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Bankruptcy, Just for the Rich? An Analysis of Popular Fee Arrangements For Pre-petition Legal Fees and a Call to Amend

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NOTES

Bankruptcy, Just For the Rich? An Analysis of Popular Fee Arrangements For Pre-petition Legal Fees and a Call to Amend

I. INTRODUCTION

The scenario is typical. An individual sits amid a pile of overdue bills. He calculates and recalculates only to verify what he has already suspected—his debt far exceeds his monthly income. Meanwhile, creditors and collection agencies demand payment while threatening repossession and other legal action. With no ready source of additional income, the debtor ultimately decides to file for bankruptcy. He consults an attorney, and the two agree to file a consumer no-asset Chapter 7 bankruptcy petition.[1] The lawyer then promises to use her best efforts to secure relief for the debtor. All she needs is a retainer.[2] A retainer? The debtor has no money, which is why he sought the counsel of a bankruptcy attorney in the first place. The attorney, however, needs to be paid up front for the services she renders prior to filing the bankruptcy petition.[3] Otherwise the court will likely discharge[4] those fees in the

1. A consumer no-asset Chapter 7 petition is normally filed by a debtor (or debtors) with no assets available for the trustee to administer for distribution to unsecured creditors. DAVID L. BUCHBINDER, FUNDAMENTALS OF BANKRUPTCY 111 (1991). The trustee is the individual appointed in all bankruptcy cases to represent the interests of the debtor's creditors and the bankruptcy estate. *See, e.g.*, 11 U.S.C. § 702 (1994) (permitting certain creditors to elect the Chapter 7 trustee); 11 U.S.C. § 704 (setting forth the duties of a Chapter 7 trustee). The bankruptcy estate is formed upon filing the bankruptcy petition and includes all legal and equitable interests the debtor retains in any item of property as of the date the petition is filed. MARGARET C. JASPER, BANKRUPTCY LAW FOR THE INDIVIDUAL DEBTOR 86 (1997). All estate assets are either secured or exempt. BUCHBINDER, *supra*, at 111. Secured claims relate to those assets that can be taken over by the creditor in case of debtor default, whereas unsecured claims relate to those assets for which credit has been extended based solely upon the creditor's assessment of the debtor's future ability to pay. BLACK'S LAW DICTIONARY 942, 1071 (6th ed. abr. 1991). "Consumer no-asset proceedings compromise a majority of all proceedings filed." BUCHBINDER, *supra*, at 111.

2. BLACK'S LAW DICTIONARY 1317 (7th ed. 1999) (a retainer is "a fee paid to a lawyer to secure legal representation").

3. JASPER, *supra* note 1, at 85 (stating that such services are commonly referred to as "prepetition services").

4. *Id.* at 27. Discharge refers to the process by which the bankruptcy court legally relieves a debtor of most debts incurred prior to filing the bankruptcy petition. THOMAS H. JACKSON, THE

bankruptcy proceedings, and the attorney will not get paid for her pre-petition work. Dejected, the debtor leaves without an agreement or an attorney, wishing he were wealthy enough to file for bankruptcy.

Legal counsel is indispensable if a debtor is to effectively file for bankruptcy.[5] The bankruptcy laws are complex, and legal counsel is often crucial in helping the debtor make an informed decision based on his unique circumstances and the available alternatives.[6] Unfortunately, it is unlikely that a no-asset Chapter 7 bankruptcy debtor can afford to pay a bankruptcy attorney up front.[7] This leaves bankruptcy practitioners in a predicament; without a retainer, prudent counsel will not agree to pay the requisite filing fees or to perform other necessary pre-petition services because the debtor's obligations to pay for pre-petition legal services are likely to be discharged in the bankruptcy proceeding.[8] This situation "limit[s] indigent debtors' access to bankruptcy relief and, perhaps,

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LOGIC AND LIMITS OF BANKRUPTCY LAW 225 (1986) ("Discharge not only releases the debtor from past financial obligations but also protects him from some of the adverse consequences that might otherwise result from that release. For these reasons, discharge is viewed as granting the debtor a financial fresh start."). These debts typically include general credit card debt and medical and hospital bills, among others. *See* JASPER, *supra* note 1, at 27. However, only those debts enumerated in the Bankruptcy Code (the "Code") and incurred pre-petition qualify for discharge. 11 U.S.C. §§ 523-524 (1994 & Supp. V 1999). Upon discharge, the automatic stay provision prohibits creditors from attempting to collect, assess, or recover a claim against the debtor. *See* 11 U.S.C. § 362(a)(6) (1994). "If a duly notified creditor takes action to collect on a discharged debt, the creditor may be held in contempt of court. This is so even if the creditor had previously obtained a judgment against the debtor prior to the bankruptcy filing." JASPER, *supra* note 1, at 27. Debts incurred post-petition are not dischargeable and will not fall within the automatic stay provision. 11 U.S.C. §§ 362(a)(6), 727 (1994). Consequently, they remain the debtor's responsibility, and creditors may seek payment for those debts. *In re* Hines, 147 F.3d 1185, 1191 (9th Cir. 1998) (holding provision of pre-petition legal services dischargeable under § 727).

5. WILLIAM C. HILLMAN, PERSONAL BANKRUPTCY: WHAT EVERY DEBTOR AND CREDITOR NEEDS TO KNOW 19-20 (1993) ("[I]t is generally a mistake and a false economy not to use the services of a bankruptcy lawyer.... The old saying that people who represent themselves 'have a fool for a client' is particularly true in the bankruptcy court.").

6. *Id.* at 20 ("The bankruptcy laws can be extraordinarily complicated. Many mistakes people make by trying to do it on their own often cannot be corrected later. Even the simplest choices involve uncertainties and risks if you are not thoroughly familiar with the law.").

7. Joshua D. Morse, Comment, *Public Policy Is Never a Substitute for Statutory Clarity: Rejecting the Notion that Pre-Petition Attorney-Fee Debts Are Dischargeable in Chapter 7 Bankruptcies*, 40 SANTA CLARA L. REV. 575, 582 (2000) ("Since a debtor's cash flow is likely constrained when filing bankruptcy, many debtors struggle to pay their counsel in full pre-petition.").

8. *In re* Leitner, 221 B.R. 502, 503 (Bankr. D. Neb. 1998) (holding that a Chapter 7 discharge relieved debtor of personal obligation to attorney for legal fees); *In re* Symes, 174 B.R. 114, 119 (Bankr. D. Ariz. 1994) ("Unless section 523 dictates otherwise, every prepetition debt becomes discharged under section 727.") (citing *In re* Beezley, 994 F.2d 1433, 1435 (9th Cir. 1993)).

increase[s] the number of *pro se* bankruptcy debtors,"[9] leaving ignorant debtors alone to navigate the complex waters of bankruptcy law.

The Bankruptcy Code fails to properly enable bankruptcy counsel in a no-asset Chapter 7 proceeding to guarantee payment for the legal services they render pre-petition.[10] Section 329 of the Code governs debtors' transactions with attorneys, requiring the debtor's attorney to file disclosure statements setting forth the source of her compensation and the amount of fees *"paid or agreed to be paid . . . for services rendered or to be rendered"*[11] in contemplation of the bankruptcy proceeding.[12] By its own terms, § 329 ad-

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9. *In re* PASCO, 220 B.R. 119, 120 (Bankr. D. Colo. 1998).

10. *See* NAT'L ASS'N OF ATTORNEYS GEN. BANKR. BULL., July 1998, at 21. In a Chapter 13 case, an attorney can choose to be paid under the debtor's plan. *Id.* Under a Chapter 13 plan, attorney's fees are priority claims entitled to full payment and are conditions of confirmation. *See generally* Jonathan L. Flaxer, *Getting Paid in Chapter 7 and Chapter 13 Cases, in* HOW TO HANDLE CONSUMER BANKRUPTCY CASES 1999, at 301 (PLI Com. L. & Practice Course, Handbook Series No. 792, 1999).

11. 11 U.S.C. § 329 (1994) (emphasis added).

12. Bankruptcy Rules 2016 and 2017 collectively comprise the "Disclosure Provisions" relating to § 329. GEORGE M. TREISTER ET AL, FUNDAMENTALS OF BANKRUPTCY LAW ix (1996) ("The Code itself contains mainly matters of substance; procedure by and large is governed by a separate package of Bankruptcy Rules promulgated pursuant to the Supreme Court's rule-making power."). Rule 2016 specifically requires debtor's counsel to file a disclosure statement identifying fee arrangements paid or agreed to be paid and whether an agreement 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:

> (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 compensation so paid or promised, whether any compensation previously received had 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 therefore, 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

vocates a discharge exemption for pre-petition attorney's fees; the phrase "paid or agreed to be paid for services rendered or agreed to be rendered" authorizes post-petition payment of fees incurred pre-petition.[13]

In contrast, § 727 of the Code 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[14] . . . as if the claim had arisen before the commencement of the case. . . except as provided under [section] 523."[15] Section 523 governs exceptions to discharge, and it does not explicitly exempt bankruptcy attorneys' pre-petition fees.[16]

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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.

Rule 2017 details the procedure by which a debtor's payments to his bankruptcy counsel are reviewed to determine if they are reasonable or excessive:

(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 therefore is for services in any way related to the case.

FED. R. BANKR. P. 2017.

13. 11 U.S.C. § 329(a) (1994).

14. 11 U.S.C. § 101(5)(A) (1994) (defining claim as "the 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"); Hessinger & Assocs. v. United States Tr. (*In re* Biggar), 110 F.3d 685, 687 (9th Cir. 1997) (noting that nowhere in § 523 is there a provision that excepts debts for attorneys' fees incurred in preparing bankruptcy petitions and that "[a]ll of the debtor's pre-petition debts, save those listed in section 523, are discharged in a Chapter 7 proceeding").

15. 11 U.S.C. § 727(b) provides:

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 allowed under section 502 of this title.

11 U.S.C. § 727(b) (1994).

16. Section 523 states:

(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 . . .

Thus, unpaid pre-petition attorneys fees appear to be dischargeable claims under § 727 and § 523.[17]

If § 329 were the only provision relevant in determining the dischargeability of pre-petition legal fees, those fees would be exempted from discharge, unless the court found the fees unreasonable.[18] Other Code provisions, however, particularly § 727 and § 523, must be considered when determining the dischargeability of pre-petition legal fees. Unfortunately, § 329 potentially conflicts with § 727 and § 523. At best, then, the Code creates confusion; at worst, it houses competing provisions.

