some breathing room to assess his current financial situation. Consumer debtors who do not possess the resources to reorganize their debts under Chapter 13 may seek a discharge of those debts through Chapter 7. [FN21]

\*578 In a Chapter 7 bankruptcy, only an individual who “reside[s] or has a domicile, a place of business, or property in the United States, or a municipality” [FN22] is considered a “debtor” for purposes of a bankruptcy. Once eligibility is determined, [FN23] the Chapter 7 debtor files a petition with the Bankruptcy Court, providing notice to creditors of the commencement of a bankruptcy. This notice of filing informs creditors that the debtor has filed bankruptcy and operates to halt any further collection attempts by creditors. [FN24] Section 362 of the Code, which immediately applies upon filing, “stays” the efforts of creditors to collect on outstanding debts. [FN25] The debtor is then \*579 given a reasonable time to file the balance of the required schedules. Creditors then have approximately sixty days to decide whether to contest dischargeability before the court orders a discharge. [FN26]

#### 1. Discharge Under § 727

Relief in the form of liquidation under Chapter 7 of the Code grants a discharge of all non-exempt debts that originated pre-petition. [FN27] For debtors in dire financial trouble, possible economic recovery requires the discharge of as many of the debtor's current liabilities as possible. A decreased debt-to-earnings ratio post-discharge enables the debtor to start his financial life over again.

Furthermore, consumer Chapter 7 protection operates both to give a “fair distribution to creditors of whatever non-exempt property the debtor has and to give the individual debtor a fresh start through the discharge in bankruptcy.” [FN28] A discharge eliminates all debts not excepted under § 523(a), [FN29] \*580 and the debtor receives a new, hopefully debt-free, financial life.

Section 524(a) [FN30] states the effects of a Chapter 7 discharge under § 727. [FN31] Such a discharge:

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability\*581 of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, or,[sic] 1228(a)(1), or 1328(a)(1) of this title, or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived. [FN32]

## 2. Legal Representation of Chapter 7 Debtors

In seeking the protection of Chapter 7, most debtors receive legal guidance from an attorney. [\[FN33\]](#) Many Chapter 7 cases are not complex, [\[FN34\]](#) and most bankruptcy attorneys usually charge a flat-rate fee, [\[FN35\]](#) due in full pre-petition. Since most Chapter 7 cases are “no asset” cases, the fee charged (not including the court determined filing fee) covers the costs associated with preparation of the petition as well as the attorney’s\*[582](#) hourly rates for court appearances. [\[FN36\]](#)

Since a debtor's cash flow is likely constrained when filing bankruptcy, many debtors struggle to pay their counsel in full pre-petition. To enable clients to pay the fee up front, attorneys advise clients on a number of different options to raise capital for payment of fees. Some attorneys advise clients to stop paying one or more creditors (the claims of which will be discharged in bankruptcy) for a few months in order to accumulate enough cash to cover the attorney fee. [\[FN37\]](#) Alternatively, many attorneys suggest borrowing the fee from a relative or friend. [\[FN38\]](#) Some debtors may also seek reaffirmation [\[FN39\]](#) of the debt through the supervision of the court. [\[FN40\]](#) Without these options, the guidance of counsel may not be available for the protection of liquidation under Chapter 7 for some debtors.

### B. Preliminary Results of a Study on Reaffirmation Agreements

Most existing case law establishes that the fees associated with legal representation in Chapter 7 cases, incurred pre-petition, are dischargeable. [\[FN41\]](#) In order to secure payment for \*[583](#) bankruptcy services rendered, some attorneys become quite creative in structuring payments to ensure collection. [\[FN42\]](#)

Results from the Reaffirmation Project, [\[FN43\]](#) an ongoing study at Creighton University School of Law, indicate that an average of 38% percent of qualified cases studied had an unpaid balance owing to the debtor's counsel post-discharge. [\[FN44\]](#) However, this balance was not included on debtor's schedules. [\[FN45\]](#) The study also reports that attorneys for Chapter 7 debtors extended fee credit [\[FN46\]](#) in “319 (or 38%) of the 850 qualified cases with Form 2016(b) on file.” [\[FN47\]](#)

Although 38% of cases had unpaid balances, not one case in the study included the debt to bankruptcy counsel on the required disclosure documents. [\[FN48\]](#) Out of the 850 qualified cases, only one case involved a reaffirmation agreement for fees owed to the debtor's counsel. [\[FN49\]](#) The results of the study, together with recent case law in which courts take a more active role with the issue of attorney-fee debt dischargeability, suggest an increase in the use of reaffirmation agreements to \*[584](#) secure post-petition payment of debts. [\[FN50\]](#)

### C. Dischargeability of Attorney Fee Credit

In *Perry*, the Bankruptcy Court for the District of Colorado held that a properly disclosed reasonable fee for legal services, unpaid upon filing, was not subject to discharge in Chapter 7. [\[FN51\]](#) The *Perry* court, rejecting the Ninth Circuit's approach, [\[FN52\]](#) followed the reasoning of a consistently criticized decision from the Bankruptcy Court for the District of Arizona. [\[FN53\]](#) The *Perry* decision renews the controversy in the bankruptcy community regarding the dischargeability of attorney-fee debt remaining unpaid post-petition in Chapter 7 bankruptcy.

#### 1. Prepetition Attorney's Fees Remaining Unpaid Post-Petition Are Not Dischargeable: The *In re Mills* Decision

In 1994, the issue of dischargeability of a Chapter 7 debtor's continuing obligation to pay attorney fees post-petition came to the attention of the Bankruptcy Court for the District of Arizona. [\[FN54\]](#) In *In re Mills*, the U.S. Trustee sought a determination that a Chapter 7 debtor's obligation to pay for pre-petition legal work through a post-petition installment payment was dischargeable. [\[FN55\]](#)

Mills is an example of an uncomplicated, “no asset” Chapter 7 case. The law firm of Hessinger & Associates (“Hessinger”) charged Mills, a debtor with few assets, a flat fee for Chapter 7 representation: [\[FN56\]](#) “\$1,500; payable at \$125 \*585 per month for twelve months, plus the filing fee of \$160.” [\[FN57\]](#) Similar to the cases studied in the Reaffirmation Project, [\[FN58\]](#) “[t]he initial Rule 2016(b) Statement [\[FN59\]](#) made no reference to the agreement.” [\[FN60\]](#) Although the court found that the firm failed to comply with Bankruptcy Rule 2016, requiring disclosure of the fee agreement, it nonetheless held that the post-petition installments due on the pre-petition fee agreement were not discharged. [\[FN61\]](#)

\*586 The court recognized that “[a]lthough the Bankruptcy Code and Rules attempt to accommodate, through a complex statutory and regulatory framework, the potentially competing interests of creditors, the debtor, and the debtor’s attorney, they do not deal coherently with the postpetition installment issue.” [\[FN62\]](#) The court recognized that § 329, [\[FN63\]](#) taken together with Rules 2016 [\[FN64\]](#) and 2017 [\[FN65\]](#) (collectively the “Disclosure Provisions” [\[FN66\]](#)), seems to allow the type of post-petition installment agreement examined in Mills. [\[FN67\]](#) On the other hand, \*587 the extent of discharge granted in § 727(b), [\[FN68\]](#) taken together with the absence of an exception for the discharge of attorney fees listed in § 523(a) (the “Discharge Provisions”), [\[FN69\]](#) seems to prohibit this post-petition fee agreement. [\[FN70\]](#) The court concluded that the danger of not allowing fee agreements in Chapter 7 cases outweighed the possible conflict of interest associated with not discharging such agreements. [\[FN71\]](#)

The court’s rationale was twofold. First, the court reasoned that discharging fee agreements would exclude many debtors, especially indigent individuals, from obtaining legal representation in Chapter 7 cases. [\[FN72\]](#) The potential exclusion from representation was inconsistent with the spirit of the Code, which strives to give all potential debtors equal access to the bankruptcy system to solve their financial problems. [\[FN73\]](#)

Second, the court reasoned that by holding debtor’s counsel to strict disclosure via Rule 2016(b) [\[FN74\]](#) and approval of fees via § 329, [\[FN75\]](#) the system could regulate the reasonableness of fees to protect Chapter 7 debtors. [\[FN76\]](#) Unable to reconcile statutory ambiguity, the court declared that “it does not make sense to apply the meat cleaver of Section 727(b) to such agreements when the scalpel of Section 329(b) was designed for that purpose.” [\[FN77\]](#)

## 2. Attorney’s Fees Unpaid Post-petition Are Dischargeable: The Mills Backlash

Around the same time as the Mills decision, many other courts in the western United States adjudicated bankruptcy proceedings involving Chapter 7 attorney fees remaining unpaid post-petition. [\[FN78\]](#)

