# The Impact of *In re Kessler* and New Chapter 13 Plans on Direct Payments to Creditors

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*Co-Author & Presenter*, 2016 Case Law Update, 2016 Bankruptcy Bench Bar Conference, Western District of Texas, Fredericksburg, Texas, April 28, 2016.
*Co-Author & Presenter*, 2015-2016 Rules and Forms Changes: What's New and What's Coming Soon?, 33rd Annual Advanced Business Bankruptcy Seminar 2016, Austin, Texas, June 24, 2016.

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The Fifth Circuit Court of Appeals is the only appellate court to have ruled on the issue of whether a debtor's direct payments to a creditor constitute payments under or through a chapter 13 plan.[1] In the intervening time between the Fifth Circuit's holdings in ***Foster*** and ***Kessler***, jurisdictions in three different states[2] have all reached the same conclusion—that a debtor's failure to pay all of the debtor's post-petition mortgage payments is a failure to make payments under the chapter 13 plan.[3] Further, these jurisdictions have held that the failure to pay all post-petition mortgage payments through the plan is grounds for dismissal, conversion to chapter 7, or denial of a chapter 13 discharge. Some courts have gone so far as to vacate a debtor's discharge when the court learns that, notwithstanding the trustee's certification that a debtor made all plan payments, the debtor was delinquent in making post-petition mortgage or direct payments.[4] This paper will examine the case law surrounding analysis by the courts of the debtor's failure to make direct mortgage payments under a plan, the remedies available to parties when a debtor defaults in their direct mortgage payments, and the potential impact of ***Kessler*** on

[1] *See* ***In re Foster***, 670 F.2d 478 (5th Cir. 1982) (finding that where a debtor proposes to cure a plan arrears on a residential mortgage in the plan, the direct payments to the mortgage lienholder are direct plan payments) and ***In re Kessler***, 655 Fed. App'x 242, 244 (5th Cir. 2016) (per curiam) (finding that a failure to make post-petition mortgage payments is cause to deny a debtor's chapter 13 discharge).

[2] The District of Colorado; the Northern, Southern, and Western Districts of Texas; and the Eastern District of Virginia.

[3] Several other bankruptcy courts have considered the application of ***Foster*** to direct mortgage payments and found that direct payments to a mortgage creditor are chapter 13 plan payments. *See* ***In re Tumblson***, No. 12-80365-TRC, 2016 WL 889772 (Bankr. E.D. Ok. Mar. 8, 2016) (finding that direct mortgage payments are payments under the plan and dismissing the case for failure to make mortgage payments); ***In re Harris***, 107 B.R. 204 (Bankr. D. Neb. 1989) (finding that a debtor cannot make plan payments to cure pre-petition arrears without also requiring a finding that direct payments to a mortgage creditor are payments "provided for" in the chapter 13 plan); ***In re Higgins***, 43 B.R. 391 (Bankr. N.D. Ala. 1984) (plan cannot be confirmed without both mortgage arrears and post-petition mortgage payment being paid through the plan); *see also* ***In re Jutila***, 111 B.R. 621 (Bankr. W.D. Mich. 1989) (finding under ***Foster*** that the debtor or trustee must be the disbursing agent for mortgage payments; not the debtor's bank).

[4] *See, e.g* ***In re Gonzales***, 532 B.R. 828, 833 (Bankr. D. Colo. 2015) (holding that when a trustee learns that a chapter 13 discharge has been granted notwithstanding a debtor's failure to make all direct mortgage payments under the chapter 13 plan, the trustee must notify the court with the consequence that a debtor's discharge may be vacated).

direct payments to other forms of debt. Further, this paper will briefly discuss the process that led to the adoption of a national chapter 13 plan form and the circumstances surrounding the opting out of a judicial district and creation of uniform district plans.

## A. *In re Foster*[5]

In ***Foster***, the Fifth Circuit considered whether a "wage earner plan" could provide for curing of the debtors' pre-petition arrears through the plan while making direct payments to the mortgage creditor. The debtors' plan stated that the first and second lien holders on the Fosters' home would be paid "the arrearage only under the plan," and that the "current payments will be outside the plan according to the terms of the notes and deed of Trust."[6] The bankruptcy court denied confirmation of the plan, finding that chapter 13 policy requires all payments be made within the plan.