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(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 education 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 institution regulatory agency. . . ;
(12) for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institution 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 Sates 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 . . . .

Id.

17. *In re* Perry, 225 B.R. 497, 498-99 (Bankr. D. Colo. 1998) (noting that the "broad discharge" under § 727(b) and the "limited exceptions to discharge" in § 523 suggest that pre-petition attorney fees are dischargeable).

18. *See supra* text accompanying note 11.

These conflicting Code provisions have forced courts to interpret and reconcile their inconsistencies. The result has been anything but ideal. In the absence of an express exemption from discharge, most courts have held pre-petition attorney fees dischargeable.[19] This has forced bankruptcy attorneys to "get creative" if they wish to get paid;[20] accordingly, they have resorted to a variety of pre-petition fee arrangements in an effort to sidestep discharge.[21] Unfortunately, the legality of these fee arrangements has varied among jurisdictions.[22] Moreover, the decisions frequently turn on fact patterns so unique that predicting the court's decision in a given case remains a challenge. This uncertainty has led many attorneys to refuse to serve as counsel for debtors unable to pay their pre-petition legal expenses in full and in advance.[23] Consequently, many debtors either file *pro se*[24] or do not file at all—and they continue to watch their financial problems spiral out of control.

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19. *See, e.g., In re* Hines, 147 F.3d 1185, 1188 (9th Cir. 1998); *In re* Leitner, 221 B.R. 502, 503 (Bankr. D. Neb. 1998); *In re* Martin, 197 B.R. 120, 126-27 (Bankr. D. Colo. 1996); Hessinger & Assocs. v. Voglio (*In re* Voglio), 191 B.R. 420, 422 (D. Ariz. 1996). *But see, e.g., In re* Perry, 225 B.R. 497, 500-01 (Bankr. D. Colo. 1998); *In re* Mills, 170 B.R. 404, 410 (Bankr. D. Ariz. 1994). The later case of *In re Biggar* effectively overruled *Mills*. *In re Biggar*, 110 F.3d at 687.

20. *See In re* Nieves, 246 B.R. 866, 873 (Bankr. E.D. Wis. 2000) (acknowledging that although the absence of an express exemption from discharge for pre-petition legal fees may make it difficult for debtors to obtain legal counsel, "[t]here are some ways, short of legislation, which can be utilized to overcome this obstacle[;] . . . [t]here may be other creative solutions which will work [as well]"); *In re* Haynes, 216 B.R. 440, 444 (Bankr. D. Colo. 1997).

21. *See infra* Part II; *see also, e.g., In re* PASCO, 220 B.R. 119, 120 (Bankr. D. Colo. 1998) (acknowledging that attorneys have attempted to bypass caselaw).

22. *Compare, e.g., In re Biggar*, 110 F.3d at 687-88 (opposing the use of installment agreements to secure pre-petition legal fees), *with In re* Perez, 177 B.R. 319, 321-22 (Bankr. D. Neb. 1995) (permitting the use of installment agreements). *Compare, e.g., In re* Mahendra, 131 F.3d 750, 759 (8th Cir. 1997) (holding that attorney's lien on client's real property constitutes a conflict of interest justifying denial of or reduction in attorney compensation), *and In re* Ragar, 3 F.3d 1174, 1180 (8th Cir. 1993) (holding that the taking of a pre-petition security interest in debtor's property creates a conflict of interest, thereby disqualifying the attorney from representing the debtor), *with In re* Leitner, 221 B.R. 502, 504 (Bankr. D. Neb. 1998) (finding that a debtor's lawyer is not disqualified from representing the debtor simply because he is a secured creditor).

23. *See, e.g.*, Posting of O. Max Gardner III, omaxii@shelby.net, to www.abiworld.org (Aug. 29, 1999) ("I have never filed a Chapter 07 case until the full amount of the agreed fee has been paid.") (responding to James P. Caher, *Visa—It's Everywhere You Want to Be. How About Bankruptcy Court?*, *available at* www.abiworld.org/newslet/99caher625.html (June 25, 1999) (copy on file with author)); Posting of Julie Stodolka, jfs349@aol.com, to www.abiworld.org (Aug. 31, 1999) ("And the risk of non-payment is quite real—Debtors have money problems, and their lawyers are well-advised to be paid up front.") (responding to Caher, *supra*).

24. BLACK'S LAW DICTIONARY 1237 (7th ed. 1999) (defining pro se as "one who represents oneself in a court proceeding without the assistance of a lawyer"). Debtors filed pro se in 5% of the Chapter 7 cases analyzed in an ongoing study at Creighton University School of Law. Marianne B. Culhane & Michaela M. White, *Reaffirmation and Discharge Problems in Consumer Financial Services Litigation 1999*, at 703, 722 n.18 (PLI Corp. Litig. Practice Course, Handbook Series No. 1114, 1999).

This Note addresses and responds to the confusion caused by the effects of the conflicting Code provisions. It proposes that Congress amend § 523 of the Bankruptcy Code to include pre-petition debtor's attorney's fees in the list of items exempted from discharge.[25] Such an express provision would render costly litigation of this issue moot,[26] thereby allowing bankruptcy attorneys to concentrate more directly on their clients' needs. It would also preempt many of the conflict of interests challenges that arise under some of the more popular non-guaranteed fee arrangements.[27] Furthermore, an exemption for pre-petition legal fees would encourage counsel to represent even the poorest of debtors by removing the risks associated with representation of those who might be unable to pay their pre-petition legal expenses in full and in advance. Under such an exemption, attorneys would be allowed to structure fee agreements that enable debtors to pay their pre-petition legal fees post-petition. Increased availability of representation would provide more debtors with access to the bankruptcy system, affording them more effective advice and enabling them to make informed financial decisions.[28] Ultimately, this would maximize debtor wealth by reducing the threat of creditor collection and granting debtors a financial fresh-start.[29]

Part II of this Note discusses the four most popular fee arrangements currently employed by attorneys attempting to circumvent the discharge of their pre-petition services. Part III scrutinizes these four fee arrangements, highlighting the shortcomings of each. The Note concludes in Part IV by calling on Congress to address the concerns and confusion that have echoed throughout bankruptcy courts. It recommends that Congress amend § 523 of the Bankruptcy Code to exempt unpaid, pre-petition bankruptcy attorney's

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25. In March 2001, Congress passed the Bankruptcy Reform Act which President George W. Bush is expected to sign. The Bankruptcy Abuse and Prevention Consumer Protection Act of 2001 (H.R. 333); The Bankruptcy Reform Act of 2001 (S. 420). The new legislation did not address the indigent debtors' difficulties accessing the bankruptcy system, nor did it add pre-petition debtors attorney's fees to the list of those items exempt from discharge under Section 523. To the contrary, the legislation is much more pro-creditor, making it very difficult for debtors to file bankruptcy, particularly Chapter 7. Philip Shenon, *Hard Lobbying on Debtor Bill Pays Dividend*, N.Y. TIMES, March 13, 2001, *available at* http://www.nytimes.com/2001/03/13/politics/13LOBB.html?searchpv=site09.

26. *In re* Hines, 147 F.3d 1185, 1186 (9th Cir. 1997) (noting that because the stakes in any individual Chapter 7 case tend to be so low in relation to the cost of litigating the dischargeability of attorneys' fees, any controversy that does arise rarely finds its way to the courts).

27. For a discussion of this conflict of interest, see *infra* Part III.A.1 and Part III.C.

28. *See* David A. Lander, Essay, *A Snapshot of Two Systems That Are Trying to Help People in Financial Trouble*, 7 AM. BANKR. INST. L. REV. 161, 163 (1999).

29. Caher, *supra* note 23.

fees from discharge, thereby opening the doors of the bankruptcy system to even the poorest of debtors.

II. FOUR PRIMARY FEE AGREEMENTS FOR PRE-PETITION LEGAL SERVICES IN A NO-ASSET CHAPTER 7 PROCEEDING

A. Reaffirmation of Debt Incurred Pre-petition

1. Historical Background

Reaffirmation is an agreement in which a debtor promises to continue payments on debts incurred pre-petition until such debts have been paid in full.[30] "The Bankruptcy Acts of 1800, 1841, 1867, and 1898 did not contain any provisions limiting or prohibiting the reaffirmation of dischargeable debts. Reaffirmation agreements were matters solely between the debtor and the creditor,"[31] and they were left to the realm of general contract law.[32] The absence of regulation led to widespread abuse by creditors, who frequently coerced debtors into paying their debts.[33] In recognition of such abuse, the 1971 Commission on Bankruptcy Laws of the United States[34] drafted legislation disallowing reaffirmation agreements except those assuming the form of redemption agreements[35] or those made to settle dischargeability litigation.[36] Congress at first rejected this prohibitive proposal, but eventually it took heed of the dangers posed by reaffirmation. Ultimately, in 1978, Congress drafted a new

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30. JASPER, *supra* note 1, at 16.

31. ROBERT A. HESSLING, REAFFIRMATION AND REDEMPTION 139 (1994).

32. DOUGLAS G. BAIRD, THE ELEMENTS OF BANKRUPTCY 49 (1992); Marianne B. Culhane & Michaela M. White, *Debt After Discharge: An Empirical Study of Reaffirmation*, 73 AM. BANKR. L.J. 709, 715 (1999).

33. HESSLING, *supra* note 31, at 24; Culhane & White, *supra* note 32, at 715.

34. HESSLING, *supra* note 31, at 42. Members of the commission were appointed by the President, the Chief Justice of the Supreme Court, and members of Congress. The Commission began its study in 1971, ultimately presenting its results to Congress on July 30, 1973. *Id.*

35. Redemption agreements give a Chapter 7 consumer debtor the right to pay a lump sum to a secured creditor for the amount equal to the value of any collateral. A court may need to hold a valuation hearing to determine the adequacy of the redemption amount. Section 722 of the Bankruptcy Code permits redemption agreements. *Id.* at 604.

36. In 1973, the Bankruptcy Commission warned Congress that: "Substantial evidence of the use of reaffirmations to nullify discharges has come to the Commission's attention. To the extent that reaffirmations are enforceable, the 'fresh start' goal of the discharge . . . is frustrated. Reaffirmations are often obtained by improper methods . . . ." H.R. REP. NO. 95-595, at 116 (1977). The commission also recommended that "reaffirmations of unsecured debts be unenforceable and that reaffirmations of secured debts be enforceable only to the extent of the fair market value of the collateral as of the date of the petition." HESSLING, *supra* note 31, at 140.