### \*588 a. Violation of the Automatic Stay From Post-petition Collection Actions: In re Symes

In *In re Symes*, [\[FN79\]](#) the U.S. Trustee, representing an aggregation of debtors in multiple Chapter 7 cases, challenged the fee collection practices of two bankruptcy law firms. [\[FN80\]](#) The firms argued that their post-petition collection actions of pre-petition retainer agreements did not violate the automatic stay of § 362(a) [\[FN81\]](#) and that the fee agreements were not dischargeable under § 727(b). [\[FN82\]](#)

The Bankruptcy Court for the District of Arizona established that both a pre-petition agreement to execute post-dated checks to be cashed post-petition [\[FN83\]](#) and a pre-petition promissory note collected post-petition [\[FN84\]](#) represented “dischargeable claim[s] subject to the automatic stay.” [\[FN85\]](#) The court first reasoned that the attorney-fee debt constituted a claim under § 101(5)(a), [\[FN86\]](#) since it arose pre-petition. [\[FN87\]](#) The court then noted that all claims arising pre-petition are dischargeable under § 727(b), [\[FN88\]](#) unless an exemption exists under § 523(a). [\[FN89\]](#) No exemption for attorney fees due post-petition exists. [\[FN90\]](#) Therefore, the court concluded that with so many exemptions enumerated in § 523(a), “if Congress intended that prepetition fee arrangements were nondischargeable, it would have so provided.” [\[FN91\]](#)

The court rejected any perceived “irreconcilable conflict \*589 among the regulatory provision of 11 U.S.C. § 329, Rules 2016 and 2017, and the broad discharge of section 727(b) and lack of a specific exception of such fees from discharge in section 523(a).” [FN92] Further, the Symes court discounted the public policy arguments that led the court in Mills [FN93] to hold similar claims nondischargeable. [FN94] Specifically, the court rejected the defendants’ claim that dischargeability provides a great threat to the ability of Chapter 7 debtors to obtain legal representation. [FN95] With the ability of attorneys to provide pro bono services, or alternatively the opportunity for the debtor to reaffirm the debt under the court’s strict supervision, the court denied that the breakdown of the entire Chapter 7 system was eminent. [FN96]

#### b. The Ninth Circuit's Interpretation: In re Biggar

The dischargeability of Hessinger’s post-petition fee agreement with Chapter 7 debtors again came under attack by the U.S. Trustee in Hessinger & Associates v. United States Trustee (In re Biggar). [FN97] The U.S. Court of Appeals for the Ninth Circuit affirmed the holding of the Bankruptcy Court that fee arrangements to pay pre-petition obligations for pre-petition legal work were dischargeable. [FN98]

Three debtors retained Hessinger as counsel in separate Chapter 7 liquidation cases. [FN99] To secure representation, each debtor entered into “a fee agreement which specified that payment for prepetition services was to be made in monthly installments after the petition was filed.” [FN100] As in Mills, the U.S. Trustee asked the court to review the dischargeability of the fee agreement. [FN101] Hessinger argued that discharge under Chapter 7 did not apply to the debtors’ obligation to pay for services rendered post-petition. [FN102] Hessinger conceded that \*590 the Discharge Provisions [FN103] contained in the Code seemed to classify his claims as dischargeable. [FN104] However, Hessinger argued that in light of the Disclosure Provisions, [FN105] his claims were nondischargeable and should pass through bankruptcy. [FN106] Stressing a conflict between the Discharge Provisions and the Disclosure Provisions, Hessinger contended that the Code would not address the approval of post-petition fees if the Code allowed discharge of those same fees post-petition. [FN107]

The court disagreed with Hessinger’s rationale for two important reasons. [FN108] First, the court found no authority in the Discharge Provisions of the Code exempting “debts for attorneys’ fees incurred in preparing bankruptcy petitions.” [FN109] Section 727 guides the court as to the appropriateness of dischargeability of pre-petition debts, while § 523 exempts certain debts from the reach of the § 727 discharge. [FN110] However, none of the eighteen exemptions enumerated in § 523 specifically operates to save attorneys’ fees from discharge. [FN111]

Second, the court failed to recognize a conflict between the Discharge Provisions and the Disclosure Provisions. Historically, courts interpret Rules 2016 and 2017 as governing the disclosure and timing of payments to the debtor’s attorney, [FN112] while § 329(b) gives the court authority to approve fee arrangements. [FN113] If these rules only applied to Chapter 7 bankruptcies, a conflict would exist. However, the Disclosure Provisions contained in the Code also apply to Chapter 11 and 13 cases. [FN114] The court emphasized the fact that in Chapter 11 and 13 cases, post-petition fee agreements are normally part of the debtor’s plan and the court must approve and monitor them. [FN115]

The court confirmed that the provisions could therefore \*591 coexist and “the plain language of section 523 must be given effect.” [FN116] Since § 523 does not exempt attorneys’ fees from discharge, the court concluded, “the debts at issue in this case are dischargeable.” [FN117] Unlike the Mills court, the Biggar court did not balance a debtor’s interest in ensuring legal representation in filing under Chapter 7. [FN118] The court found the Code clear on this issue, declaring that “[i]f an exception is to be made, therefore, it should be crafted by Congress.” [FN119]

#### c. Conflicts of Interest Diminish the Value of Services Rendered: In re Martin

In *In re Martin*, [FN120] the U.S. Trustee objected to the approval of a fee application because the agreement created a post-petition conflict of interest between the Chapter 7 debtor and her counsel. [FN121] The application stemmed from a fee agreement, executed pre-petition, requiring post-petition monthly payments to pay for the cost of legal services provided in a Chapter 7 bankruptcy. [FN122]

The Bankruptcy Court for the District of Colorado reached two important conclusions. First, the court rejected *Mills*, holding that the fee agreement was in the nature of a dischargeable debt. [FN123] The court examined the fee agreement in a manner similar to the analysis used in *Biggar*. [FN124] Second, the court focused on the conflict of interest created by the change in the nature of the relationship between the Chapter 7 debtor and her counsel post-petition. [FN125] Specifically, after filing *Martin* “became a debtor whose legal interest was to obtain the broadest possible discharge of prepetition debts.” [FN126] \*592 Meanwhile, her attorney “became a creditor whose self-interest was to except the prepetition attorney fee obligation from discharge.” [FN127]

The conflict of interest impaired the quality of representation the debtor received in two ways. [FN128] First, the fee agreement gave the attorney remedies [FN129] that § 362(a)(6) excludes other creditors from exercising. [FN130] Second, because the debtor's counsel classified the pre-petition fee agreement as nondischargeable, he did not advise his client as to the dischargeability of such debt. [FN131] The court concluded that “[u]nder § 329, ethical conflicts can diminish the value of services to a client, making the fee charged ‘excessive.’” [FN132] In this case, the entire fee was excessive, and the court deemed the agreement “null and void.” [FN133]

The same bankruptcy court analyzed a similar situation in *In re Haynes*. [FN134] Although the court recognized that “there are legitimate and important public policy concerns about access to the bankruptcy system for indigent debtors,” [FN135] the court again rejected the policy considerations of *Mills*, [FN136] and affirmed the *Martin* analysis. [FN137]

The *Haynes* decision put bankruptcy attorneys practicing in Colorado on notice that fee agreements executed pre-petition requiring post-petition payment are unacceptable. [FN138] \*593 The court warned that if attorneys engage in such practices, “they are actively perpetrating a fraud on the Court, and if this Court discovers such activity it will take the most extreme action available against such attorneys, including seeking disbarment.” [FN139] Through the *Haynes* decision, the court attempted to improve the level of representation received by Chapter 7 debtors. [FN140]

### 3. Attempts to Avoid Dischargeability in the Ninth Circuit: Quantum Meruit

In *In re Hines*, [FN141] the U.S. Court of Appeals for the Ninth Circuit also addressed the issue of post-petition dischargeability of a pre-petition fee agreement in a Chapter 7 proceeding. [FN142] The court recognized that the issue of post-petition dischargeability rarely reaches the point of adversarial proceedings. [FN143] The relatively low stakes involved in relation to the cost of litigation preclude most Chapter 7 debtors from seeking legal recourse. [FN144] The court nonetheless felt compelled to “deal . . . with the consequences of Congress' delinquency in failing to set out express ground rules to be followed\*594 by lawyers.” [FN145] Distinguishing the issue at bar from that in *Biggar*, [FN146] the court held that the debtor's former counsel had an undischarged claim, in quantum meruit, [FN147] for reasonable compensation for legal services provided post-petition. [FN148]

The *Hines* case arose from the competitive circumstances surrounding the personal bankruptcy business in the greater Los Angeles area. [FN149] The debtor originally filed for Chapter 13 protection with attorney Harold Shilberg. [FN150] One of Shilberg's competitors, Robert L. Gordon, persuaded the debtor to leave Shilberg's firm and convert her case to a Chapter 7 bankruptcy. [FN151] The debtor entered into a fee agreement retaining Gordon and executed a promissory note supported by seven postdated checks totaling the \$875 fee. [FN152]