On appeal, the Fifth Circuit began its analysis by noting the confusing nature of the term "outside the plan."[7] The court noted:

> The Fosters stated in their proposed plan that "(t)he current payments (on their mortgage claim) will be outside the plan according to the terms of the notes and deed of Trust." (emphasis added). While the Fosters have argued on appeal that they meant only that these payments would be made by the debtors directly to the creditors, rather than through the standing trustee, it is clear that the bankruptcy court did not give the plan provision the same reading. The bankruptcy court held the making of the current mortgage payments outside the plan to be unlawful, despite expressly recognizing that a plan can leave to the debtor the responsibility as disbursing agent of physically paying the creditors.[8]

The Fifth Circuit observed that the phrasing of how payments were made inside or outside the plan was significant under the Bankruptcy Act of 1898 because secured creditors whose claims were dealt with under the plan were required to accept the plan in order for the

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[5] 670 F.2d 478 (5th Cir. 1982).
[6] ***Id.*** at 482.
[7] ***Id.*** at 485.
[8] ***Id.***

plan to be confirmed. The practice at that time was to avoid the inclusion of an objecting secured creditor by proposing payment of the creditor "outside the plan" such that a plan would be confirmed.

The issue on appeal to the Fifth Circuit was whether the Fosters could act as the disbursing agent to make direct payments to their mortgage creditor "outside of the plan" and thereby, avoid the payment of a commission to the chapter 13 trustee. The Fifth Circuit found:

> One of the primary concerns of Congress in the 1978 revisions of Chapter 13 was the enhancement of the "flexibility" of debtors in the formulation of Chapter 13 plans. "Chapter 13 is designed to serve as a flexible vehicle for the repayment of part or all of the allowed claims of the debtor. Section 1322 emphasizes that purpose by fixing a minimum of mandatory plan provisions." S.Rep. No. 989, 95th Cong., 1st Sess. 141 (1978), U.S.Code Cong. & Admin.News 1978, p. 5927 [sic]. Although we believe that the intent of Congress to enhance the flexibility of debtors in formulating plans under Chapter 13 should be given strong consideration by a bankruptcy court in deciding whether to allow the debtor to serve as disbursing agent for the current mortgage payments, we also believe that the provisions of Chapter 13 make it clear that the designation of the debtor as such a disbursing agent is very much a matter left to the considered discretion of the bankruptcy court. Several courts have held that s 1325(a) [sic] makes confirmation of a Chapter 13 plan mandatory where all six conditions of that provision are satisfied. See, e.g., *In re Polak*, 9 B.R. 502, 506 (D.C.W.D. Mich. 1981); *In re Scott*, 7 B.R. 692, 694 (Bankr. E.D. Penn. 1980); *In re Bonder*, 3 B.R. 623, 626 (Bankr. E.D.N.Y. 1980); *In re Keckler*, 3 B.R. 155, 157 (Bankr. N.D. Ohio 1980). Section 1325(a)(6), however, requires that the debtor "be able to make all payments under the plan and to comply with the plan."[13] Where a plan designates the debtor as disbursing agent with respect to current mortgage payments to be made under the plan, then, the bankruptcy court, in deciding whether to confirm the plan, must determine whether the debtor will be able to make those payments and to comply with the plan.[9]

The Fifth Circuit then examined several provisions of the Bankruptcy Code regarding chapter 13 and found that:

> [s]everal sections of Chapter 13 refer to payments "under the plan" or to claims "provided for by the plan," suggesting that Congress contemplated that there might be payments not "under the plan" or claims not "provided for by the plan."

[9] ***Id.*** at 486.

> Although we do not say that such statutory language must always be so read, such a reading in this case seems consistent with Congress' intent that debtors be given substantial flexibility in formulating Chapter 13 plans.[10]

The court concluded Congress wanted chapter 13 to be an attractive alternative for over-extended debtors. In doing so, Congress gave a debtor the choice of who would be the disbursing agent for mortgage claims and whether to pay fully secured mortgage claims directly. The court held that semantics should not dictate whether a chapter 13 plan is confirmed, because the debtors must decide between including a mortgage claim in or outside the plan as the determinative reason for confirming a plan. Rather, whether a claim is being paid "inside" or "outside" a chapter 13 plan should be determined under the requirements of chapter 13.