Bankruptcy Act which required a court determination that reaffirmation agreements did not impose undue hardships upon debtors and that they served debtors' best interests.[37] As further protection, the 1978 Code allowed debtors to rescind reaffirmation agreements up to thirty days after they became effective.[38] These strict provisions reflected congressional distrust of reaffirmations and "a desire to provide debtors with protection that did not exist under the Bankruptcy Act" of 1898.[39]

In 1984, Congress further revised the Code's reaffirmation provisions, implementing more demanding requirements. Congress intended these amendments to remind debtors of the voluntary nature of reaffirmation agreements and to inform them of their right to discharge certain debts under the Bankruptcy Code.[40] The amendments extended the rescission period from thirty to sixty days,[41] mandated discharge hearings,[42] required court approval of reaffirmations where the debtor was not represented by counsel during negotiations or throughout the bankruptcy process,[43] and directed not only that reaffirmation agreements inform debtors of the voluntary nature of such agreements, but also that they present such information in a clear and conspicuous statement.[44]

2. Reasons for Reaffirming

A close look at reaffirmation reveals a variety of reasons why debtors choose to reaffirm debts. With respect to unsecured debts, reaffirmation typically provides little or no benefit to the debtor because the debtor receives no new consideration for the promise to repay, and the unsecured creditor has no right to penalize the

37. *See* 11 U.S.C. § 524(c)-(d) (1994); BAIRD, *supra* note 32, at 49; Culhane & White, *supra* note 32, at 715.

38. *See* 11 U.S.C. § 524(c)(4); S. REP. NO. 65, at 59-60 (1983) (noting that reaffirmation agreements become effective immediately upon their filing with the court, subject to the court's review); BAIRD, *supra* note 32, at 50.

39. HESSLING, *supra* note 31, at 141; *see also In re* Smurzynski, 72 B.R. 368, 370 (Bankr. N.D. Ill. 1987) (noting that the strict limitations the 1978 Code placed on reaffirmation agreements reflected an effort "to prevent the debtor from being coerced into signing the agreement and to enable the debtor to be fully aware of its contents").

40. H.R. REP. No. 835, at 37 (1994).

41. HESSLING, *supra* note 31, at 141.

42. *Id.* at 143-44.

43. *Id.* at 141.

44. *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 103(a), 108 Stat. 4108 (1994).

debtor for defaulting by repossessing his property.[45] A debtor with a special relationship with her creditor, however, may feel a moral obligation to reaffirm.[46] For example, the creditor may be a relative or a friend of the debtor, thus creating even greater responsibility to reaffirm.[47] The debtor could also choose to reaffirm in order to protect the loan guarantor or co-signer; if the debt is discharged, the creditor may attempt to collect the debt from the non-discharging party, thereby forcing the remaining guarantor to bear the entire financial burden.[48] Alternatively, the need for additional credit or loans may also cause a debtor to reaffirm an existing debt.[49] By discharging all debts, the bankruptcy court relieves the debtor of his obligation to repay them. Declaring bankruptcy, however, may prevent the debtor from obtaining future credit. To avoid such a negative outcome, the debtor may wish to reaffirm.[50]

With respect to secured debts, a debtor may seek to reaffirm in order to prevent repossession or foreclosure of property, such as a home, a car, or furniture. A secured creditor may be willing to forego repossession of the property, but only if the debtor reaffirms the debt.[51] The cost of replacing such items may be so extraordinary that reaffirmation may be more financially advantageous than discharge.[52] Moreover, retention of such property is often essential if

45. MICHAEL J. HERBERT, UNDERSTANDING BANKRUPTCY 230 (1995) ("It is generally believed that reaffirmations are rarely appropriate for anything other than secured debt. Seldom will the debtor receive benefits from paying an unsecured claim that are in any way equivalent to the cost of the payments."); *see also* Culhane & White, *supra* note 24, at 711; Karen Gross, *As We Fleece Our Debtors*, 102 DICK. L. REV. 747, 748 (1998) (citing the Bankruptcy Review Commission's 1997 Final Report which detailed concerns about the number of debtors reaffirming their debts and recommended absolute elimination of unsecured reaffirmation agreements).

46. *See* Jean Braucher, *Counseling Consumer Debtors to Make Their Own Informed Choices—A Question of Professional Responsibility*, 5 AM. BANKR. INST. L. REV. 165, 191 (1997) ("A discharge from a legal obligation does not necessarily mean a discharge from a moral obligation, and debtors may feel guilty about getting a discharge.").

47. BAIRD, *supra* note 32, at 49.

48. Sheldon Barasch, *Reaffirmation*, *in* HOW TO HANDLE CONSUMER BANKRUPTCY CASES 1999, at 235, 237 (PLI Com. L. & Practice Course, Handbook Series No. 792, 1999). If a debtor files for bankruptcy and lists a debt for which he has a co-signer, that co-signer will be held responsible for that debt after the debtor is discharged, even if the co-signer never received the underlying consideration. Therefore, the debtor may wish to reaffirm the debt to protect the co-signer. *Id.*

49. HESSLING, *supra* note 31, at 142; *see also* Culhane & White, *supra* note 24, at 711.

50. *See* Barasch, *supra* note 48, at 238.

51. *See* BAIRD, *supra* note 32, at 49.

52. *See id.* For example, a debtor may be unable to purchase a new car after he files a no-asset Chapter 7 claim due to his poor credit. It may be in his best interest to reaffirm the debt and continue paying his creditor in order to keep his car. *Id.*

the debtor is to gain a "fresh start"[53] following the bankruptcy proceeding.[54]

3. Practical Application Today

In a typical no-asset Chapter 7 proceeding, the judge discharges all debts in accordance with the discharge requirements set forth in § 727 and § 523.[55] Dischargeable debts generally include credit card debt[56] and medical and hospital bills, but they can also include attorneys' fees incurred prior to filing the bankruptcy petition.[57]

The Code permits the debtor to voluntarily agree to repay a particular debt.[58] No new legal obligation is created if the reaffirmation does not comply with the requirements set forth in § 524(c) and § 524(d);[59] the creditor will have no remedy against the debtor under contract law because no new consideration is offered, nor will he find a remedy under bankruptcy law because the agreement does not comport with the Code's requirements. The debtor creates a legally enforceable obligation, however, if he complies with the Bankruptcy Code's provisions and obtains court approval of a reaffirmation agreement.[60]

Legal reaffirmation is one approach attorneys often take to guarantee payment of services rendered pre-petition. Typically, the situation arises when the debtor informs his attorney that he cannot provide her with a retainer to pay for work performed pre-petition. The attorney, still wishing to represent the debtor in the bankruptcy proceeding, suggests that the debtor reaffirm his debt

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53. *See* HERBERT, *supra* note 45, at 3 ("[B]ankruptcy is seen as a financial rebirth; after the 'estate' . . . is administered, and the debts discharged, the debtor begins a new financial life, unencumbered by the debts of the old."); Hessling, *supra* note 31, at 142.

54. Culhane & White, *supra* note 24, at 711. *But see* Gross, *supra* note 45, at 758 (citing the Bankruptcy Review Commission's 1997 Final Report which recommended the elimation of secured reaffirmation agreements where the value of the collateral secured is under $500).

55. *See* 11 U.S.C. §§ 523, 727 (1994 & Supp. V 1999); FED. R. BANKR. P. 4004, 4007 (allowing a trustee or creditor to file a complaint and claim that there are reasons for denying discharge). If no objecting complaints are filed, the court must issue a discharge order upon expiration of the sixty days following the § 341 meeting. *Id. See also* JASPER, *supra* note 1, at 27.

56. The Code specifically refuses to discharge credit card debt if the debtor incurred that debt with the intent to hinder, delay, or defraud the credit card company. 11 U.S.C. § 548(a)(1)(A) (1994 & Supp. V 1999); *see also* HILLMAN, *supra* note 5, at 81.

57. 11 U.S.C. § 522 (1994); JASPER, *supra* note 1, at 27.

58. 11 U.S.C. § 524(c) (1994).

59. 11 U.S.C. § 524(c)(3).

60. 11 U.S.C. § 524(c)-(d).

by agreeing to continue payments until the debt has been paid in full. To ensure the legal enforceability of such an agreement, the debtor must adhere to the provisions of § 524(c)[61] and § 524(d)[62] of

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61. 11 U.S.C. § 524(c) 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 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 an 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).

62. 11 U.S.C. § 524(d) provides:

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 arrangement 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—

the Code. Under these provisions, the debtor must file a written reaffirmation agreement with the court prior to entry of the debtor's discharge.[63] The agreement must contain a "clear and conspicuous statement" advising the debtor that he may rescind the reaffirmation at any time prior to receiving a discharge, or sixty days after the agreement is filed, whichever comes later.[64] Equally critical is the attorney's responsibility to file a declaration or affidavit representing that the debtor's agreement is knowing and voluntary and that it complies with the Code.[65] The court then holds a hearing to determine whether the relevant Code provisions have been satisfied, and whether the debtor understands that the reaffirmation agreement is a voluntary one.[66] If the court approves the reaffirmation agreement, the legal obligation to pay the debt remains unless the debtor rescinds the agreement prior to discharge or within sixty days of court approval.[67]

B. Characterization As Post-Petition Fees

Agreements allowing pre-petition fees to be paid post-petition are the second type of fee arrangements employed by bankruptcy attorneys in order to evade the Code's discharge provisions. If a bankruptcy attorney permits post-petition payment, she typically structures the fee agreement in one of three ways.

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(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).

63. 11 U.S.C. § 524(c)(1); BUCHBINDER, *supra* note 1, at 125.

64. 11 U.S.C. § 524(c)(2); BUCHBINDER, *supra* note 1, at 125.

65. *See* 11 U.S.C. § 524(c)(3); BUCHBINDER, *supra* note 1, at 125.

66. *See, e.g., In re* PASCO, 220 B.R. 119, 123 (Bankr. D. Colo. 1998); *In re* Perez, 177 B.R. 319, 321-22 (Bankr. D. Neb. 1995).

67. *See* 11 U.S.C. § 524(c)(4).