The problem began when, after Gordon cashed two postdated payment checks, the debtor became dissatisfied

with Gordon's post-petition services and reverted back to Shilberg for representation. [FN153] On behalf of the debtor, Shilberg filed a motion “for contempt against Gordon for willful violation of the Section 362(a)(6) automatic stay, seeking compensatory damages of \$250, punitive damages of \$50,000 and attorneys' fees.” [FN154] The bankruptcy court denied the contempt motion. [FN155] The debtor appealed to the Bankruptcy Appellate Panel (“BAP”), which reversed and remanded for a determination of damages. [FN156] Gordon then appealed the BAP's ruling to the Ninth Circuit. [FN157]

By framing the issue slightly differently from prior cases \*595 regarding dischargeability of fee debt, [FN158] the Ninth Circuit did not overturn its previous rulings that deemed “courts powerless to create non-statutory exceptions to a bankrupt's discharge.” [FN159] Fearing a massive breakdown of the entire bankruptcy system, the court concluded that “all claims for lawyers' compensation stemming from such postpetition services actually provided to the debtor really do not fall within the automatic stay provisions of Section 362(a)(6) or the discharge provisions of Section 727.” [FN160]

The court justified this position, which appears at odds with the Ninth Circuit's previous analysis, [FN161] on two grounds. First, the court held that Gordon did not have a viable claim under § 101(4)(A). [FN162] Second, without a viable claim, the court reasoned that Gordon's attempt to collect on his “right to payment” does not violate the automatic stay provisions of § 362(a)(6). [FN163] Therefore, the court concluded that Gordon had an undischarged claim for reasonable compensation for services\*596 rendered post-petition. [FN164] The court held that the value of Gordon's claim should be determined “under a quantum meruit theory of recovery.” [FN165]

In *In re Jastrem*, [FN166] the U.S. Bankruptcy Court for the Eastern District of California followed the Hines analysis. A Chapter 7 debtor entered into a pre-petition fee agreement with counsel to pay \$1000, secured by four post-dated checks for \$250 each, plus a filing fee of \$175. [FN167] The debtor paid \$87 of the filing fee pre-petition and agreed to pay the remaining fee in four installments of \$22 each. [FN168]

The court required the debtor's counsel to disclose all payments for services rendered in the Chapter 7 proceeding. [FN169] Once the court learned of the composition, [FN170] it set a hearing to determine how to treat the fee agreement. [FN171]

The court crafted a decision that further muddied the waters in the area of Ninth Circuit opinions regarding post-petition dischargeability of unpaid pre-petition attorneys' \*597 fees. [FN172] On one hand, the court classified the amount that relates to services rendered pre-petition, yet unpaid upon filing, as dischargeable and subject to the automatic stay provisions of § 362(a). [FN173] On the other hand, the court declared the amount related to post-petition services nondischargeable and, therefore, owed to the attorney on a theory of quantum meruit. [FN174]

#### 4. Properly Disclosed Reasonable Attorney Fees, Unpaid Upon Filing, Are Not Subject to Chapter 7 Discharge: Mills Revisited

In *In re Perry*, [FN175] the Bankruptcy Court for the District of Colorado again renewed the ongoing debate regarding dischargeability of attorney fees remaining unpaid post-petition. Although recent decisions in the Ninth Circuit [FN176] seem to resolve this issue, the question of dischargeability in the Tenth Circuit remains unsettled. [FN177]

Perry dealt with a reaffirmation agreement between a Chapter 7 debtor and her counsel. The court denied the approval of the reaffirmation agreement because the debtor entered into it after receiving her discharge, [FN178] thereby conflicting with § 524(c). [FN179] Nonetheless, the court held the fee \*598 nondischargeable because it was “properly disclosed pursuant to [s] ection 329(a) and Bankruptcy Rule 1016(b).” [FN180]

The court relied on the public policy arguments contained in *Mills*. [FN181] Those considerations feared a

denial of access to the bankruptcy system by indigent debtors if Chapter 7 prohibits\*599 entering into fee agreements. [FN182] The court also recognized the conflicts of interest arising in the culmination of reaffirmation agreements in Chapter 7 cases. [FN183] Although many courts across the nation allow reaffirmation agreements [FN184] as a viable option to full payment pre-petition in Chapter 7 cases, the Perry court asserted, “it is not apparent in the Bankruptcy Code that Congress contemplated such agreements.” [FN185]

#### D. Another Possible Solution to Dischargeability: Reaffirmation Agreements

One potential solution used to combat the public policy concerns regarding fair access to the bankruptcy system for indigent individuals is the reaffirmation of the debt associated with legal fees. [FN186] By reaffirming the debt in a Chapter 7 bankruptcy, the debtor makes a fully informed decision to pay a debt post-petition knowing the Code does not require payment in light of discharge. [FN187] However, the possibility of coercion or misrepresentation is prevalent in a reaffirmation agreement situation because counsel for the debtor will ultimately become a creditor post-petition. Therefore, the Code mandates that the courts strictly supervise reaffirmation agreements. [FN188]

Historically, bankruptcy courts permitted the debtor and the creditor to enter reaffirmation agreements. [FN189] Formal reaffirmation agreements first appeared in the Bankruptcy Reform Act of 1978. [FN190] However, the Bankruptcy Amendments and Federal Judgeship Act of 1984 substantially revised the requirements for approval of reaffirmation agreements. [FN191] Both § 524(c) [FN192] and § 524(d) [FN193] operate as guides for approving \*600 reaffirmation agreements.

In *In re Pasco*, [FN194] the Bankruptcy Court for the District of Colorado concluded that a “debtor may, under proper circumstances, reaffirm [a] fee agreement with bankruptcy counsel and thereby pay prepetition legal fees on [a] postpetition basis.” [FN195] In *Pasco*, the debtor and her counsel entered into a reaffirmation agreement pre-petition for legal services associated with representation in a Chapter 7 case. [FN196] The debtor's attorney asked the court to approve a reaffirmation agreement representing fees incurred pre-petition but requiring payment post-petition. [FN197]

The court recognized that case law barred the filing of a Chapter 7 bankruptcy with an outstanding balance owing post-petition to debtor's counsel. [FN198] Noting the potential difficulties in raising the necessary funds for all pre-petition services before filing, the court declared reaffirmation, when \*601 properly supervised by the court under § 524(c) [FN199] and (d), [FN200] a viable option for Chapter 7 debtors to retain representation. [FN201]

Unfortunately, the reaffirmation agreement in *Pasco* failed to state “in plain, conspicuous, and written terms” that: (1) the debtor did not have to enter into the agreement, and (2) that the fee agreement was dischargeable. Such omissions prevented the court from approving the agreement. [FN202] With the reaffirmation agreement between the debtor and her counsel void, the debt became dischargeable. [FN203]

### III. Identification of the Problem

The problem with the analysis used in *Perry* arises when a balance remains unpaid upon filing a Chapter 7 debtor's petition. When a debtor files a Chapter 7 bankruptcy, the relationship between debtor and counsel changes if an outstanding balance for attorney fees remains. As counsel for the debtor, the attorney strives to discharge as much pre-petition debt as the Code permits. On the other hand, as a creditor, the attorney may not want to inform the client about the dischargeability of the fees still owing.

The dual purposes of Chapter 7 are to provide a fresh start to the debtor and treat all creditors equally. [FN204] With fewer debts remaining after bankruptcy, the debtor retains a better chance at regaining financial stability. A nondischarged fee that remains collectible post-petition conflicts with both goals of Chapter 7 bankruptcy.

Taking the figures obtained from the Reaffirmation Project, [\[FN205\]](#) together with the decision in Perry, [\[FN206\]](#) it is evident that confusion exists in the bankruptcy legal community regarding dischargeability of pre-petition attorney-fee debt. Many attorneys are unsure of the dischargeability of unpaid post-petition attorney-fee debts. Further, some attorneys may be misleading debtors as to the dischargeability of these debts, assuming most debtors will not pursue legal action against **\*602** their own bankruptcy counsel.

#### IV. Analysis

The Haynes court stated: “If Congress decides to insert a new sub-section to § 523 to provide for the nondischargeability of debtors' prepetition attorneys' fees, it certainly has that option. But until that time, we must all live with the law as it stands.” [\[FN207\]](#) Congress has yet to act on this issue, although some courts create their own interpretations to skirt dischargeability. [\[FN208\]](#) A danger to the legal system exists when any court substitutes its judgment for the legislative acts of Congress. Congress must act first to ensure the highest level of professional representation in Chapter 7 cases.

##### A. No Exception Exists to Exempt Post-petition Attorneys' Fees Remaining Unpaid From Discharge

The Biggar court's analysis is correct. [\[FN209\]](#) An agreement between debtor and counsel for Chapter 7 representation, consummated pre-petition and obligating post-petition repayment, is dischargeable along with other debts incurred pre-petition. It is squarely against the discharge provisions contained in § 727 [\[FN210\]](#) to conclude otherwise.