**B. The Colorado Bankruptcy Court Decisions**

The holding in ***Foster*** that direct payments to a mortgage creditor were payments under or through a chapter 13 plan received little attention until the Bankruptcy Court for the District of Colorado noted a systemic problem with chapter 13 debtors being unable to make their chapter 13 plan payment *and* direct mortgage payments to creditors. Judge Elizabeth E. Brown succinctly detailed the reoccurring problem in her district, stating:

> In the past year, however, this Court and others within this district have seen a new and disturbing trend emerge in chapter 13 cases. At the conclusion of the three- or five-year plan, the lender objects on the basis that it has not received the Direct Payments from the debtor, often over a substantial portion of the plan's term.[11]

Judge Brown also noted the non-responsiveness of mortgage lenders and questioned why any lender would chose to remain silent in the face of such substantial defaults. Judge Brown recognized that a mortgage lender could file a motion for the relief from stay or file a motion to dismiss for the non-payment of the mortgage. Judge Brown would, on occasion, ask attorneys

[10] ***Id.*** at 488 (footnotes omitted).
[11] ***In re Hoyt-Kieckhaben***, 546 B.R. 868, 870 (Bankr. D. Colo. 2016).

why mortgage lenders would not pursue their remedies at law only to be told that lenders are unable to keep track of securitized mortgages passing through so many servicers. Judge Brown also surmised that mortgage lenders were reluctant to foreclose on homes until the housing market recovered sufficiently and that possibly a number of the debtors in her court were awaiting consideration and approval of a loan modification.

Judge Brown found the reasoning of the ***Foster*** case persuasive, stating:

> Ultimately the Court finds the reasoning of the *Foster* case to be the most persuasive. Both the cure payments and regular payments while the case is pending are equal and necessary parts of a plan's treatment of a secured claim under § 1322(b)(5). It follows that any payment made to effectuate the plan's treatment of this claim is a "payment under the plan." The Court concludes that the Direct Payments were payments under the Debtor's plan that she did not complete. She is, therefore, not entitled to a discharge under § 1328(a).[12]

Judge Howard R. Tallman was the first Colorado bankruptcy judge to consider whether payments made directly to a creditor are payments under the plan.[13] The court found that, in cases where a debtor fails to make all of the debtor's post-petition mortgage payments, the express predicate for a discharge of debts under § 1328(a) is the "completion by the debtor of all payments under the plan." Judge Tallman held that a debtor was not entitled to a discharge under § 1328(a) due to her failure to make all payments under the plan. The court further found that failure to make all post-petition mortgage payments to be a material default under § 1307(c) and converted the case to chapter 7.

In ***In re Formaneck***[14], Chief Judge Michael Romero found that the failure to make more than thirty months of post-petition mortgage payments was a "material default" under the debtors' chapter 13 plan and provided sufficient cause to dismiss the debtor's case. Nonetheless,

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[12] ***Id***. at 874.
[13] *See* ***In re Gonzales***, 532 B.R. 828, 831 (Bankr. D. Colo. 2015) (citing ***In re Daggs***, No. 10-16518-HRT, Docket No. 49 (Bankr. D. Colo. January 6, 2014)).
[14] 534 B.R. 29 (Bankr. D. Colo. 2015)

the debtors argued that their default was not "material" because the failure to pay the post-petition mortgage payments did not harm the trustee's administration of the estate nor did it adversely affect unsecured creditors. The debtors also argued that, because their post-petition income vested in the debtors after confirmation, only they could choose how to use their vested assets for post-petition payments.

Judge Romero found the debtors' arguments unpersuasive. The court noted that the debtors' plan contained a provision to pay the mortgage creditor outside the chapter 13 plan and that the mortgage expense was included in the debtors' disposable income calculation. The court noted that the debtors wanted a fixed distribution to unsecured creditors while having the "unbridled discretion to utilize post-petition income as they see fit."[15] The debtors admitted that their failure to make post-petition mortgage payments was a material default, but argued that only the mortgagee should be able to move to dismiss the case because the mortgage lender was the only party harmed by the non-payment of the mortgage. ***Id***. at 34. The court found the debtors' arguments unavailing, reasoning that had the debtors sold or surrendered their residence, the debtors would have had the ability to increase their plan payment and pay more to unsecured creditors. As such, the court adopted "the uncontroverted reasoning and conclusions of other courts determining payments required to be made directly to creditors under a confirmed chapter 13 plan are 'payments under the plan,' as that term is used in § 1328(a)."[16]

**C. The Eastern District of Virginia Decisions**

The Bankruptcy and District Courts for the Eastern District of Virginia have also issued opinions regarding whether the failure to make post-petition mortgage payments is a "material

[15] ***Id.*** at 33.
[16] ***Id.*** at 34 (footnote omitted).

default" under the plan and a basis for dismissal or conversion to chapter 7. In ***In re Evans***[17], the bankruptcy court considered whether a post-petition mortgage delinquency and the non-payment of homeowner association fees are payments under the plan. The bankruptcy court adopted the reasoning of the Bankruptcy Court for the Western District of Texas in ***In re Heinzle***[18], stating:

> The Court has examined the applicable case law and concludes that Congressional intent, as formulated in the Bankruptcy Act of 1898, and subsequently analyzed in case law, holds that Chapter 13 debtors are afforded flexibility in proposing their plans, including making post-petition mortgage payments directly to their mortgage lender. In doing so, Debtors are then required to make their post-petition mortgage payments as well as their plan payments to the Trustee, all as payments pursuant to the plan.[19]

The debtor in ***Evans*** argued that the courts that have found the reasoning of ***Foster*** persuasive for purposes of denying a discharge because the debtor failed to make post-petition mortgage payments have misconstrued its holding. The bankruptcy court in ***Evans*** found the district court's ruling in ***Kessler*** to be dispositive of the issue. The ***Evans*** court recognized ***Kessler***'s holding that:

> although the matter before the bankruptcy court in *Foster* was whether to confirm a Chapter 13 plan, the holding thereof still applies: "[J]ust because *Foster* did not deal with the issue of discharge specifically does not mean that its holding is inapplicable to the present case. *Foster* definitively established that current mortgage payments made on a § 1322(b)(5) debt fall under the Chapter 13 plan when arrears for such a debt are included in the plan." *Kessler v. Wilson* (*In re Kessler*), Civil Action No. 6:15–CV–040–C, slip op. at 5 (N.D. Tex. Nov. 19, 2015) (citing *In re Foster*, 670 F.2d at 489). Judge Cummings' analysis, accordingly, clearly debunks the Debtor's theory of inapplicability.[20]

The ***Evans*** bankruptcy court also adopted the reasoning of ***Heinzle*** that Fed. R. Bankr. P. 3002.1 does not preclude the chapter 13 trustee from asserting that not all payments under the plan have been made when the debtor does not make post-petition mortgage payments. The

[17] 543 B.R. 213, 219 (Bankr. E.D. Va. 2016), *aff'd*, ***Evans v. Stackhouse***, 564 B.R. 513 (E.D. Va. 2017).
[18] 511 B.R. 69 (Bankr. W.D. Tex. 2014).
[19] 543 B.R. at 221.
[20] ***Id.*** at 222.

debtor in ***Evans*** argued that, once the trustee has served the Notice of Final Cure Payment, the trustee is adopting the position that a debtor has made all required payments under the plan. In ***Heinzle***, the court held that:

> [T]he Trustee is not taking inconsistent positions that would lead to the application of judicial estoppel. The Trustee has only certified in her Rule 3002.1(f) notice that she has made all cure payments to the mortgage lender. She cannot certify if Debtors have made all post-petition mortgage payments because she lacks personal knowledge. The Rule 3002.1(f) notice does not certify, as Debtors suggest, that the Trustee has acknowledged that all plan payments have been made, including post-petition mortgage payments. Therefore, judicial estoppel does not apply.[21]

On appeal, the District Court for the Eastern District of Virginia similarly found that the bankruptcy court was correct in its holding, stating:

> The plain language of Section 1328(a) makes clear that a court shall grant discharge "after completion by the debtor of all payments under the plan" (emphasis added). It is apparent to the Court that the phrase "all payments under the plan" would encompass both direct and trustee payments. This Court agrees with the Bankruptcy Court that had Congress intended that discharge only be granted after completion by the debtor of some payments under a confirmed plan, Congress could have easily included such language limiting the payments that needed to be completed prior to receiving a discharge. *See In re Evans*, 543 B.R. at 221. Rather, by drafting the language in this fashion, Congress made clear that this Court should grant a discharge only after completion of all of the payments under the Bankruptcy Court-confirmed plan. Thus, the plain language of the legislation is conclusive.[22]

The district court also found that the debtor-appellant's contention that the chapter 13 trustee should be estopped from seeking dismissal of a case for failure to make post-petition mortgage payments when the trustee makes the certification that all plan payments have been made pursuant to Rule 3002.1 equally unavailing:

> Furthermore, with respect to Appellant's claim that the trustee would be filing inconsistent positions by submitting a Notice of File Cure Payment without

[21] ***In re Heinzle***, 511 B.R. at 81.
[22] ***Evans v. Stackhouse (In re Evans)***, 564 B.R. 513, 525 (E.D. Va. 2017).