1. Post-Dated Checks

The first of these methods involves the use of post-dated checks.[68] In this type of fee arrangement, the debtor presents the attorney with post-dated checks before the attorney files the bankruptcy petition.[69] This method recasts pre-petition legal fees as having been incurred post-petition;[70] it is intended to give the impression that the debtor is paying the attorney for work performed post-petition—a debt which is non-dischargeable under the Code.[71] Despite the risk that post-dated checks might eventually bounce, they nonetheless provide the attorney with some hope of collecting a debt that would otherwise be discharged in the bankruptcy proceeding.[72] More importantly, post-dated checks enable the debtor to secure the legal advice and representation he might otherwise be forced to go without. Furthermore, post-dated checks allow the debtor to spread out payment of his legal fees over time, thereby eliminating the financial burden of a single, lump-sum payment.[73]

2. Installment Contracts

The installment contract is another popular fee arrangement that artificially characterizes pre-petition fees as having been incurred post-petition.[74] Installment contracts are akin to post-dated checks in that they allow for payment of attorney's fees over a period of time following the bankruptcy filing.[75] The primary differ-

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68. *E.g., In re* Jastrem, 224 B.R. 125, 125 (Bankr. E.D. Cal. 1998) (holding that a debt to attorney for pre-petition services is subject to discharge); *In re* Symes, 174 B.R. 114, 114 (Bankr. D. Ariz. 1994) (holding that pre-petition fee agreements requiring debtors to execute post-dated checks to be cashed post-petition, or requiring execution of pre-petition promissory notes to be collected post-petition, constitute dischargeable claims).

69. *See In re Jastrem*, 224 B.R. at 126 (requiring debtor's counsel to disclose whether he had requested or received any promissory notes or post-dated checks).

70. *See In re Symes*, 174 B.R. at 118 (debtor's counsel arguing that when payment is supposed to occur by post-dated checks, the claim, if any, arises when the checks are not honored).

71. Caher, *supra* note 23.

72. *See, e.g., In re Jastrem*, 224 B.R. at 126 n.2 (noting that use of post-dated checks was a common business practice for debtor's counsel).

73. *See id.* (debtor executed four separate checks, each in the amount of $250.00, to be cashed every two weeks so as to ease the burden of paying $1,000 in attorney's fees).

74. *See, e.g.*, Hessinger & Assocs. v. United States Trustee (*In re* Biggar), 110 F.3d 685, 686 (9th Cir. 1997); Hessinger & Assocs. v. Voglio (*In re* Voglio), 191 B.R. 420, 421 (D. Ariz. 1996); *In re* Perez, 177 B.R. 319, 320 (Bankr. D. Neb. 1995).

75. *See In re Biggar*, 110 F.3d at 827 (describing an installment arrangement which provided that the debtor would pay for pre-petition services in monthly installments after the attorney filed the bankruptcy petition).

ence lies in the varying means and timing of these payments. Post-dated checks are written and given to the attorney prior to acceptance of the debtor's case. They will subsequently be cashed in accordance with the dates on the checks, leaving the debtor no further control over payment.[76] In contrast, an installment contract is signed pre-petition, but it does not require the debtor to immediately convey the negotiable instrument; thus the debtor retains more control over the timing of his payments.[77]

3. Skeletal Cases

A third popular fee agreement disguising pre-petition legal fees as post-petition fees is commonly referred to as the skeletal case agreement.[78] Here, the debtor agrees to advance the attorney a nominal fee,[79] in return for which the attorney agrees to perform the minimal pre-petition work required in order to file a bankruptcy petition; the bulk of the legal work will then be completed post-petition.[80] Deferring work in this way allows the attorney to sidestep the threat of discharge; fees incurred for work performed post-petition are not subject to discharge under bankruptcy law.[81] This benefits both the debtor and attorney in much the same manner as do post-dated checks and installment contracts.

C. Pre-Petition Security Interests

A pre-petition security interest is another popular fee arrangement. Here, the debtor grants his attorney a security interest in an item of his property to secure a promissory note executed in

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76. This statement assumes that the debtor's bank account will retain funds sufficient to cover such checks when cashed.

77. Some debtors may find this payment method preferable to immediate conveyance because in certain months the debtor may have funds insufficient to pay for anything beyond the bare necessities. If the lawyer cashes a payment check that month, the debtor and his family may find themselves in dire financial straits. In contrast, using an installment contract allows the debtor a degree of leverage to renegotiate that month's payment with his attorney before the money comes out of his bank account.

78. *See, e.g., In re* Haynes, 216 B.R. 440, 442 (Bankr. D. Colo. 1997) (noting that the debtor's attorney employed this fee arrangement so as to avoid discharge); Caher, *supra* note 23.

79. *See, e.g. In re Haynes*, 216 B.R. at 444 (noting that debtors must pay for all pre-petition legal services before filing their bankruptcy case).

80. *See id.*

81. *See id.*

favor of his attorney.[82] To satisfy his obligations under the note, the debtor makes installment payments to the attorney.[83] As a secured creditor, the attorney may foreclose on the lien in the event of default.[84] In consideration for the promissory note, the attorney typically agrees to represent the debtor in all aspects of his Chapter 7 case.[85]

Security interests are attractive to bankruptcy attorneys for several reasons. First, the security interest provides an added incentive to debtors to pay off their debt; if they wish to keep their property, repayment of the debt will become a priority.[86] Second, if the debtor defaults on the note, the security interest provides the attorney with a form of collateral compensation.[87] Third, the attorney's status as a secured creditor allows the lien to pass through bankruptcy;[88] it remains enforceable as long as the property is exempt under bankruptcy law[89] and a Rule 2016[90] statement discloses the details of the agreement.[91]

D. Credit Cards

Using a credit card to pay pre-petition attorney fees is the latest type of fee arrangement to which attorneys have resorted.[92] Access to a credit card typically affords a debtor two options: (1) to take out a cash advance to pay the attorney's pre-petition fees; or (2) to use the credit card for direct payment to the attorney.

Because this payment method is so new, there are neither precedent cases nor Code provisions specifically addressing its legality or its impact on dischargeability; and the few cases that do speak to the issue do little to fashion an appropriate standard. Much can be inferred from the caselaw governing everyday credit card transactions conducted by debtors just prior to filing for bank-

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82. *See, e.g., In re* Leitner, 221 B.R. 502, 503 (Bankr. D. Neb. 1998); *In re* Perez, 177 B.R. 319, 320 (Bankr. D. Neb. 1995); *see also* JASPER, *supra* note 1, at 13.

83. *See, eg., In re* Leitner, 221 B.R. at 503.

84. U.C.C. § 9-502 (2000); U.C.C. § 9-601 (effective July 1, 2001); HERBERT, *supra* note 45, at 27 ("[T]he key feature of this property interest outside of bankruptcy is that the secured party may seize and sell the property when the debtor defaults.").

85. *See, e.g., In re* Leitner, 221 B.R. at 503; *In re* Perez, 177 B.R. at 319.

86. *See supra* note 84.

87. BUCHBINDER, *supra* note 1, at 361.

88. 11 U.S.C. § 725 (1994).

89. *See* 11 U.S.C. § 522 (1994) (setting forth property exempted under bankruptcy law).

90. *See supra* note 12 (quoting Rule 2016).

91. *See* 11 U.S.C. § 362(b)(3) (Supp. V 1999); JASPER, *supra* note 1, at 12-13.

92. *See, e.g., In re* Frazier, 231 B.R. 454, 455 (Bankr. D. Conn. 1999); Citibank (South Dakota) v. Meeks (*In re* Meeks), 139 B.R. 559, 561 (Bankr. M.D. Fla. 1992).

ruptcy. Here, courts generally have found the Code's fraud-related provisions relevant and applicable;[93] specifically, they have held § 523(a)(2)(A)[94] to be the most relevant provision. This section states that an individual shall not be discharged from any debt "for money, property, services, or an extension, renewal or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition."[95] According to the Code, courts should presume that the debt is nondischargeable if the debtor acquired luxury goods or services, or obtained a cash advance under an open end credit plan, within sixty days of filing bankruptcy.[96] When this is the case, the debtor has the burden of rebutting the presumption of fraud if he wishes to discharge the debt.[97] This approach has provided a preliminary analytical blueprint for the few courts considering the legality and dischargeability of credit card payment for a bankruptcy attorney's pre-petition legal fees.[98]

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93. *See, e.g.*, Chase Manhattan Bank v. Sparks (*In re* Sparks), 154 B.R. 766, 768 (N.D. Ala. 1993); *In re Meeks*, 139 B.R. at 559.

94. 11 U.S.C. § 523 (Supp. V 1999).

95. 11 U.S.C. § 524(a)(2)(A) (1994).

96. *See* 11 U.S.C. § 523(a)(2)(C); H.R. REP. NO. 103-834, at 40 (1994).

97. *See* H.R. REP. NO. 103-834, at 40 (1994).

98. *See, e.g.*, Am. Express Travel Related Servs. Co. v. Hashemi (*In re* Hashemi), 104 F.3d 1122, 1125-26 & n.2 (9th Cir. 1996) (applying the *Dougherty* factors as set forth *In re* Dougherty, 84 B.R. 653 (9th Cir. BAP 1988)). The *Dougherty* factors are:

1) The length of time between the charges made and the filing of bankruptcy;
2) Whether or not an attorney has been consulted concerning the filing of bankruptcy before the charges were made;
3) The number of charges made;
4) The amount of the charges;
5) The financial condition of the debtor at the time the charges were made;
6) Whether the charges were above the credit limit of the account;
7) Whether the debtor made multiple charges on the same day;
8) Whether or not the debtor was employed;
9) The debtor's prospects for employment;
10) Financial sophistication of the debtor;
11) Whether there was a sudden change in the debtor's buying habits; and
12) Whether the purchases were made for luxuries or necessities.

In re Dougherty, 84 B.R. at 657.

The court also noted that none of these factors are dispositive; courts may simply use them to determine if the debtor had an overall fraudulent intent. *Hashemi*, 104 F.3d at 1125; *see In re Sparks*, 154 B.R. at 769 (finding the debtor liable for fraudulently incurring debts, based on a determination that the debtor should have known that he had no ability to repay the debts he continued to incur because of his slight income and certain court judgements entered against him).

III. INADEQUACIES OF THE POPULAR PAYMENT AGREEMENTS

A. Reaffirmation

Of the four payment arrangements discussed in this Note, reaffirmation is currently the most accepted means by which attorneys can avoid a court-ordered discharge of their pre-petition fees.[99] This is largely because the Code explicitly permits debtors to enter into reaffirmation agreements, provided that the attorney and debtor adhere to the requirements set forth in § 524(c) and § 524(d) of the Code.[100] Attorneys find reaffirmation agreements desirable because they are legally enforceable as long as the requirements of § 524(c) and § 524(d) are met.[101] Debtors also find reaffirmation agreements beneficial because they allow the debtor to meet his moral obligation to repay his debt.[102] Satisfaction of this obligation creates an incentive for the debtor's attorney to provide sound legal advice and to adequately handle the bankruptcy proceeding. Yet, despite the benefits it provides to both attorneys and debtors, and although it appears to be the most effective means currently employed to avoid discharge, reaffirmation by no means guarantees payment for pre-petition legal services.