Even interpreting the requirements of discharge [\[FN211\]](#) in light of the disclosure requirements [\[FN212\]](#) contained in the Code does not exempt a fee debt from discharge, because the disclosure requirements contained in the Code also apply to Chapter 11 and 13 proceedings. [\[FN213\]](#) The court supervision of attorneys' fees through the disclosure requirements also applies to Chapter 7 proceedings where reaffirmation of the fee debt occurs. Thus, where no conflict between the disclosure and discharge provisions exists, “the plain language of § 523 must be given effect.” [\[FN214\]](#)

**\*603** Giving Chapter 7 debtors a fresh start post-petition requires a discharge of all debts other than those expressly listed in § 523. Congress did not include debts for attorneys' fees in the exemptions listed in § 523. [\[FN215\]](#)

Therefore, because Congress specifically excluded attorneys' fees from the exemptions, attorneys' fees remain dischargeable. Congress's intentions are clear from this exclusion: attorney-fee debts should be discharged post-petition. [\[FN216\]](#)

##### B. The Defects of Perry

Although the court in Perry is not bound by Ninth Circuit decisions, it should have followed Biggar and its progeny. Ignoring common sense and the guidance of Martin, the Perry court concentrated on the perceived conflict between the discharge and disclosure provisions in the Code. [\[FN217\]](#) The court conceded that the majority in Martin correctly analyzed the discharge provisions of the Code. [\[FN218\]](#) However, the court questioned why the disclosure provisions contemplate the validation of fees if the discharge provisions do not allow them to pass through bankruptcy. [\[FN219\]](#) By ignoring the fact that the disclosure provisions also apply to Chapters 11 and 13, the court erred in concluding that a reasonable fee for legal services is not subject to discharge post-petition. [\[FN220\]](#)

Perry rests, in large part, on the public policy concerns of the court. According to the court, if attorneys' fees remaining unpaid post-petition are dischargeable, many debtors would not be represented in Chapter 7 proceedings. In furtherance of this public policy concern, the court essentially fabricated a new exception to § 523. [\[FN221\]](#)

**\*604** 1. No Evidence of any Difficulty in Chapter 7 Access Exists

The Perry court asserted that if debtors are capable of entering fee agreements to pay for Chapter 7 representation, then a greater number of individuals will have access to the bankruptcy system. [\[FN222\]](#) This assertion is unsubstantiated. The court cited no evidence connecting the decision to discharge fee agreements with the denial of access to the bankruptcy system by indigent debtors. [\[FN223\]](#)

If the Perry court produced statistics demonstrating a decrease in the number of Chapter 7 filings in the Ninth Circuit since Biggar, then perhaps the public policy concerns would have validity; however, the number of Chapter 7 filings continue to increase. [\[FN224\]](#) Therefore, despite the initial finding that attorney-fee debts are dischargeable, [\[FN225\]](#) a substantial number of debtors still access the bankruptcy system. [\[FN226\]](#)

The “creative solutions” espoused in Martin for paying attorneys' fees pre-petition also provide opportunities for Chapter 7 debtors to access the bankruptcy system. Martin enumerates a number of “creative solutions . . . [[[that] can assist indigent debtors who have difficulty raising funds for legal representation prior to filing a bankruptcy case.” [\[FN227\]](#) Thus, representation by counsel is available to many debtors through alternative means, despite the concerns of the Perry court.

Debtors also have access to many less expensive alternatives to filing a Chapter 7 case with legal representation. For example, numerous resources available to consumer debtors \*605 enable debtors to represent themselves in pro per. Insights contained in “do-it-yourself bankruptcy kits,” as well as tips provided by consumer-oriented Internet sites, [\[FN228\]](#) are available to virtually everyone.

With minimal effort, many debtors can file in pro per, incurring costs substantially less than the cost of assisted representation. Even taking into account the time used to prepare the Chapter 7 petition and supporting documents, filing in pro per is a potential cost-saving option. Further, this option allows all potential debtors access to the bankruptcy system.

## 2. The Real Conflict of Interest: Nondischargeable Pre-Petition Attorney-Fee Debt

The Perry court also downplayed the ability of a debtor to reaffirm attorney-fee debt because of the potential conflict of interest. [\[FN229\]](#) What greater conflict of interest exists for a debtor's attorney than to diminish the debtor's fresh start by collecting fees post-petition?

The reaffirmation process is rich with regulation to ensure that a potential conflict of interest does not endanger a debtor's fresh start. Sections 524(c) [\[FN230\]](#) and 524(d) [\[FN231\]](#) operate to minimize potential dangers from the reaffirmation process by requiring court supervision. In fact, in proceedings that attempt to reaffirm attorney-fee debts, the court views the debtor as “unrepresented by counsel.” [\[FN232\]](#)

The Perry [\[FN233\]](#) court also believed that the disclosure provisions exist to regulate post-petition fee payments in Chapter 7. [\[FN234\]](#) However, the statutory language of § 524 clearly allows the court to approve reaffirmation agreements rather than post-petition fee payments. [\[FN235\]](#) Therefore, the Code does not provide, as Perry [\[FN236\]](#) incorrectly concludes, for post-petition \*606 nondischargeable attorney-fee debts. [\[FN237\]](#)

## 3. The Court Does Not Have the Power to Legislate

Even the threat of diminished access for debtors to the bankruptcy system does not justify what amounts to legislative action taken by the Perry court. The Constitution of the United States prescribes a “separation of powers” that operates to distinguish the judiciary and the legislative branches of our government. [\[FN238\]](#) The first three articles ensure that one branch of government does not dominate another branch. [\[FN239\]](#) When the judiciary prescribes new law instead of interpreting the laws enacted by Congress, it defies the separation of powers of the Con-

stitution.

In this case, it is evident that the Perry court overstepped its bounds. While the Perry court might not agree “on a philosophical basis with the results mandated by the Bankruptcy Code . . . [all courts are] bound to apply the law as Congress has written it.” [\[FN240\]](#) Until Congress acts, “we must all live with the law as it stands.” [\[FN241\]](#)

## V. Proposal

It is time for Congress to address the issue of dischargeability of pre-petition attorney-fee debts. Is there statutory discord between the Discharge Provisions and the Disclosure Provisions? Did Congress envision an exception to § 523 that is absent from the present Code? Congress must speak to these issues in order to ensure the highest levels of representation to, and equity among, Chapter 7 debtors nationwide.

If Congress intends to include attorney fees unpaid post-petition in dischargeable pre-petition debts, then it must now expand § 523 to include such a provision. Although the Ninth Circuit properly interprets the relevant statutory authority, [\[FN242\]](#) other jurisdictions are unclear as to congressional intentions regarding the dischargeability of attorneys' fees in Chapter 7 \*607 bankruptcies. [\[FN243\]](#) Alternatively, if Congress intended these fees to be nondischargeable, as the Ninth Circuit ruled, then Congress should provide further clarification to the disclosure provisions. In support of the Ninth Circuit's rulings, Congress could simply revise the Disclosure Provisions, alleviating any perceived tension with the Discharge Provisions.

Upcoming Code reform, which fell victim to the end-of-the-year problems in the 105th Congress, is currently before the 106th Congress. Both recommendations regarding proposed changes to the Code were silent on the dischargeability issue. In light of the present confusion interpreting relevant statutory provisions along with the willingness of some courts to act on their own, Congress must clear up these issues now.

## VI. Conclusion

The Code is clear: Chapter 7 debtors must pay for legal representation in full before filing or else the debt is discharged. If an attorney-fee debt remains unpaid or not appropriately reaffirmed under § 524, it succumbs to dischargeability. Nothing in the Code operates to protect attorney-fee debts from discharge. Until Congress acts to except these types of debts from discharge, it is inappropriate for any court to expand the plain language of § 523.

[\[FN1\]](#). Comments Editor, Santa Clara Law Review, Volume 40. J.D. candidate, Santa Clara University School of Law; B.B.A., New Mexico State University.

[\[FN2\]](#). See American Bankruptcy Institute, Filing Statistics (visited Sept. 26, 1999) <<http://www.abiworld.org/stats/newstatsfront.html>>.

[\[FN3\]](#). See id.

[\[FN4\]](#). Over one million individuals filed for Chapter 7 protection in 1998. See id.

[\[FN5\]](#). See id.

[\[FN6\]](#). See Judge Eugene R. Wedoff, An Updated Analysis of the Consumer Bankruptcy Provisions of H.R. 833 Bankruptcy Reform Act of 1999, As passed by the House of Representatives (posted Aug. 27, 1999) <<http://www.abiworld.org/legis/bills/106anal/wedoff833ana820.html>>. H.R. 833 would provide for dismissal of a debtor's Chapter 7 case (or conversion to Chapter 13) upon a finding that the debtor had more than a defined median

monthly income available to pay general unsecured debt. See *id.*

[FN6]. [In re Perry, 225 B.R. 497 \(Bankr. D. Colo. 1998\)](#). The Perry court held that “fees for legal services, properly disclosed pursuant to Section 329(a) and Bankruptcy Rule 2116(b), regardless of whether the services are performed pre-petition or post-petition, is not subject to discharge under Section 727(b) if unpaid upon the filing of the bankruptcy petition.” [Id. at 501](#).