> confirming all direct payments, this Court notes that this argument has already been rejected by other courts. The *Heinzle* court concluded that a trustee would not be taking inconsistent positions by filing a Notice of Final Cure Payment: "The Trustee has only certified in her Rule 3002.1(f) notice that she has made all cure payments to the mortgage lender. She cannot certify if Debtors have made all post-petition mortgage payments because she lacks personal knowledge. The . . . notice does not certify . . . that the Trustee has acknowledged that all plan payments have been made, including post-petition mortgage payments," only that all trustee payments have been made. 511 B.R. at 81. The Court agrees.[23]

**D. The Texas Bankruptcy Court Opinions**

Four Texas bankruptcy courts have issued opinions regarding the application of ***Foster*** to delinquent post-petition mortgage payments and answering whether the delinquency is a material default under the plan. The Southern District of Texas in ***In re Perez***[24], first considered if the chapter 13 plan form for the Southern District of Texas that required chapter 13 debtors to include as part of the debtor's plan payment the debtor's mortgage payment so that the chapter 13 trustee could act as the disbursing agent for the mortgage payment violated the Bankruptcy Code and Rules.

In ***In re Perez***, the bankruptcy court noted that all six bankruptcy judges voted for the adoption of Local Rule 3015(b) that required chapter 13 debtors to pay their home mortgage payments through the chapter 13 trustee. Several debtors objected to the new Local Rule as contrary to the Bankruptcy Code and Rules. The bankruptcy court then conducted an exhaustive analysis of the debtors' arguments (with several debtors in a number of cases filing similar objections). The court found that the proposed plan form did not violate § 1326(a)(2) because the plan form required the trustee to hold monies until the plan is confirmed. The court found that adequate protection payments to a mortgage holder are not payments under the plan. Additionally, the court found that the form chapter 13 plan did not violate § 1322(b)(2) (the anti-

[23] ***Id.*** at 527.
[24] 339 B.R. 385 (Bankr. S.D. Tex. 2006), *aff'd sub. nom.*, ***Perez v. Peake***, 373 B.R. 468 (S.D. Tex. 2007).

modification provision) or that the proposed plan violated the priority scheme under the Code (the payment of secured claims before the payment of administrative claims). The court then analyzed ***Foster***, finding that ***Foster*** permitted the debtor to serve as the disbursing agent on mortgage claim where the debtor could justify the need for doing so, but without the sole reason being the desire to avoid the trustee's percentage fee. The court then found ***Foster*** did not preclude the court from requiring debtors to make mortgage payments directly to the trustee because, in doing so, a debtor's plan would have a greater chance for success.

The Western District of Texas then issued its opinion in ***Heinzle***[25] in which the court held that the failure to make post-petition mortgage payments under the plan is a material default and a basis for the denial of the debtor's discharge under § 1328(a), because the debtor did not make all payments under the plan. The court followed the reasoning in ***Foster***, finding that the Fifth Circuit had ruled a direct payment to a mortgage lender was nonetheless a payment under the chapter 13 debtor's plan. The holding in ***Heinzle*** applies to non-conduit mortgage cases, and the result is that a debtor who does not make direct mortgage payments to the lender is at risk of having the debtor's chapter 13 discharge denied.

The Northern District of Texas has issued two opinions applying ***Foster*** and ***Heinzle*** as well. In ***In re Ramos***[26], the court adopted the reasoning in ***Heinzle***, holding that direct mortgage payments are payments under the plan. The court then considered if a debtor may surrender a home at the end of the term of the plan in satisfaction of the debt and found that § 1329 precludes amending the plan once all plan payments have been made. The court found that the language of § 1329 did not permit the surrender of the home in that case while noting, however, that there could be circumstances where the court may permit the surrender of the home, particularly if the

[25] 511 B.R. at 81-83.
[26] 540 B.R. 580, 582-83 (Bankr. N.D. Tex. 2015).

mortgagee had lifted the stay and could have filed a deficiency claim prior to the conclusion of the case.

The Northern District of Texas also issued the underlying opinion in ***In re Kessler***[27], which was subsequently affirmed by the Fifth Circuit Court of Appeals. In the underlying opinion, Judge Robert L. Jones agreed with the ***Heinzle*** court that a payment is considered to be "under the plan" when the debt is provided for by the plan. In doing so, the court rejected the debtor's argument that only payments under the plan are those paid by the trustee. Looking to the statutory interplay, the court noted that § 1322(b)(5) provides for the curing of any default only where the plan provides for maintenance of current payments while the case is pending, while § 1328(a)(1) does not permit discharge of the long-term debt treated under § 1322(b)(5) upon completion of payments under the plan. The court then interpreted the Fifth Circuit's holding in ***Foster*** as providing "that post-petition payments of a mortgage debt, as a long-term debt, whether paid *direct* or through the trustee, are treated as paid *under the plan* when the plan also provides for the curing of pre-petition arrears on the debt."[28] Thus, the bankruptcy court in ***Kessler*** held that debtors who had not made their post-petition mortgage payments directly to the secured creditor did not complete their payments under the plan and denied them discharge.