1. Court Approval Required

The first problem with reaffirmation agreements between a debtor and his bankruptcy attorney is that their enforceability is conditioned upon court approval.[103] Such approval is required because the attorney is a party to the agreement; representation in pursuit thereof thus creates an unacceptable conflict of interest.[104] Procuring court approval of reaffirmation agreements therefore, proves much more onerous than one might initially expect.[105] In

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99. *See In re* PASCO, 220 B.R. 119, 123 (Bankr. D. Colo. 1998) (noting that a reaffirmation agreement is a viable solution to the problem created by deeming unpaid pre-petition legal fees dischargeable); *In re* Symes, 174 B.R. 114, 117 (Bankr. D. Ariz. 1994).

100. *See* 11 U.S.C. §§ 524(c), 524(d) (1994); *In re* Perez, 177 B.R. 319, 321-22 (Bankr. D. Neb. 1995).

101. *See* 11 U.S.C. § 524(c); *In re* Perez, 177 B.R. at 322.

102. *See* BUCHBINDER, *supra* note 1, at 123.

103. *See In re* Leitner, 221 B.R. 502, 505 (Bankr. D. Neb. 1998).

104. *See In re PASCO*, 220 B.R. at 123 (citing *In re Perez*, 117 B.R. at 322); Hessinger & Assocs. v. Voglio (*In re* Voglio), 191 B.R. 420, 425 (D. Ariz. 1996).

105. *In re* Nieves, 246 B.R. 866, 873 (Bankr. E.D. Wis. 2000) (noting that these reaffirmation agreements may lead to conflict of interest problems which "may well necessitate the debtor

most cases, the inherent conflict of interest obligates the court to employ heightened scrutiny before issuing its approval.[106]

This enhanced judicial scrutiny is employed during the actual reaffirmation hearing. In this proceeding the court considers the debtor to be without legal representation.[107] The Code requires the court to inform the debtor that the Code does not require a reaffirmation agreement.[108] In addition, the court must make certain that the debtor understands the legal and financial ramifications of entering into such an agreement.[109] Most importantly, the court must determine whether reaffirmation imposes an undue hardship upon the debtor and whether the agreement serves the debtor's best interest.[110]

Demonstrating both a lack of hardship and that reaffirmation is in the debtor's best interest is the greatest challenge for bankruptcy attorneys in the reaffirmation hearing.[111] If the reaffirmation agreement places no restrictions on the debtor's statutory right to rescind, the court typically will not find undue hardship.[112] "A more difficult question, [however,] is whether the reaffirmation is in the 'best interest' of the debtors as required by § 524(c)(6)(A)(ii)."[113] Arguably, it is never in the best interest of a bankruptcy debtor to reaffirm any unsecured pre-petition debt, including attorney's fees, because the debtor can always repay any pre-petition debt without a reaffirmation agreement.[114] Moreover, by the time a reaffirmation hearing is held, the debtor is likely to have already received the legal assistance he needed.[115] Thus, it is

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obtaining independent counsel in connection with . . . the agreement . . . . [and] would involve additional expenses which the debtor may not be able to pay").

106. *See In re PASCO*, 220 B.R. at 123 (quoting *In re Perez*, 177 B.R. at 321-22). The Code does not subject a reaffirmation agreement to heightened scrutiny if the debtor is represented by independent counsel during the reaffirmation negotiations. *See id.* at 123 n.7.

107. *See id.* at 123.

108. 11 U.S.C. § 524(d)(1)(A) (1994); *In re PASCO*, 220 B.R. at 123.

109. 11 U.S.C. § 524(d)(2)(B); *In re PASCO*, 220 B.R. at 123.

110. 11 U.S.C. §§ 524(c)(6), 524(d)(2); *In re PASCO*, 220 B.R. at 123.

111. *See In re PASCO*, 220 B.R. at 123 n.7.

112. *See In re* Nidiver, 217 B.R. 581, 584 (Bankr. D. Neb. 1998); *In re Perez*, 177 B.R. at 319.

113. *In re Nidiver*, 217 B.R. at 584; *see also* 11 U.S.C. § 524(c)(6)(A)(ii):

> (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 . . . (ii) in the best interest of the debtor.

114. *In re Nidiver*, 217 B.R. at 584 ("It may be reasonable and necessary for rehabilitation for a bankruptcy debtor to reaffirm a secured debt in order for the debtor to retain collateral. In the instance of an unsecured debt, it is not so clear that the debtor will receive any benefit from such reaffirmation.").

115. Caher, *supra* note 23; *see, e.g.*, *In re* Jastrem, 224 B.R. 125, 129 (Bankr. E.D. Cal. 1998) (finding that the attorney rendered nearly all necessary legal services prior to the filing of the

difficult to see why reaffirming a debt for services already rendered would be in the debtor's best interest.[116] Perhaps most troubling is that, in general, the attorney has a responsibility to discourage reaffirmation of unsecured debts, including attorney fees.[117]

The use of reaffirmation agreements to secure payment of pre-petition legal fees results in significant detriment to the debtor and provides no new benefit or consideration in exchange thereof. In one breath the attorney advises the debtor not to reaffirm unsecured pre-petition debts due to the lack of financial benefits, yet in the next breath she asks the debtor to reaffirm her own pre-petition fee.[118] This is precisely why determination of whether a reaffirmation agreement serves the best interest of the debtor is left to the discretion of the court; and it is precisely why approval is anything but a certainty.[119]

2. Debtor's Right to Rescind

The second major problem with reaffirmation agreements involves the debtor's right to rescind the agreement even after securing court approval.[120] Under § 524(c)(4),[121] the debtor retains the right to rescind "at any time prior to discharge or within sixty days after such agreement is filed," whichever comes later, by sending notice of the rescission to the claim holder.[122] This provision effectively negates the certainty of payment that one might expect following a court-approved reaffirmation agreement; rather than providing attorneys with a means of ensuring payment of pre-petition fees, § 524(c)(4) serves as a last-second parachute for the indecisive debtor.

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bankruptcy petition); *In re* Haynes, 216 B.R. 440, 443 (Bankr. D. Colo. 1997) ("[T]his court is of the opinion that most of the time spent by attorneys and paralegals in Chapter 7 cases is spent pre-petition."); *see also* Flaxer, *supra* note 10, at 307-09 (listing the legal services typically covered by the initial fee).

116. Caher, *supra* note 23. *But see* Caher, *supra* note 23 (noting that the *Nidiver* court based its reasoning on the questionable assumption that the lawyer would be permitted to withdraw if the debtor refused to affirm); *cf. In re Nidiver*, 217 B.R. at 584 (finding that reaffirmation was in the debtor's best interest because the debtor still needed a lawyer, and reaffirmation ensured continued representation during the remainder of his bankruptcy proceeding).

117. *See In re Nidiver*, 217 B.R. at 584.

118. *See In re* Perry, 225 B.R. 497, 500 (Bankr. D. Colo. 1998) (noting the "serious conflict of interest" reaffirmation agreements place on the attorney-debtor relationship).

119. *See id.*

120. *See* 11 U.S.C. § 524(c)(4) (1994).

121. *See id.*

122. *See id.*; *In re Perry*, 225 B.R. at 498.

The flexibility of the rescission option allows for a spectrum of potential debtor reactions. At one extreme stands the debtor who reaffirms his pre-petition legal expenses, and eventually repays the debt, without ever invoking the Code's rescission provision. At the other extreme stands the well-intentioned debtor who reflects upon the judge's reaffirmation admonitions following the approval hearing. After assessing his financial situation, the debtor realizes that reaffirmation will lead to serious financial hardship and that he never should have agreed to reaffirm his pre-petition legal expenses.[123] Section 524(c)(4) grants the debtor the option to extricate himself from the reaffirmation agreement with no legal consequences.[124] Moreover, this provision also aids the bad faith debtor who, from the outset, intended to comply with the reaffirmation agreement until just prior to the expiration of the rescission period, ultimately leaving the attorney with no compensation for her valuable legal services.[125] Even worse, some courts still require the attorney to represent a rescinding debtor for the duration of the bankruptcy proceeding.[126]

Despite the radical differences in these possible scenarios, one thing remains certain: until the debtor rescinds the agreement or allows the rescission period to expire, the bankruptcy attorney continues to provide pre-petition services with no guarantee that the debtor will adhere to the reaffirmation agreement. The uncertainty created by the rescission provision may therefore deter attorneys from representing poor debtors; rather than rely on the debtor's quasi-guarantee to fulfill his payment obligation, some attorneys may choose to avoid representation altogether.[127] By no means, then, does reaffirmation constitute the guaranteed fee arrangement most attorneys desire.

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123. *See In re* Leitner, 221 B.R. 502, 503 (Bankr. D. Neb. 1998).

124. *See* 11 U.S.C. § 524(c)(4); *see also* 11 U.S.C. § 524(c)(2)(A); *In re* PASCO, 220 B.R. 119, 124 n.8 (Bankr. D. Colo. 1998).

125. Caher, *supra* note 23.

126. *See, e.g., In re* Meyers, 120 B.R. 751, 752-54 (Bankr. S.D.N.Y. 1990) (denying application by the debtor's attorney for withdrawal after attorney had been paid a $1,500 retainer and debtor did not pay for additional legal representation at a discharge objection); *see also* Caher, *supra* note 23. *But see, e.g.*, Arnold M Quittner, *Employment and Compensation of Appointed Professionals, in* 18TH ANNUAL CURRENT DEVELOPMENTS IN BANKRUPTCY AND REORGANIZATION 1996, at 297, 480-81 (PLI Com. L. & Practice Course, Handbook Series No. 737, 1996) (noting that counsel may have a basis for withdrawal if the client has intentionally disregarded fee arrangements, been uncooperative, or breached the attorney's trust).

127. *See In re* Perry, 225 B.R. 497, 500 (Bankr. D. Colo. 1998) (noting the "heavy burden" reaffirmation agreements place on counsel); Hessinger & Assocs. v. Voglio (*In re* Voglio), 191 B.R. 420, 425 (Bankr. D. Ariz. 1996) ("[T]he attorney who does not want to deal with uncertainty may be deterred from representing clients who cannot afford to pay attorney's fees pre-petition.").