[FN7]. *Id.*

[FN8]. The term pre-petition refers to any point in time prior to the commencement of a bankruptcy case; the term post-petition refers to any point in time subsequent to the commencement of a bankruptcy case. Bankruptcy cases commence with the filing of a bankruptcy petition “under section 301, 302, 303, or 304 of this title, as the case may be, commencing a case under this title.” [11 U.S.C. §101\(42\) \(1994\)](#).

[FN9]. All code and section references refer to [11 U.S.C. §§101-1330 \(1994\)](#) unless otherwise specified. All rule references refer to [Fed. R. Bankr. P. 1001-9036](#) unless otherwise specified.

[FN10]. See discussion *infra* Part IV.

[FN11]. See *infra* Part II.A.

[FN12]. See *infra* Part II.B.

[FN13]. See *infra* Part II.C.

[FN14]. See *infra* Part II.D.

[FN15]. See *infra* Part III.

[FN16]. [In re Perry, 225 B.R. 497 \(Bankr. D. Colo. 1998\)](#).

[FN17]. See *infra* Part IV.

[FN18]. See *infra* Part IV.B.

[FN19]. See *infra* Part IV.B.

[FN20]. See *infra* Part V.

[FN21]. Chapter 13 allows a debtor to propose to keep all assets, see [11 U.S.C. §1306\(b\) \(1994\)](#), in exchange for promising to pay off debts over a period of time out of future income, see *id.* §1322. Chapter 7 liquidation seeks to relieve a debtor of allowable debts while providing a fair distribution of the debtor's assets to all creditors. See *id.* §727. A discharge under Chapter 7 is granted through [§727 of the Bankruptcy Code](#), which provides:

(a) The court shall grant the debtor a discharge ....

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

Id.

[\[FN22\]](#). Id. §109(a).

[\[FN23\]](#). Section 109(b) specifies eligibility for a debtor to qualify for liquidation under Chapter 7. It provides:

A person may be a debtor under chapter 7 of this title only if such person is not --

- (1) a railroad;
- (2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, a small business investment company licensed by the Small Business Administration under subsection (c) or (d) of section 301 of the Small Business Investment Act of 1958, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act; or
- (3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union, engaged in such business in the United States.

Id. §109(b).

[\[FN24\]](#). See id. §362(a).

[\[FN25\]](#). Section 362(a) also stays the following actions against a debtor:

- (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
- (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
- (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
- (4) any act to create, perfect, or enforce any lien against property of the estate;
- (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
- (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
- (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
- (8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

Id. §362(a).

[\[FN26\]](#). Creditors may object to the discharge of particular debts pursuant to §523, or to the discharge of all debts pursuant to [§727](#). A §523 denial of discharge renders only one debt nondischargeable, whereas a [§727](#) denial of discharge renders all of the debtor's debts nondischargeable. See id. [§§523, 727](#).

[\[FN27\]](#). See Walter Ray Phillips, Liquidation Under Chapter 7 of the Bankruptcy Code §22-4, at 129 (2d ed. 1988).

[\[FN28\]](#). See George M. Treister et al., Fundamentals of Bankruptcy Law §1.04, at 17 (4th ed. 1996).

[\[FN29\]](#). Exceptions to dischargeable debts in Chapter 7 are listed in [§523](#) of the Code, which provides:

- (a) A discharge under [section 727, 1141, 1228\(a\), 1228\(b\), or 1328\(b\)](#) of this title does not discharge an individual debtor from any debt\*
  - (1) for a tax or customs duty ...;
  - (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by [fraudulent means];
  - (3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit [timely filing of a proof of claim];

- (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;
- (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child ...;
- (6) for willful and malicious injury by the debtor to another entity or to the property of another entity;
- (7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty...;
- (8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit ...;
- (9) for death or personal injury caused by the debtor's operation of motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;
- (10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge ...;
- (11) provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any state, issued by a Federal depository institutions [sic] regulatory agency...;
- (12) for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions [sic] regulatory agency to maintain the capital of an insured depository institution ...;
- (13) for any payment of an order of restitution issued under title 18, United States Code;
- (14) incurred to pay a tax to the United States that would be nondischargeable pursuant to paragraph (1);
- (15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation ...;
- (16) for a fee or assessment that becomes due and payable after the order for relief to a [condominium] membership association...;
- (17) for a fee imposed by a court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing regardless of an assertion of poverty by the debtor...

[11 U.S.C. §523\(a\) \(1994\)](#).

[\[FN30\]](#). *Id.* §524(a).

[\[FN31\]](#). See *supra* note 21.

[\[FN32\]](#). [11 U.S.C. §524\(a\)](#).

[\[FN33\]](#). “Debtors were represented by an attorney in 91% of the sample cases, assisted by petition preparers in 4% of the cases and filed pro se in the remaining 5%.” Marianne B. Culhane & Michaela M. White, *Reaffirmation and Discharge Problems*, in *Consumer Financial Services Litigation 1999*, at 703, 722 n.18 (PLI Corp. L. and Prac. Course Handbook Series No. 1114, 1999).

[\[FN34\]](#). “The great majority of consumer Chapter 7 bankruptcy cases are ‘no asset’ cases, in which the debtor has no non-exempt assets.” Elizabeth Warren & Jay Lawrence Westbrook, *The Law of Debtors and Creditors: Text, Cases, and Problems* 233 (3d ed. 1996) (citations omitted).

[\[FN35\]](#). One study reports a median attorney fee of \$550, and an average total attorney fee of \$612. See Culhane & White, *supra* note 33, at 732 tbl.10.

[\[FN36\]](#). The study documented by Culhane and White reports that median fees were lower in non-credit cases (\$550) than in credit cases (\$600), most likely “to cover the risk of nonpayment. However, the mean fee in non-credit cases was \$614, higher than the mean fee of \$609 in credit cases.” *Id.* at 722.

[\[FN37\]](#). See [In re Martin](#), 197 B.R. 120, 127 (Bankr. D. Colo. 1997).

[\[FN38\]](#). See *id.*

[FN39]. A reaffirmation agreement is “an agreement to repay an otherwise dischargeable obligation.” Treister et al., *supra* note 28, §7.09, at 383.

[FN40]. See, e.g., [In re Perry, 225 B.R. 497 \(Bankr. D. Colo. 1998\)](#); [In re Pasco, 220 B.R. 119 \(Bankr. D. Colo. 1998\)](#); [In re Nidiver, 217 B.R. 581 \(Bankr. D. Neb. 1998\)](#); [In re Perez, 177 B.R. 319 \(Bankr. D. Neb. 1995\)](#).

[FN41]. See [Perry, 225 B.R. at 498](#); see also [Hessinger & Assocs. v. United States Trustee \(In re Biggar\), 110 F.3d 685 \(9th Cir. 1997\)](#) (ruling that obligations of a Chapter 7 debtor to attorneys for pre-petition legal work, to be paid in installments post-petition, were dischargeable); [Pasco, 220 B.R. at 119](#) (disallowing reaffirmation agreement of attorney fees because of failure to advise debtor in plain, conspicuous, and written terms that she was not required to enter into fee agreement, or that fee was dischargeable); [In re Haynes, 216 B.R. 440 \(Bankr. D. Colo. 1997\)](#) (following holding in [Martin, 197 B.R. at 120](#), that a “conflict of interest” existed because of fee agreement apparently executed pre-petition but calling for post-petition installment payments that was in nature of dischargeable debt); [In re Zapanta, 204 B.R. 762 \(Bankr. S.D. Cal. 1997\)](#) (ruling that attorney's post-petition presentment of checks did not fall within the stay exception of §362(b)(11) for presentment of negotiable instruments); [Martin, 197 B.R. at 120](#) (ruling that obligation of Chapter 7 debtor for attorney fee agreement, as pre-petition obligation not specifically excepted from discharge, was in nature of dischargeable debt and that fee agreement which enabled debtor to pay for attorney's services in installments over time gave rise to “conflict of interest” justifying at least a partial disallowance of attorney's fees); [In re Voglio, 191 B.R. 420 \(Bankr. D. Ariz. 1996\)](#) (ruling that pre-petition agreement of Chapter 7 debtor to pay attorney fees post-petition gave rise to dischargeable debt); [In re Symes, 174 B.R. 114 \(Bankr. D. Ariz. 1994\)](#) (ruling that pre-petition attorney retention agreements requiring clients pre-petition to execute postdated checks to be cashed post-petition, or requiring execution of pre-petition promissory note to be collected post-petition, constituted dischargeable claims subject to automatic stay).