The Fifth Circuit Court of Appeals issued a *per curiam* opinion in ***Kessler*** affirming the district court's affirmance of the bankruptcy court's denial of discharge.[29] First, the court affirmed application of ***Foster*** to the debtors' case holding that "post-petition payments of § 1322(b)(5) debts fall under the plan when pre-petition defaults are also provided for in the

[27] No. 09-60247, 2015 WL 4726794 (Bankr. N.D. Tex. June 9, 2015).
[28] ***Id.*** at *2 (citing ***Foster***, 670 F.2d at 489).
[29] ***Kessler v. Wilson (In re Kessler)***, 655 Fed. App'x 242 (5th Cir. 2016).

plan."[30] Thus, because the debtors included terms in their plan for maintaining post-petition mortgage payments, those payments are deemed payments "under the plan." Second, the court rejected the debtors' argument that ***United Student Aid Funds, Inc. v. Espinosa***[31], requires the mortgage creditor to object to entry of discharge before the court may deny discharge for failure to make post-petition mortgage payments. The court held that "nothing in ***Espinosa*** stands for the proposition that a creditor's failure to object to a requested discharge requires a bankruptcy judge to grant a discharge. Section 1328 contains no requirement that trustees or creditors must object in order for a court to deny discharge."[32]

## II. A Discussion of Remedies

Now that the Fifth Circuit Court of Appeals has affirmed that payments provided for under § 1322(b)(5) are indeed payments "under the plan," the next questions to consider are: (1) What remedies are available to the trustee or creditors?; and (2) Does ***Kessler*** mandate action by the trustee? The answers to both these questions depend on the procedural position of the case when the post-petition default is made known.

At the earliest point, a creditor may move for a lifting of the stay when the debtor becomes delinquent on post-petition maintenance payments on the long-term debt. This is a common practice that often results, where available, in agreed orders to incorporate the post-petition arrearage into the plan base being paid through the trustee. As discussed previously in this paper, however, the Colorado bankruptcy court in ***Hoyt-Kieckhaben*** noted a pattern of many mortgage lenders remaining silent and unresponsive in the face of substantial defaults. The

[30] ***Id.*** at 244 (citation omitted).

[31] 559 U.S. 260 (2010).

[32] ***Kessler***, 655 Fed. App'x at 245.

situation where a mortgage lender does not speak up about an ongoing delinquency in post-petition payments often leads to discovery of the default at the end of the case.

Upon filing of the Trustee's Notice of Final Cure Payment, a § 1322(b)(5) creditor may also file a response or objection to the Trustee's notice disputing that the debtor has made their ongoing direct mortgage payments. In such case, the parties have two options—conversion or dismissal under § 1307. The Eastern District of Virginia bankruptcy court stated the remedies simply:

> Under the Bankruptcy Code, there are three ways to conclude a Chapter 13 case: "discharge pursuant to § 1328, conversion to a Chapter 7 case pursuant to § 1307(c) or dismissal of a Chapter 13 case 'for cause' under § 1307(c)." ***Leavitt v. Solo (In re Leavitt)***, 171 F.3d 1219, 1223 (9th Cir. 1999). With the first path precluded by the Debtor's failure to complete a major component of her Plan—her failure to make her Direct Payments to the Lender in accordance with the requirements of her confirmed Plan—only two options remain ... Because the Debtor has failed to successfully complete her Plan according to its terms, the remedies available to the Trustee under the Bankruptcy Code are either conversion or dismissal of the case pursuant to 11 U.S.C. § 1307.[33]

One quasi-remedy to cure post-petition mortgage arrears was entertained by the Colorado bankruptcy court in ***In re Payer***.[34] In ***Payer***, the debtors acknowledged the accuracy of the creditor's post-petition mortgage arrearage but asked the court to hold the matter of dismissal in abeyance until a final determination was made on their application for a loan modification. The court appeared to consider a number of circumstances surrounding the loan modification application but ultimately, decided against holding the case open until resolution of the application. The court noted that the debtors had missed ten months of mortgage payments, waited to apply for the loan modification until after the end of their plan term, and that it would

[33] ***In re Evans***, 543 B.R. 213 (Bankr. E.D. Va. 2016); *see also* ***In re Heinzle***, 511 B.R. 69, 81-83 (Bankr. W.D. Tex. 2014) (finding that failure to make direct mortgage payments as provided under confirmed chapter 13 plan was grounds for dismissal under § 1307(c)).