B. Pre-Petition Agreements for Post-Petition Payment of Fees

1. Post-Dated Checks

The use of post-dated checks is effective as long as the debtor's checks clear and no one challenges the fee arrangement in court. If this fee arrangement becomes the subject of litigation, however, current caselaw suggests that the debtor's attorney should have an alternate plan.

In re Symes provides one example of judicial disdain for the use of post-dated checks to pay pre-petition legal fees.[128] In this case, an estate trustee challenged certain bankruptcy attorneys' practice of requiring clients to execute post-dated checks to be cashed by the attorney after filing for bankruptcy.[129] The trustee claimed that this fee agreement represented a dischargeable pre-petition debt subject to the automatic stay provision.[130] In response, the attorneys argued that these pre-petition retainer agreements did not constitute dischargeable pre-petition debt; therefore, they did not violate the Code's automatic stay provision.[131] The court ruled against the attorneys, holding that retainer agreements involving the acceptance of post-dated checks are dischargeable pre-petition debts.[132] The court based its conclusion on the fact that the right to payment arises when the debtor and the attorneys execute a post-dated check retainer—not when the attorneys actually cash those checks.[133] Because the debtor and attorneys had executed the agreement pre-petition, the court found the fee arrangements dischargeable as non-exempt pre-petition debt.[134]

The court in *In re Jastrem*[135] rendered a similar holding. Here, the debtor presented the attorney with four post-dated checks in satisfaction of pre-petition legal fees.[136] In his defense, the bank-

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128. *In re* Symes, 174 B.R. 114, 117 (Bankr. D. Ariz. 1994).

129. *Id.* at 116.

130. *Id.* Filing a bankruptcy petition automatically stays a creditor's attempt to collect a pre-petition debt from the debtor; *see also* 11 U.S.C. § 362 (1994 & Supp. V 1999).

131. *In re* Symes, 174 B.R. at 116; *see also* 11 U.S.C. § 362(a) (providing that the automatic stay provision prohibits any act by a creditor to collect, assess, or recover a claim against the debtor that arose prior to filing for bankruptcy until lifted by the court in accordance with 11 U.S.C. § 362(d)).

132. *In re Symes*, 174 B.R. at 116.

133. *Id.* at 118.

134. *Id.* at 119 ("Unless section 523 dictates otherwise, every pre[-]petition debt becomes discharged under section 727.").

135. *In re* Jastrem, 224 B.R. 125, 130 (Bankr. E.D. Cal. 1998).

136. *Id.* at 126.

ruptcy attorney argued that the post-dated checks represented non-dischargeable post-petition debts because payment of the filing fee was a condition precedent to the payment of legal fees.[137] This condition, the attorney claimed, was not satisfied until after filing of the bankruptcy petition; hence, the claim arose post-petition and was non-dischargeable.[138] The court ultimately disagreed,[139] bolstering its own holding with those of other courts.[140] It found that although the debtor paid all his legal fees after filing the petition, the fees owed for pre-petition services were dischargeable in bankruptcy.[141]

As evidenced in the caselaw, post-dated checks used to satisfy pre-petition legal expenses constitute dischargeable debt subject to the automatic stay provision (unless the debtor secures court approval for a reaffirmation).[142] This essentially makes the legality of post-dated checks subject to the implementation of valid reaffirmation agreements, which themselves present significant problems for bankruptcy attorneys seeking guaranteed payment for pre-petition legal expenses. Consequently, the success of this type of fee agreement is anything but guaranteed.

2. Installment Agreements

As with post-dated checks, judicial acceptance of installment agreements is far from widespread. In 1997, the Ninth Circuit announced its opposition to such agreements in *In re Biggar*.[143] Here, the debtor and the attorney agreed to a fee arrangement that established monthly installment payments for pre-petition legal

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137. *Id.* at 128.

138. *Id.* at 128-29.

139. *Id.* at 129.

140. *Id.* at 130 (citing *In re* Hines, 147 F.3d 1185, 1191 (9th Cir. 1998) (holding that the automatic stay provision applied to the debtor's attorney's attempts to collect fees he earned pre-petition, under a pre-petition fee agreement)); *In re* Hessinger & Assoc., 192 B.R. 211, 216-18 (Bankr. N.D. Cal. 1996) (holding that a pre-petition agreement to make post-petition installment payments for pre-petition legal work is dischargeable); *In re* Symes, 174 B.R. 114, 119 (Bankr. D. Ariz. 1994) (holding that pre-petition fee agreements requiring debtors to execute post-dated checks to be cashed post-petition constituted a dischargeable claim subject to the automatic stay provision).

141. *In re Jastrem*, 224 B.R. at 130.

142. Post-dated checks can be enforceable if legally reaffirmed and judicially approved. *In re Symes*, 174 B.R. at 119.

143. Hessinger & Assocs. v. United States Tr. (*In re* Biggar), 110 F.3d 685, 688 (9th Cir. 1997).

services.[144] The installments were to be paid following the filing of the Chapter 7 petition.[145] The trustee for the estate moved for a review of the fees, and the court of appeals held that pre-petition legal debts, to be paid in installments post-petition, are dischargeable.[146] The attorney for the debtor asserted that the discharge[147] and disclosure[148] provisions conflicted because there is no logical purpose behind post-petition review of dischargeable fees.[149] The court insisted, however, that the disclosure and discharge provisions could coexist.[150] To begin, the court noted that § 523 and § 727 do not explicitly exempt pre-petition attorney's fees from discharge.[151] Therefore, the court concluded, if these fees are to be exempt from discharge, statutory authority must be found elsewhere.[152] The court then addressed the disclosure rules[153] implemented in accordance with § 329.[154] It noted that if such rules applied only to Chapter 7 cases, there would, indeed, be a conflict of Code provisions.[155] The court determined, however, that these provisions also apply to Chapter 11 and Chapter 13 cases, in which fee agreements for pre-petition and post-petition legal fees are typically aspects of the debtors' plans for which court approval must be secured.[156] Because § 329 and the disclosure rules have such broad applicability, the court concluded that they must be construed to govern more than simply pre-petition fee arrangements entered into for Chapter 7 cases.[157] Therefore, while the dischargeability of a Chapter 7 pre-petition fee agreement renders its review moot, § 329(b)'s cancellation provision is still relevant to Chapter 11 and Chapter 13 plans because pre-petition attorney's fees under those plans are still reviewable and subject to cancellation.[158] In so dismissing the attorney's claim of conflict, the court ultimately dis-

144. *In re Biggar*, 110 F.3d at 686.
145. *Id.* at 686.
146. *Id.* at 688.
147. 11 U.S.C. §§ 523, 727 (1994 & Supp. V 1999).
148. 11 U.S.C. § 329 (1994).
149. *In re Biggar*, 110 F.3d at 688.
150. *Id.* ("Thus, while the disclosure provisions contemplate examination of post-petition payments to the debtor's attorney, those provisions can be reconciled with the discharge provisions.") (citing *In re* Martin, 197 B.R. 120, 126-27 (Bankr. D. Colo. 1996)).
151. *Id.* at 687.
152. *Id.* at 687-88.
153. *See supra* note 12 (quoting Bankruptcy Rules 2016 and 2017, the "disclosure rules").
154. *In re Biggar*, 110 F.3d at 687-88.
155. *Id.*
156. *Id.* at 688.
157. *Id.*
158. *Id.*

charged the installment agreement based on § 523's failure to exempt pre-petition attorneys' fees from discharge.[159]

In *In re Martin*, the Bankruptcy Court for the District of Colorado sided with the Ninth Circuit's opinion in *Biggar*.[160] In that case, the debtor and his bankruptcy attorney entered into a fee arrangement involving a pre-petition filing fee and a flat post-petition fee payable in installments.[161] The trustee filed an application for review of attorney's fees, arguing that the attorney's disclosure of the fee arrangement was inadequate, that the fee agreement was dischargeable, and that it created an "impermissible conflict of interest" between the debtor and his attorney.[162] The attorney responded that she had adequately disclosed the fee arrangement, that the arrangement was not dischargeable, that the debtor had entered into the executory contract freely, and that § 329 only permits the discharge of excessive fees.[163] Although the court found each party's arguments persuasive, it ultimately cancelled the fee agreement.[164] The court based its decision on the fact that § 727(b) does not exempt pre-petition attorney's fees from discharge; it reasoned that, had Congress wished to create an exemption for pre-petition legal fees, it very easily could have done so.[165] In addition, the court found that an impermissible conflict of interest arose between the debtor and the attorney.[166] Although it is permissible and quite common for a client to pay his legal fees over time, the court criticized fee arrangements in which the bankruptcy attorney simultaneously plays the roles of counselor and creditor.[167]

Contrary to *Biggar* and *Martin*, *In re Perez* approved the use of installment agreements, subject to certain stipulations.[168] Prior to filing for Chapter 7 bankruptcy, the debtors and their attorney executed a promissory note obligating the debtors to make ten installment payments to cover the attorney's fees.[169] The debtors and the attorney then entered into a reaffirmation agreement since the parties had executed the installment agreement pre-petition.[170]

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159. *Id.*
160. *In re* Martin, 197 B.R. 120, 127 (Bankr. D. Colo. 1996).
161. *Id.* at 123-24.
162. *Id.* at 124.
163. *Id.*
164. *Id.* at 129-30.
165. *Id.* at 127.
166. *Id.* at 129.
167. *Id.*
168. *In re* Perez, 177 B.R. 319, 321 (Bankr. D. Neb. 1995).
169. *Id.* at 320.
170. *Id.*

When challenged by the trustee for the estate, the bankruptcy judge replied that he "support[ed] and encourage[d] the use of installment fee agreements for bankruptcy services," noting that the Code permits such arrangements.[171] The court was careful to state that such installment agreements executed pre-petition will only have legal effect if the parties enter into a reaffirmation agreement which complies with the disclosure procedures set forth in § 524(c) of the Code.[172]

The *Perez* judge's claim that the Code encourages installment arrangements is somewhat misleading because the Code does not specifically allow installment arrangements. Rather, it permits a debtor to reaffirm an installment contract for pre-petition legal fees because an installment contract is a pre-petition debt that would otherwise be discharged in the bankruptcy proceeding.[173] Thus, the Code allows reaffirmation—not installment contracts. Absent reaffirmation, and unless the installment contract pertains to matters specifically exempt from discharge, the contract will be discharged in bankruptcy.[174] Most importantly, one must remember that even if the installment contract is reaffirmed, the Code grants the debtor sixty days to rescind that reaffirmation.[175] Installment contracts are therefore viable only if reaffirmed and not rescinded. Obviously, this situation does not provide the financial security a debtor's attorney would like to have prior to agreeing to represent a debtor in a bankruptcy proceeding.