[FN42]. See, e.g., [In re San Miguel, 40 B.R. 481 \(Bankr. D. Colo. 1984\)](#). In *San Miguel*, a Colorado attorney proposed a Chapter 13 plan that would pay unsecured creditors one dollar each over the sixteen-month plan. See *id.* The court failed to approve the plan, holding that the plan constituted an “abuse of the spirit and purpose of Chapter 13” to repay creditors. See *id.* The court also found that the true purpose of the plan was to stretch payment of legal fees associated with representation over the life of the plan. See *id.* at 485. The court recognized the difficulty associated with obtaining Chapter 7 representation without payment in full of attorney fees in advance, but did not believe that that difficulty warranted the abuse of the congressional intent of Chapter 13. See *id.*

[FN43]. See *Culhane & White*, *supra* note 33.

[FN44]. See *id.* at 722, 732 tbl.10.

[FN45]. See *id.* at 722.

[FN46]. The term “fee credit” connotes that an attorney has extended credit to the debtor in the amount of the unpaid fees associated with Chapter 7 representation. See *id.*

[FN47]. *Id.*

[FN48]. See *id.*

[FN49]. See *Culhane & White*, *supra* note 33, at 722.

[FN50]. See [In re Pasco, 220 B.R. 119, 122 \(Bankr. D. Colo. 1998\)](#) (citing [In re Nidiver, 217 B.R. 581 \(Bankr. D. Neb. 1998\)](#); [In re Voglio, 191 B.R. 420 \(Bankr. D. Ariz. 1996\)](#); [Hessinger & Assocs. v. United States Trustee \(In re Biggar\), 185 B.R. 825 \(Bankr. N.D. Cal. 1995\)](#), *aff'd*, [110 F.3d 685 \(9th Cir. 1997\)](#); [In re Perez, 177 B.R. 319](#)

[\(Bankr. D. Neb. 1995\)](#); [In re Symes, 174 B.R. 114 \(Bankr. D. Ariz. 1994\)](#)).

[FN51]. See [In re Perry, 225 B.R. 497, 500-01 \(Bankr. D. Colo. 1998\)](#).

[FN52]. See [Biggar, 110 F.3d at 685](#).

[FN53]. See [In re Mills, 170 B.R. 404 \(Bankr. D. Ariz. 1994\)](#) (ruling that obligation of Chapter 7 debtor to pay attorney fees incurred in bankruptcy case, pursuant to pre-petition agreement with attorney, was not discharged).

[FN54]. See [id. at 404](#).

[FN55]. Although the case also dealt with the adequacy of fee disclosures, see [id. at 405](#), this comment focuses solely on the dischargeability issue.

[FN56]. See [id. at 406](#).

[FN57]. [Id. at 405](#).

[FN58]. See *supra* Part II.B.

[FN59]. Compensation for services rendered and reimbursement of expenses are outlined in [Bankruptcy Procedure Rule 2016](#), which provides:

(a) Application for Compensation or Reimbursement. An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity. Unless the case is a chapter 9 municipality case, the applicant shall transmit to the United States Trustee a copy of the application.

(b) Disclosure of Compensation Paid or Promised to Attorney for Debtor. Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States Trustee within 15 days after the order for relief, or at another time as the court may direct, the statement required by §329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States Trustee within 15 days after any payment or agreement not previously disclosed.

[Fed. R. Bankr. P. 2016](#).

[FN60]. See [Mills, 170 B.R. at 406](#).

[FN61]. See [id. at 407](#).

[FN62]. [Id. at 410](#).

[FN63]. Section 329 controls a debtor's transactions with attorneys. It provides:

(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to\*

(1) the estate, if the property transferred\*

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or

(2) the entity that made such payment.

[11 U.S.C. §329 \(1994\).](#)

[FN64]. See supra note 59.

[FN65]. [Bankruptcy Procedure Rule 2017](#) governs the examination of a debtor's transactions with the debtor's attorney as follows:

(a) Payment or Transfer to Attorney Before Order for Relief. On motion by any party in interest or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property by the debtor, made directly or indirectly and in contemplation of the filing of a petition under the Code by or against the debtor or before entry of the order for relief in an involuntary case, to an attorney for services rendered or to be rendered is excessive.

(b) Payment of Transfer to Attorney After Order for Relief. On motion by the debtor, the United States trustee, or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property, or any agreement therefor, by the debtor to an attorney after entry of an order for relief in a case under the Code is excessive, whether the payment or transfer is made or is to be made directly or indirectly, if the payment, transfer, or agreement therefor is for services in any way related to the case.

[Fed. R. Bankr. P. 2017.](#)

[FN66]. See [Hessinger & Assocs. v. United States Trustee \(In re Biggar\)](#), 110 F.3d 685, 686 (9th Cir. 1997).

[FN67]. [Mills](#), 170 B.R. at 410.

[FN68]. See supra note 21.

[FN69]. See supra note 29.

[FN70]. See [Mills](#), 170 B.R. at 410.

[FN71]. See id.

[FN72]. See id. at 411.

[FN73]. See id.

[FN74]. [Fed. R. Bankr. P. 2016\(b\)](#).

[FN75]. [11 U.S.C. §329 \(1994\)](#).

[FN76]. See [Mills, 170 B.R. at 411.](#)

[FN77]. [Id. at 412.](#)

[FN78]. See supra note 41.

[FN79]. [In re Symes, 174 B.R. 114 \(Bankr. D. Ariz. 1994\).](#)

[FN80]. See [id. at 116.](#)

[FN81]. See supra note 25.

[FN82]. See [Symes, 174 B.R. at 116.](#) See generally supra note 21.

[FN83]. It appears that Hessinger attempted to institute this post-dated check fee agreement to circumvent the ongoing litigation occurring in [Hessinger & Assocs. v. United States Trustee \(In re Biggar\), 185 B.R. 825 \(N.D. Cal. 1995\)](#), aff'd, [110 F.3d 685 \(9th Cir. 1997\)](#). See [Symes, 174 B.R. at 116.](#)

[FN84]. The attorney's practice was to "require execution of a prepetition promissory note to be collected postpetition" to retain representation in a Chapter 7 case. [Symes, 174 B.R. at 116.](#)

[FN85]. [Id.](#)

[FN86]. A claim is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured...." [11 U.S.C. §101\(5\)\(A\) \(1994\).](#)

[FN87]. See [Symes, 174 B.R. at 116.](#)

[FN88]. [11 U.S.C. §727\(b\).](#)

[FN89]. See [Symes, 174 B.R. at 118.](#)

[FN90]. See [id.](#)

[FN91]. [Id.](#)

[FN92]. [Id.](#) (citing [In re Mills, 170 B.R. 404, 410 \(Bankr. D. Ariz. 1994\)](#)).

[FN93]. [Mills, 170 B.R. at 404.](#)

[FN94]. See [Symes, 174 B.R. at 118.](#)

[FN95]. See [id. at 117.](#)

[FN96]. See [id.](#)

[FN97]. [Hessinger & Assocs. v. United States Trustee \(In re Biggar\), 110 F.3d 685 \(9th Cir. 1997\)](#), aff'g [185 B.R.](#)

[825 \(Bankr. N.D. Cal. 1995\)](#).

[\[FN98\]](#). See id.

[\[FN99\]](#). See id. at 686.

[\[FN100\]](#). Id.

[\[FN101\]](#). See id.

[\[FN102\]](#). See id.

[\[FN103\]](#). See supra note 29.

[\[FN104\]](#). See [Biggar, 110 F.3d at 686](#).

[\[FN105\]](#). See supra notes 64-66 and accompanying text.

[\[FN106\]](#). See [Biggar, 110 F.3d at 686](#).

[\[FN107\]](#). See [id. at 687](#).

[\[FN108\]](#). See [id. at 688](#).

[\[FN109\]](#). Id. at 687.

[\[FN110\]](#). See id.

[\[FN111\]](#). See id.

[\[FN112\]](#). See [Biggar, 110 F.3d at 687](#).

[\[FN113\]](#). See id.

[\[FN114\]](#). See id.

[\[FN115\]](#). See id.

[\[FN116\]](#). Id. (citing [Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1018 \(1984\)](#) (holding that statutory provisions should be given effect where capable of coexistence)).

[\[FN117\]](#). Id. (citing [Gleason v. Thaw, 236 U.S. 558, 562 \(1915\)](#) (ruling that exceptions to discharge should be confined to those enumerated in Code); [In re Martin, 197 B.R. 120, 126-27 \(Bankr. D. Colo. 1996\)](#) (analyzing decisions holding pre-petition attorney fee agreements dischargeable)).

[\[FN118\]](#). See [In re Mills, 170 B.R. 404, 411 \(Bankr. D. Ariz. 1994\)](#).

[FN119]. [Biggar, 110 F.3d at 687.](#)

[FN120]. [Martin, 197 B.R. at 123.](#)

[FN121]. See [id. at 124.](#)

[FN122]. See [id. at 123-24.](#)

[FN123]. See [id. at 127.](#)

[FN124]. See discussion supra Part II.C.2.b.