[34] No. 10-33656-HRT, 2016 WL 5390116 (Bankr. D. Colo. May 5, 2016).

be nine months past the end of the plan term before a decision would be rendered on the application. Importantly, the Court also observed that an excess of $10,000 which was not paid to the mortgage lender had gone unaccounted for during the pendency of the plan. For these reasons, the court in ***Payer*** denied the debtors' request to abate a decision on dismissal and permitted the debtors a period of time in which to convert the case to chapter 7 or the case would be dismissed.

A final remedy that may be exercised where the post-petition default is revealed to the court after the entry of discharge is a motion to vacate the discharge. This remedy may be exercised by the parties or the court and was exercised by the Colorado court in both ***Gonzales***[35], and ***In re Doggett***.[36] Notably, in both these cases, the court took action to vacate the discharge order which it determined was improvidently granted despite the trustee and creditor's knowledge of the delinquency prior to entry of the discharge.

In asking whether the holding in ***In re Kessler*** places an onus on the trustee to move for dismissal or otherwise take action, we note that such direction is not explicitly stated in the opinion. The bankruptcy court in Colorado, however, has taken the trustee to task in that district for not moving or acting on knowledge that the debtor has not completed post-petition direct mortgage payments. In ***Gonzales***, the court heard the trustee's objections and concerns that "she should not be required to insert herself into a dispute over payments between the debtor and a direct-payment creditor."[37] The trustee argued that she lacks access to evidence required to prosecute a dismissal or conversion motion where the debtor's default involves a direct payment creditor. The court noted, however, that the trustee in ***Gonzales*** affirmatively requested entry of

[35] 532 B.R. 828 (Bankr. Dist. Colo. 2015).
[36] No. 09-35061-HRT, 2015 WL 4099806 (Bankr. D. Colo. July 6, 2015).
[37] 532 B.R. at 832.

discharge after having received a response to her 3002.1 notice which alleged post-petition default in direct payments. In further addressing the trustee's actions, the ***Gonzales*** court stated:

> The Trustee says that "[a] plan provision may include direct post-petition payments—perhaps lease payments, direct vehicle payments, HOA payments, or a direct mortgage loan which is current on pre-petition payments." The Court fully agrees that a chapter 13 trustee has no way to know if debtors have complied with obligations such as HOA dues, lease payment or maintenance of property insurance. Nothing in this Order should be taken to suggest that this Court expects a chapter 13 trustee to determine the status of such payments before making a request for discharge in a chapter 13 case. But, where a trustee has received information that the direct payment mortgage creditor alleges a substantial default, that is a matter of an entirely different character and gives rise, at minimum, to a duty to inform the Court of the alleged default. Just because certain obligations may appear in a confirmed plan, with respect to which a trustee has no knowledge of a debtor's compliance, is no justification to ignore the knowledge a trustee does have.[38]

Similarly, in another case out of Colorado, the bankruptcy court expressed frustration that—despite the filing of a "Trustee's Statement" informing the court that a mortgage direct-pay creditor had filed a response to the trustee's Rule 3002.1 notice advising the trustee of a post-petition delinquency—no party moved for relief.[39] Further, no party responded to the court's order setting response date to file a response or statement regarding whether debtors were entitled to a discharge. In the end, the court determined that it could not grant the debtors a discharge and ordered the trustee or other interested parties to file a motion seeking dispositive relief.

## III. Implication of *In re Kessler* to Other Direct Payments

One looming question stemming from the Fifth Circuit's decision in ***Kessler*** is its applicability to other direct payments by the Chapter 13 debtor that fall delinquent during the pendency of the Chapter 13 case. Does the reasoning of ***Kessler*** extend beyond post-petition

[38] ***Id.*** at 833.
[39] ***In re Abila***, No. 10-18358-HRT, 2016 WL 5389266 (Bankr. D. Colo. April 20, 2016).

mortgage arrears to include other direct payments such as domestic support obligations, vehicle payments, HOA dues, etc.? The answer to that question has not been explicitly addressed in any published opinion we could find. The language of § 1322(b)(5), however, lends itself to potential broad interpretation that the reasoning in ***Kessler*** and the other cases discussed in this paper is applicable to "any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due" that is provided for in the plan.