3. Skeletal Cases

Skeletal cases, as previously noted,[176] are those in which the attorney performs the least amount of work necessary in order to file for bankruptcy without prejudice to the debtor.[177] The idea is to perform nearly all bankruptcy services post-petition so that the fees generated for such work will not be discharged in the bankruptcy proceeding. Unfortunately for attorneys relying on this type of fee arrangement, current caselaw cautions against the practice.

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171. *Id.* at 321.
172. *Id.* at 321-22.
173. *See* 11 U.S.C. § 524(c)-(d) (1994).
174. *See* 11 U.S.C. §§ 523, 524(c)-(d) (1994 & Supp. V 1999).
175. *See* 11 U.S.C. § 524(c)(4).
176. *See supra* Part II.B.3.
177. *See, e.g., In re* Haynes, 216 B.R. 440, 442-43 (Bankr. D. Colo. 1997) (referring to these types of cases as "deficient").

In re Haynes serves as a typical example of judicial opposition to skeletal filings.[178] In *Haynes*, the debtor's attorney entered into an agreement with the debtor to file a skeletal bankruptcy petition; after filing, the attorney would complete the work for a flat rate of $600.00.[179] The attorney chose this arrangement to circumvent a previous holding that fee agreements involving flat fees to be paid, post-petition, in monthly installments create a dischargeable debt.[180] Unfortunately for the attorney in *Haynes*, her argument was insufficient to overcome precedent[181] and earn court approval. The court recognized the attorney's good intentions, stating that it had no problem approving flat fees.[182] Problems arise, however, when flat fees are attributable, even in part, to pre-petition work.[183] The court refused to endorse this skeletal filing method, asserting that such arrangements are really pre-petition agreements calling for post-petition installment payments.[184] These arrangements not only create a dischargeable pre-petition debt, but they also create a conflict of interest between the debtor and the attorney, ultimately requiring cancellation of the fee agreement.[185]

C. Pre-Petition Security Interests

Security interests, though widely accepted in most personal transactions, raise eyebrows when utilized in the legal profession. The concern stems from the ethical implications of attorneys simultaneously assuming the two seemingly inconsistent roles of counselor and creditor.[186] The misgivings are especially pronounced in the case of bankruptcy attorneys. Once a bankruptcy attorney accepts a security interest in her client's property as payment, she becomes a creditor indistinguishable from those adverse to her client.[187] The attorney now has an independent financial interest in the outcome of the bankruptcy proceedings; consequently, she "may be tempted to consider not only the best interests of [her] client but also the probable impact on [her] own fees and [the] likelihood of

178. *Id.*
179. *Id.* at 442.
180. *Id.* at 441-42 (citing the holding in *In re* Martin, 197 B.R. 120 (Bankr. D. Colo. 1996)).
181. *See id.* (citing *In re* Martin, 197 B.R. 120 (Bankr. D. Colo. 1996)).
182. *In re Haynes*, 216 B.R. at 443-44.
183. *Id.* at 443.
184. *Id.*
185. *Id.*
186. *See, e.g., In re Martin*, 197 B.R. at 128-29.
187. *See, e.g., id.* at 129.

payment" when deciding how to handle the case.[188] As one bankruptcy court noted, "where the creditor is the debtor's own attorney, the conflict of interest involved is obvious. How can the lawyer advise the debtor fully and effectively where the lawyer himself or herself is on the other side of the bargaining table from the client?"[189] Despite these concerns, courts generally uphold security interests in the form of promissory notes executed in favor of the bankruptcy attorney for his pre-petition legal fees.[190] Problems arise in one of two situations: (1) when an attorney becomes a creditor by accepting a security interest prior to and wholly unrelated to the bankruptcy proceeding,[191] or (2) when a bankruptcy attorney attempts to extend a security interest taken in a non-bankruptcy matter to the bankruptcy matter.[192]

In re Leitner exemplifies the general judicial approval of bankruptcy attorneys taking security interests in exempt property to secure their pre-petition fees.[193] In this case, the debtors gave their bankruptcy attorney a promissory note for $1,275, payable in monthly installments and secured by a mortgage on their home.[194] The debtors initially reaffirmed their obligation to pay counsel, but then sought to rescind the agreement.[195] The court initially noted that a bankruptcy attorney is not automatically disqualified from representing a debtor simply because she holds a security interest for legal services rendered pre-petition.[196] To avoid disqualification, though, the security interest must be disclosed by counsel in the Bankruptcy Rule 2016(b) statement,[197] and by debtors in their bankruptcy schedule.[198] Thus, while approving of security interests as a valid means of securing payment for pre-petition legal services, the *Leitner* court acknowledged the limitations of such an endorse-

188. *See* Quittner, *supra* note 126, at 447.

189. *In re* Frazier, 231 B.R. 454, 459 (Bankr. D. Conn. 1999) (quoting *In re* Hines, 147 F.3d 1185, 1190 (9th Cir. 1998)).

190. *See, e.g., In re* Leitner, 221 B.R. 502, 503 (Bankr. D. Neb. 1998). If, however, security interests are taken in property deemed to be exempt under Section 522(f), those interests will likely be avoidable. "Section 522(f) protects the debtor's exemptions, his discharge, and thus his fresh start by permitting him to avoid certain liens on exempt property." H.R. REP. NO. 595, at 362 (1977).

191. *See, e.g., In re* Ragar, 3 F.3d 1174, 1176-77 (8th Cir. 1993).

192. *See, e.g., In re* Mahendra, 131 F.3d 750, 755-57 (8th Cir. 1997).

193. *In re Leitner*, 221 B.R. at 502.

194. *Id.* at 503.

195. *Id.*

196. *Id.* at 504.

197. *See supra* note 12 (quoting Bankruptcy Rule 2016).

198. Caher, *supra* note 23; FED. R. BANKR. P. 2016 (addressing compensation for services rendered and reimbursement of expenses); *supra* note 12 (quoting Bankruptcy Rule 2016).

ment.[199] Unless debtors reaffirm their obligation to pay counsel, the obligation will be discharged in bankruptcy proceedings as pre-petition debt.[200] Unlike this personal obligation, however, the court concluded that the mortgage would pass through bankruptcy unimpaired because it was fully secured and may be enforced against the debtor's estate after the automatic stay provisions terminate.[201] Therefore, although the debtors would have no further personal obligation to their attorney, the attorney would be free to enforce the mortgage and collect from the debtor's estate.[202]

As one would expect, there are exceptions to the general judicial approval of paying attorneys with security interests. At least two cases have held that a security interest creates a conflict of interest between the debtor and the attorney, thus disqualifying the attorney from further representation.[203]

In *In re Mahendra,* the debtor gave his attorney a promissory note for advances up to $35,000.00 and secured the note with a lien on his property.[204] The debtor had originally sought legal assistance in defending against criminal proceedings brought by the Internal Revenue Service, and he executed the note in consideration thereof.[205] Two months after entering into the security agreement, the attorney filed a Chapter 7 petition on behalf of the debtor.[206] The court found that, as of the date of the bankruptcy filing, the attorney was a pre-petition creditor whose security interest was limited to the value of his pre-petition, tax-related legal services.[207] Thus, as soon as the attorney sought to provide the debtor with bankruptcy representation, a conflict arose.[208] The court not only held that the attorney had created a conflict of interest by at-

199. *In re Leitner,* 221 B.R. at 505.

200. *Id.*

201. *Id.* at 505-06. In order to pass through bankruptcy unimpaired, the court noted that a debt must be fully secured, not "avoidable as a preference or fraudulent conveyance," and not avoidable under "[s]ection [522](f) which can be used to avoid certain non-purchase money security interests . . . ." *Id.* Moreover, bankruptcy counsel must wait to enforce her claim until the bankruptcy court has lifted the automatic stay under § 362. *Id.*

202. *Id.* at 506; CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY 540 (1997) ("[A] bankruptcy discharge does not destroy the in rem rights of the lien holder, which instead passes through bankruptcy unaffected; the discharge only eliminates the debtor's in personam liability.").

203. *See In re* Mahendra, 131 F.3d 750, 759 (8th Cir. 1997); *In re* Ragar, 3 F.3d. 1174, 1176 (8th Cir. 1993).

204. *In re Mahendra,* 131 F.3d at 759.

205. *Id.* at 753.

206. *Id.*

207. *Id.* at 759.

208. *Id.* at 756.

tempting to apply the lien to the bankruptcy-related services, but it went so far as to sanction the attorney under Rule 9011(a)[209] for his inappropriate conduct.[210]

The bankruptcy court in *In re Ragar* heard a case with facts comparable to *Mahendra* and reached a similar conclusion.[211] The court held that the attorney had a conflict of interest because he had a pre-petition claim for non-bankruptcy related legal fees, including a security interest in the debtor's property.[212] Because the attorney was a creditor of the debtor, and because he held a security interest in the debtor's property that was wholly unrelated to a subsequent bankruptcy filing, the court disqualified the attorney from representing the debtor in the bankruptcy action.[213]

Despite the potential for conflict, most courts approve of bankruptcy attorneys taking a pre-petition security interest in their clients' property.[214] For example, in addressing conflict of interest concerns, the court in *In re Leitner* pointed out that attorneys and clients are almost always in a creditor-debtor relationship: "[T]he fact that a client is indebted to counsel for undisputed charges for services rendered within the scope of the current representation does not provide an ethical or statutory basis for disqualification of counsel."[215] Typically, disqualification due to an unacceptable conflict of interest results only when the attorney is found to be a pre-petition creditor with respect to non-bankruptcy related matters.

If courts enforce security interests as compensation for bankruptcy legal services, why are such interests an inadequate solution to the problem of finding a guaranteed fee arrangement? The answer lies not in the character of the fee arrangement, but in

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209. *Id.* at 758. Rule 9011(a) gave courts the authority to sanction attorneys for submitting bankruptcy petitions to the court, detailing information not grounded in fact or good faith beliefs. *See id.* at 758-59 (quoting the rule in part). Bankruptcy Rule 9011 was amended on April 11, 1997, with the amendments becoming effective on December 1, 1997. *See id.* at 758 n.9. Because the sanction orders in this case arose prior to the effective date, the court determined that the amendments to 9011 did not have implications in the case. *See id.*

210. *See id.* at 759 ("The established standard for imposing sanctions is an objective determination of whether a party's conduct was reasonable under the circumstances . . . . Snyder's [counsel's] assertion that his lien extended to other matters was not supported by the law or a good faith argument for its modification or reversal . . . . It is appropriate to deny or reduce compensation to a professional that represents a party (here, Snyder represented himself as a creditor of Debtor) who has an interest adverse to the bankruptcy estate.").