[FN125]. See [Martin, 197 B.R. at 127.](#)

[FN126]. [Id. at 128.](#)

[FN127]. [Id.](#)

[FN128]. See [id.](#)

[FN129]. The court stated:

If the debtor defaults in payment of the post-petition installments, the debt can be accelerated, bears interest, accrues a late charge, and if submitted to collection may result in additional attorney fees. The Fee Agreement also authorizes [counsel] to withhold post-petition representation if the pre-petition debt is not paid as required. [Id. at 129.](#)

[FN130]. “For any other creditor, exercise of such remedies to collect a prepetition debt would be stayed as acts to ‘recover a claim against the debtor that arose before the commencement of the case.’ ” [Id.](#) (citing [11 U.S.C. § 362\(a\)\(6\) \(1994\)](#)).

[FN131]. See [Martin, 197 B.R. at 129.](#)

[FN132]. [Id. at 127](#) (citation omitted).

[FN133]. [Id. at 129-30.](#)

[FN134]. [In re Haynes, 216 B.R. 440, 410 \(Bankr. D. Colo. 1997\).](#)

[FN135]. [Id. at 444](#) (citing [In re Mills, 170 B.R. 404 \(Bankr. D. Ariz. 1994\)](#)).

[FN136]. See discussion supra Part II.C.1.

[FN137]. See [Haynes, 216 B.R. at 444.](#)

[FN138]. The court stated:

Counsel are advised that they must disclose to their clients that any fees earned pre-petition are dischargeable in bankruptcy. They must also be aware that if the attorneys seek to recover pre-petition fees from their clients post-petition, there is a conflict of interest between the client and the attorney which must be resolved. [Id.](#) (emphasis in original).

[\[FN139\]](#). Id.

[\[FN140\]](#). The court stated:

The effect of this Court's determination to apply the holdings of Martin to all cases will mean that every debtor will now have to come up with some amount of money for pre-petition attorney fees. It will mean that attorneys will not longer file Chapter 13 cases that really should be Chapter 7 cases just so the debtor can pay all of the attorney's fees over time. This Court has heard many times from attorneys that the only reason Chapter 13 was used was because of the debtor's lack of funds to pay attorney's fees. And, indeed, this Court has often lamented that there was no reason for a certain debtor to file a Chapter 13 case when it appeared from the case file that a Chapter 7 would better serve that debtor. Thus, because clients will now have to pay for all pre-petition services before their case is filed, the attorneys will be able to properly advise their clients without being hampered by the conflict of interest problem that was recognized in Martin. And debtors will be better able to make a rational decision as to which Chapter best serves their needs.

Id. at 444-45 (emphasis omitted).

[\[FN141\]](#). [Gordon v. Hines \(In re Hines\), 147 F.3d 1185 \(9th Cir. 1998\)](#).

[\[FN142\]](#). See id.

[\[FN143\]](#). See id.

[\[FN144\]](#). See id. at 1186.

[\[FN145\]](#). Id. at 1187.

[\[FN146\]](#). See discussion supra Part II.C.2.b.

[\[FN147\]](#). Quantum meruit is “[a]n equitable doctrine, based on the concept that no one who benefits by the labor and materials of another should be unjustly enriched thereby; under those circumstances, the law implies a promise to pay a reasonable amount for the labor and materials furnished, even absent a specific contract therefor.” Black's Law Dictionary 1243 (6th ed. 1990).

[\[FN148\]](#). See [Hines, 147 F.3d at 1190](#).

[\[FN149\]](#). See [id. at 1187](#).

[\[FN150\]](#). See id.

[\[FN151\]](#). See id.

[\[FN152\]](#). See id.

[\[FN153\]](#). See id.

[\[FN154\]](#). [Hines, 147 F.3d at 1188](#).

[\[FN155\]](#). See [id. at 1188](#).

[\[FN156\]](#). See [id. at 1187](#).

[\[FN157\]](#). See *id.*

[\[FN158\]](#). The issue in this case was framed as: “whether the postpetition rendition of legal services bargained for pursuant to a pre-filing fee agreement entitles Gordon to recover the fees for those later services, not from the bankruptcy estate (which in a no-asset case would amount to tapping an empty barrel) but directly from Hines herself.” *Id.* at 1189.

[\[FN159\]](#). *Id.* at 1188 n.6.

[\[FN160\]](#). [Hines](#), 147 F.3d at 1191.

[\[FN161\]](#). The concurring opinion by Judge Tashima criticized the majority for:

undertak[ing] the heavy burden of rewriting the Bankruptcy Code to come up with [the] best solution from its own public policy perspective. The answer the majority comes up with is that there must be a judicially implied exception to [11 U.S.C. §§362\(a\)\(6\)](#) and [727](#) for legal fees for postpetition services. The majority reaches this conclusion in spite of this circuit's binding precedent that the only exceptions to [§727](#)'s discharge are listed in [11 U.S.C. §523](#), and that courts are powerless to create new ones.

*Id.* at 1192 (Tashima, J., concurring) (relying on [Hessinger & Assocs. v. United States Trustee \(In re Biggar\)](#), 110 F.3d 685, 687-88 (9th Cir. 1997)).

[\[FN162\]](#). “[I]t strains the notion of a viable [claim]... to attach that label to a lawyer's ability--though agreed upon pre-petition--to receive payment of a contracted-for fee only if and when the lawyer performs the postpetition services that create the entitlement to that fee.” *Id.* at 1191.

[\[FN163\]](#). The right to payment only arises:

if the attorney actually renders the postpetition legal services that match up to the debtor's prepetition promise to pay, it strains that statutory language a good deal to characterize the attorney as having violated the [Section 362\(a\)\(6\)](#) automatic stay by seeking payment once the postpetition services have thereafter been performed. And in that sense Gordon's efforts to collect the fees at issue would not appear to have violated the [Section 362\(a\)\(6\)](#) automatic stay.

*Id.*

[\[FN164\]](#). See *id.*

[\[FN165\]](#). *Id.* The court followed the reasoning used in [Carolco Television Inc. v. NBC \(In re De Laurentiis Entertainment Group, Inc.\)](#), 963 F.2d 1269, 1272 (9th Cir. 1992), relating to the issue of quantum meruit.

Quantum meruit (or quasi contract) is an equitable remedy implied by the law under which a plaintiff who has rendered services benefiting the defendant may recover the reasonable value of those services when necessary to prevent unjust enrichment of the defendant.... [F]urther[,] ... “[c]ompensation must be ‘expected’ [by the party rendering services] only in the sense that the services rendered must not have been intended to be gratuitous.” And of course that aptly describes Gordon's rendition of postpetition services for Hines' benefit.

*Id.* (final alteration in original) (citations omitted) (quoting [De Laurentiis](#), 963 F.2d at 1272, 1273).

[\[FN166\]](#). [In re Jastrem](#), 224 B.R. 125 (Bankr. E.D. Cal. 1998).

[\[FN167\]](#). See [id.](#) at 126.

[\[FN168\]](#). See *id.*

[\[FN169\]](#). See *id.*

[\[FN170\]](#). The record indicates that this was the attorney's common business practice. See *id.* A declaration was filed

with the court “indicating that he had received and negotiated post-dated checks from debtors in 38 bankruptcy cases between January 1, 1996 and May 25, 1998.” *Id.* at 126 n.2.

[FN171]. The court set a hearing to determine:

(1) whether the respondent had been paid an amount in excess of the reasonable value of services rendered; (2) whether any fee agreement should be canceled; (3) whether the respondent had violated the automatic stay by negotiating the post-dated checks postpetition; and (4) whether any obligation of the debtor to the respondent was discharged by the debtor's discharge.

*Id.*

[FN172]. Compare [Hessinger & Assocs. v. United States Trustee \(In re Biggar\)](#), 110 F.3d 685 (9th Cir. 1997) with [Gordon v. Hines \(In re Hines\)](#), 147 F.3d 1185 (9th Cir. 1998).

[FN173]. See [In re Jastrem](#), 224 B.R. 125, 132 (Bankr. E.D. Cal. 1998). This conclusion is consistent with the determination in *Biggar* that “debt arising from a bankruptcy attorney's fee agreement is dischargeable in bankruptcy at least to the extent that it provides for postpetition payment for prepetition services. Pending discharge, the automatic stay bars any such action.” *Id.* at 128 (citing [Biggar](#), 110 F.3d at 685).

[FN174]. See [Jastrem](#), 224 B.R. at 132. This conclusion is consistent with the judicial exceptions crafted in *Hines* that operate to allow “the postpetition payment for services rendered postpetition permissible even though the parties contract for those services prior to the filing of the petition.” *Id.* at 130 (citing [Hines](#), 147 F.3d at 1191).

[FN175]. [In re Perry](#), 225 B.R. 497 (Bankr. D. Colo. 1998).

[FN176]. See [Hines](#), 147 F.3d at 1185; [Biggar](#), 110 F.3d at 685; [Jastrem](#), 224 B.R. at 125.

[FN177]. Compare [Perry](#), 225 B.R. at 497, and [In re Mills](#), 170 B.R. 404 (Bankr. D. Ariz. 1994), with [In re Pasco](#), 220 B.R. 119 (Bankr. D. Colo. 1998), [In re Haynes](#), 216 B.R. 440 (Bankr. D. Colo. 1997), [In re Martin](#) 197 B.R. 120 (Bankr. D. Colo. 1996), and [In re Symes](#), 174 B.R. 114 (Bankr. D. Ariz. 1994).