## IV. The Making of a National Plan Form

The start for the current movement toward a national plan came from the fallout of the Supreme Court's decision in ***Espinosa***[40], decided by the Supreme Court of the United States in March of 2010. The suggestions to formulate a national chapter 13 plan followed shortly after the ***Espinosa*** decision. To put things in perspective from a timeline point of view, big stories dominating headlines in 2010 included a new healthcare reform act being signed into law by President Obama; the BP Deepwater Horizon spill disaster leaving the Gulf of Mexico crippled; and China was launching their second moon probe.

The Advisory Committee on Bankruptcy Rules began considering the possibility of creating an official form for chapter 13 plans in 2011. In August of 2013, a proposed plan and amendments to nine related rules were published for public comment. The Advisory Committee received a large number of comments in response to the publication, including many which objected to the very idea of a national plan form. In deliberating what changes to make, if any, the Advisory committee considered whether to abandon the national plan form in whole or possibly propose the form as an optional Director's Form. Ultimately, the Advisory Committee

[40] ***United Student Aid Funds, Inc. v. Espinosa***, 559 U.S. 260 (2010) (holding that creditor had not been denied due process that would justify relief under Fed. R. Civ. P. 60(b)(4) because the creditor had notice of the plan's contents and confirmation with the opportunity to object at confirmation).

concluded that changes should be made, and the plan form should go forward as an Official Form to achieve the goal of providing greater uniformity in chapter 13 practice. Due to the numerous comments received, the Advisory Committee made several changes to the published plan form and rules.

At this point, one possible option available was to go ahead and seek final approval of the plan form and rules with the most recent changes with hope that they would go into effect in 2015. For several reasons, the Advisory Committee decided to, once again, publish and seek input on the plan form and related rules with the latest changes. At this point in our timeline in 2013, the words "twerk" and "selfie" were added to the dictionary, and the world welcomed a new pope and a new royal baby.

In August of 2014, a revised plan form and revised related rules changes were published; and once again, the Advisory Committee received many public comments. In addition to comments, the Advisory Committee received a suggested compromise solution proposed by a small group of bankruptcy judges and practitioners. The Advisory Committee considered this proposed compromise and accepted the resulting proposed amendment to Rules 3015 and 3015.1. Rule 3015.1 is commonly referred to as the "opt out" provision, allowing districts to use their own local plan form rather than the proposed national plan form, provided that the local plan form meets certain requirements. Time marches on in our timeline, and in 2014, a robot made the first-ever landing on a comet and oil prices crashed.

In October of 2015, the Advisory Committee gave tentative approval to a plan form along with the associated rule changes, with the exception of Rule 3015 and possibly, 3015.1. The Advisory Committee decided the best way to proceed with Rules 3015 and 3015.1 was to publish those proposed changes and seek public comment. The Advisory Committee received several

comments which, in general, supported the opt-out approach amidst some opposition. In our timeline of events, Pope Francis visited the United States in 2015.

The many years of hard work culminated in the Advisory Committee's unanimous approval of the nine rules amendments, the addition of new Rule 3015.1, and the new plan form at the November 14, 2016, meeting held in Washington D.C. Those items approved were the proposed amendments to Bankruptcy Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001 and 9009, along with new Rule 3015.1. Together, these will implement a new official plan form, or a local plan form equivalent, for use in cases filed under Chapter 13 of the Bankruptcy Code. The year 2016 also contained one of the most hotly-debated elections in U.S. history.

In January of 2017, the Standing Committee approved all nine rules amendments, new Rule 3015.1, and the new plan form. In March of 2017, the Judicial Conference of the United States also approved all of the nine rules amendments, new Rule 3015.1, and the new plan form. The approved changes were then adopted by the Supreme Court of the United States on April 27, 2017, and transmitted to Congress. Absent passage of a contrary law, the amendments will take effect on December 1, 2017. Congress has a statutory period of seven months to act on any rules prescribed by the Supreme Court.[41] If Congress does not enact legislation to reject, modify or defer the rules, they take effect as a matter of law on December 1, 2017.

Today, we are now seven years past the Supreme Court's ***Espinosa*** decision in our present-day timeline. President Trump has attempted to repeal the healthcare reform act signed into law by President Obama at the beginning of our timeline, Deepwater Horizon is now a movie, and China has launched their second aircraft carrier. All this occurred along with the very

[41] 28 U.S.C. §§ 2074-75 (2017).

real possibility of a set of bankruptcy rules that will require use of a uniform plan form in every chapter 13 bankruptcy.