[FN178]. See [Perry](#), 225 B.R. at 497-98.

[FN179]. [Section 524\(c\) of the Bankruptcy Code](#) sets out criteria for approval of reaffirmation agreements. It provides:

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if --

(1) such agreement was made before the granting of the discharge under [section 727](#), [1141](#), [1228](#) or [1328](#) of this title;

(2)(A) such agreement contains a clear and conspicuous statement

which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim; and

(B) such agreement contains a clear and conspicuous statement which advises the debtor that such agreement is not required under this title, under nonbankruptcy law, or under any agreement not in accordance with the provisions of this subsection;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that --

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of --  
(i) an agreement of the kind specified in this subsection; and  
(ii) any default under such an agreement;  
(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;  
(5) the provisions of subsection (d) of this section have been complied with; and  
(6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as --  
(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and  
(ii) in the best interest of the debtor.  
(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

[11 U.S.C. §524\(c\) \(1994\).](#)

[\[FN180\]. Perry, 225 B.R. at 500.](#)

[\[FN181\]. Mills, 170 B.R. at 404.](#)

[\[FN182\]. See id. at 500.](#)

[\[FN183\]. See id. at 497.](#)

[\[FN184\]. See discussion infra Part II.D.](#)

[\[FN185\]. Perry, 225 B.R. at 500.](#)

[\[FN186\]. See \*In re Martin\*, 197 B.R. 120, 127 \(Bankr. D. Colo. 1996\).](#)

[\[FN187\]. See id.](#)

[\[FN188\]. See \[11 U.S.C. §524\\(c\\), \\(d\\) \\(1994\\)\]\(#\).](#)

[\[FN189\]. See generally Robert A. Hessling, Reaffirmation and Redemption 139-40 \(1994\).](#)

[\[FN190\]. See id. at 140.](#)

[\[FN191\]. See \[11 U.S.C. §§524\\(c\\)-\\(d\\) \\(1994\\)\]\(#\); Hessling, supra note 189, at 141.](#)

[\[FN192\]. See supra note 179.](#)

[\[FN193\]. \[Section 524\\(d\\) of the Bankruptcy Code\]\(#\)](#) further regulates the court's approval of reaffirmation agreements. It provides:

(d) In a case concerning an individual, when the court has determined whether to grant or not to grant a discharge under [section 727](#), [1141](#), [1228](#), or [1328](#) of this title, the court may hold a hearing at which the debtor shall appear in person. At any such hearing, the court shall inform the debtor that a discharge has been granted or the reason why a discharge has not been granted. If a discharge has been granted and if the debtor desires to make an agreement of the kind specified in subsection (c) of this section and was not represented by an attorney during the course of negotiating such agreement, then the court shall hold a hearing at which the debtor shall appear in person

and at such hearing the court shall --

(1) inform the debtor --

(A) that such an agreement is not required under this title, under nonbankruptcy law, or under any agreement not made in accordance with the provisions of subsection (c) of this section; and

(B) of the legal effect and consequences of --

(i) an agreement of the kind specified in subsection (c) of this section; and

(ii) a default under such an agreement; and

(2) determine whether the agreement that the debtor desires to make complies with the requirements of subsection (c)(6) of this section, if the consideration for such agreement is based in whole or in part on a consumer debt that is not secured by real property of the debtor.

[11 U.S.C. §524\(d\) \(1994\).](#)

[\[FN194\]. In re Pasco, 220 B.R. 119 \(Bankr. D. Colo. 1998\).](#)

[\[FN195\]. Id. at 119.](#)

[\[FN196\]. See id. at 120-21.](#)

[\[FN197\]. See id.](#)

[\[FN198\]. See id. at 120.](#)

[\[FN199\]. See supra note 179.](#)

[\[FN200\]. See supra note 193.](#)

[\[FN201\]. See Pasco, 220 B.R. at 119.](#)

[\[FN202\]. See id. at 122-23.](#)

[\[FN203\]. See id.](#)

[\[FN204\]. See Treister et al., supra note 28.](#)

[\[FN205\]. See supra Part II.B.](#)

[\[FN206\]. See generally In re Perry, 225 B.R. 497 \(Bankr. D. Colo. 1998\).](#)

[\[FN207\]. In re Haynes, 216 B.R. 440, 445 \(Bankr. D. Colo. 1997\).](#)

[\[FN208\]. See Perry, 225 B.R. at 497; In re Mills, 170 B.R. 404 \(Bankr. D. Ariz. 1994\).](#)

[\[FN209\]. See discussion supra Part II.C.2.b.](#)

[\[FN210\]. See supra note 21.](#)

[\[FN211\]. See supra notes 21, 29.](#)

[\[FN212\]. See supra notes 59, 63, 65.](#)

[FN213]. See discussion supra Part II.C.2.b.

[FN214]. [Hessinger & Assocs. v. United States Trustee \(In re Biggar\)](#), 110 F.3d 685, 688 (9th Cir. 1997) (citing [Ruckelshaus v. Monsanto Co.](#), 467 U.S. 986, 1018 (1984) (ruling that statutory provisions should be given effect where capable of coexistence)).

[FN215]. See supra note 29.

[FN216]. See [Biggar](#), 110 F.3d at 688 (citing [Gleason v. Thaw](#), 236 U.S. 558, 562 (1915) (ruling that exceptions to discharge should be confined to those enumerated in Code); [In re Martin](#), 197 B.R. 120, 126-27 (Bankr. D. Colo. 1996) (analyzing decision holding that pre-petition attorney fee agreements are dischargeable)).

[FN217]. See discussion supra Part II.C.4.

[FN218]. See [In re Perry](#), 225 B.R. 497, 500 (Bankr. D. Colo. 1998).

[FN219]. See [id.](#) at 499.

[FN220]. See [id.](#) at 500.

[FN221]. See [id.](#) at 500-01.

[FN222]. See [id.](#) at 500.

[FN223]. See [id.](#)

[FN224]. See American Bankruptcy Institute, Non-Business Bankruptcy Filings by Chapter 1990-1998 (3rd Quarter) (visited Jan. 20, 1999) <<http://www.abiworld.org/stats/1990nonbuschapter.html>>.

[FN225]. See discussion supra Part II.C.2.

[FN226]. See discussion supra notes 1-4 and accompanying text.

[FN227]. [In re Martin](#), 197 B.R. 120, 127 (Bankr. D. Colo. 1996).

Debtors commonly defer payment of other debts or borrow from family and friends in order to pay attorneys. Attorneys can lessen the financial burden by quantifying the fee for prepetition and postpetition services, requiring only payment for prepetition services prior to filing. If a debt for fees will be dischargeable, some attorneys accept payment by a third-party guarantor. Some courts authorize reaffirmation of the debt. [Id.](#) (citing [In re Perez](#), 177 B.R. 319 (Bankr. D. Neb. 1995)).

[FN228]. See, e.g., The American Bankruptcy Institute, Consumer Corner (visited Oct. 1, 1999) <<http://www.abiworld.org/consumer/A.html>>.

[FN229]. See [In re Perry](#), 225 B.R. 497, 500 (Bankr. D. Colo. 1998).

[FN230]. See supra note 179.

[FN231]. See supra note 193.

[\[FN232\]](#). See discussion supra Part II.D.

[\[FN233\]](#). [Perry, 225 B.R. at 497.](#)

[\[FN234\]](#). See generally discussion supra Part II.C.3.

[\[FN235\]](#). See supra notes 179, 193; [In re Pasco, 220 B.R. 119 \(Bankr. D. Colo. 1998\).](#)

[\[FN236\]](#). [Perry, 225 B.R. at 499.](#)

[\[FN237\]](#). See [Hessinger & Assocs. v. United States Trustee \(In re Biggar\), 110 F.3d 685, 687 \(9th Cir. 1997\).](#)

[\[FN238\]](#). See U.S. Const. arts. I-III.

[\[FN239\]](#). See id.

[\[FN240\]](#). [In re Haynes, 216 B.R. 440, 445 \(Bankr. D. Colo. 1997\).](#)

[\[FN241\]](#). Id.

[\[FN242\]](#). See [Hessinger & Assocs. v. United States Trustee \(In re Biggar\), 110 F.3d 685, 687 \(9th Cir. 1997\).](#)

[\[FN243\]](#). Compare [In re Perry, 225 B.R. 497 \(Bankr. D. Colo. 1998\)](#), and [In re Mills, 170 B.R. 404 \(Bankr. D. Ariz. 1994\)](#), with [In re Pasco, 220 B.R. 119 \(Bankr. D. Colo. 1998\)](#), [In re Haynes, 220 B.R. 440 \(Bankr. D. Colo. 1997\)](#), and [In re Martin, 197 B.R. 120 \(Bankr. D. Colo. 1996\)](#).

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