211. *In re* Ragar, 3 F.3d 1174, 1176 (8th Cir. 1993).

212. *Id.* at 1176. The attorney previously represented the debtor in various non-bankruptcy matters for which the debtor transferred some property to the attorney to secure legal fees. *Id.*

213. *Id.*

214. *See, e.g., In re* Leitner, 221 B.R. 502, 502 (Bankr. D. Neb. 1998); *In re Ragar*, 3 F.3d at 1174; *In re* Perez, 177 B.R. 319, 319 (Bankr. D. Neb. 1995).

215. *In re Leitner*, 221 B.R. at 504.

the condition of those debtors from whom the attorney seeks to extract such an agreement. A debtor filing a no-asset Chapter 7 bankruptcy petition by definition has few, if any, assets.[216] Although most courts would likely approve of the use of a security interest to guarantee a note for pre-petition legal fees, it is highly unlikely that the debtor will own outright any property valuable enough to pledge as security.[217] Worse yet, consumer no-asset proceedings comprise the majority of all bankruptcy proceedings filed.[218] Thus, while security interest fee arrangements garner judicial approval, they are unlikely to be of much use to an attorney handling a consumer no-asset Chapter 7 proceeding.

D. Credit Cards

The United States economy is largely based on consumer debt, and no one knows that better than the credit-reliant consumer.[219] Last year alone, Americans charged over $1 trillion on their credit cards.[220] Although the consumer regularly uses credit cards to pay for everything from groceries to doctor's bills, using them to pay for legal fees is a relatively new development. Credit card payment for pre-petition bankruptcy fees has yet to secure widespread judicial approval, and according to some courts, it may even constitute fraud under § 523(a)(2)(A).

1. Judicial Disparity

In re Frazier is one of two cases specifically addressing the use of credit cards in bankruptcy proceedings. In this case, the law-

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216. BAIRD, *supra* note 32, at 13.

217. *See id.* (noting that in most "no asset" Chapter 7 cases there is nothing to be divided amongst the creditors and no assets significant enough to be the subject of litigation); BUCHBINDER, *supra* note 1, at 111 (noting that normally there will be no assets available for the trustee to distribute).

218. *See* Non-Business Bankruptcy Filings by Chapter, 1999-2000, per Quarter, *available at* http://www.abiworld.org/stats/1990nonbuschapter.html (last visited March 28, 2001) (showing that nearly 70% of all bankruptcy filings for the year 2000 were filed under Chapter 7); *see also* BUCHBINDER, *supra* note 1, at 111.

219. JASPER, *supra* note 1, *Introduction* (noting that the American economy is largely based on consumer debt). "There is a virtually unlimited supply of goods and services, and credit is readily available to those who do not have the cash on hand to make such purchases. The temptation to live beyond one's means is often difficult to resist." *Id.*

220. *See Nightline: Drowning in Debt* (ABC television broadcast, Mar. 14, 2001). Perhaps even more staggering is the fact that the average credit card balance was more than $4,000 this year, representing a 100% increase over the last 10 years. *Id.*

yer told the debtor she could charge a bankruptcy fee of $1,750.00 to a credit union credit card provided she intended to reaffirm that debt.[221] For undisclosed reasons, the debtor did not reaffirm the debt, and the credit union filed a dischargeability proceeding for the credit card debt and the other debts it was owed.[222] The trustee sought an order requiring the attorney to return a portion of his allegedly excessive fee and to pay the costs of defending the debtors against the credit union.[223] The court concluded that the attorney's compensation was reasonable and that, because the attorney was not responsible for the debtor's failure to reaffirm, he should not be held accountable for the legal fees incurred by the debtors in defense of the pending non-dischargeability action.[224] While not specifically approving of the use of credit cards to pay a bankruptcy attorney's pre-petition legal fees, the absence of judicial condemnation in *Frazier* seemingly represents a tacit endorsement of the practice.[225]

Citibank v. Meeks reached a very different conclusion, deeming the use of a credit card to pay a bankruptcy attorney's pre-petition fees to be fraudulent and holding the credit card debt non-dischargeable.[226] In this case, Citibank brought a non-dischargeability claim based on the allegation that the debtors used their Citibank credit card to obtain a $5,000 cash advance just six weeks prior to filing bankruptcy.[227] Even worse, just seven days after obtaining the cash advance, the debtor consulted with his attorney about filing bankruptcy; later, he paid the attorney $770.00 from the advance.[228] The court held that a cash advance obtained by a debtor at a time when he knew or should have known that he would be unable to repay the debt is non-dischargeable on the grounds of fraud.[229]

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221. *In re* Frazier, 231 B.R. 454, 455 (Bankr. D. Conn. 1999); Caher, *supra* note 23.

222. *In re Frazier*, 231 B.R. at 456-57.

223. *Id.* at 457.

224. *Id.* at 458; Caher, *supra* note 23.

225. *See* Caher, *supra* note 23.

226. Citibank (South Dakota) v. Meeks (*In re* Meeks), 139 B.R. 559, 561 (Bankr. M.D. Fla. 1992).

227. *Id.* at 560.

228. *Id.* at 561.

229. *Id.* at 559.

2. Potential for Fraud

Divergent court opinions are not the only basis for rejecting the credit card fee arrangement; more importantly, perhaps, accepting payment by credit card or advising a client to take a cash advance to pay bankruptcy attorney fees is intuitively offensive, and it borders on fraud.[230] If a debtor visits a bankruptcy attorney shortly after obtaining a cash advance, a court would likely infer that the debtor knew or should have known that he would be unable to repay the recently incurred credit card debt—hence his reason for visiting a bankruptcy attorney in the first place. In this situation, the court would likely declare the credit card debt to be non-dischargeable.[231] Consequently, it is inadvisable to suggest to a client that it is acceptable to use his credit card near the date of his bankruptcy filing. Even if the suggestion is conditioned upon a promise by the client to reaffirm the debt, he can always refuse to do so, or later rescind; the attorney then would come uncomfortably close to being implicated in a fraudulent scheme.[232] In addition, if the creditor contests the discharge on grounds of fraudulent debtor intent, the bankruptcy attorney could be forced to become a witness against his own client, which again could implicate his client and/or himself in the perpetration of a fraud.[233] Clearly, then, bankruptcy attorneys should not feel at all confident in relying upon credit card fee arrangements to ensure payment of pre-petition legal fees.

IV. THE NEED FOR AN EXEMPTION: A CALL TO AMEND § 523

This Note has demonstrated the difficulties associated with securing payment for pre-petition legal services in a no-asset Chapter 7 bankruptcy proceeding when the debtor is unable to pay for such services up front and in full. The plain language of § 329 appears to advocate a discharge exemption for pre-petition bankruptcy attorney's fees; yet § 523 refrains from specifically including pre-petition attorney's fees in the list of debts exempted from § 727

230. *See* Caher, *supra* note 23; *In re Meeks*, 139 B.R. at 561 (holding that a cash advance obtained by a debtor at a time he knows or should know that he is unable to repay the debt is nondischargeable on grounds of fraud).

231. Caher, *supra* note 23 ("In most cases, attorney fees will be only a part of a larger obligation owed to a creditor, and the fact that the debtor charged his or her bankruptcy fees might just tip the scales in favor of the entire debt being held to be nondischargeable.").

232. *Id.*

233. *Id.*

discharge.[234] Absent specific instructions in the Code that pre-petition attorney's fees should be exempt from discharge, courts generally characterize such debts as dischargeable.[235] This has forced bankruptcy attorneys handling consumer no-asset Chapter 7 claims to resort to a variety of fee arrangements in order to sidestep discharge.[236] Unfortunately, the most popular fee arrangements have proven largely inadequate, and they are often illegal. This Note proposes a solution that will reduce litigation in this area while encouraging attorney representation of the poorest of debtors: Congress must amend § 523 of the Bankruptcy Code to exempt unpaid, pre-petition bankruptcy attorney's fees from discharge.

A. Judicial Deference to Congress

As this Note demonstrates, many courts have confronted the issue of whether a bankruptcy attorney's pre-petition legal fees can, or should, be discharged in a no-asset Chapter 7 proceeding. Although several of these courts believe that there are important public policy justifications for exempting pre-petition fees from discharge, they also recognize that their decisions must comply with statutory constraints.[237] Most significantly, they believe that they are bound to follow the plain language of the Code, which does not explicitly include pre-petition legal fees in the list of those debts exempt from discharge under § 523.[238] Thus, many courts have called upon Congress to fashion a legislative remedy to adequately address the no-asset Chapter 7 attorney's dilemma.[239]

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234. *See* 11 U.S.C §§ 523, 727 (1994 & Supp. V 1999).

235. *See supra* note 19 and accompanying text.

236. *See supra* notes 20-21.

237. *See, e.g.*, Hessinger & Assocs. v. United States Tr. (*In re* Biggar), 185 B.R. 825, 829 (N.D. Cal. 1995) ("[T]here are legitimate and important public policy concerns in this dispute. No one wishes that indigent debtors are denied counsel because they lack a retainer . . . however . . . public policy concerns cannot trump the plain language of the bankruptcy code."); *see also In re* Haynes, 216 B.R. 440, 445 (Bankr. D. Colo. 1997) ("This court may not agree on a philosophical basis with the results mandated by the Bankruptcy Code. . .[b]ut this Court is bound to apply the law as Congress has written it."); *In re* Martin, 197 B.R. 120, 127 (Bankr. D. Colo. 1996) ("Though I agree . . . that there are legitimate and important public policy concerns about access to the bankruptcy system for indigent debtors . . . public policy concerns cannot trump the plain language of the Bankruptcy Code.").

238. *See, e.g., In re* Nieves, 246 B.R. 866, 873 (Bankr. E.D. Wis. 2000) (stating that because the statute is so clear, a request to exempt pre-petition legal fees from discharge should be made to Congress and not the courts).

239. *See, e.g., In re* Hines, 147 F.3d 1185, 1190 (9th Cir. 1998) ("[T]he optimum solution to the problem would call for action by Congress . . . ."); Hessinger & Assocs. v. Voglio (*In re* Voglio), 191 B.R. 420, 426 (Bankr. D. Ariz. 1996).

Congress should take action where the judiciary has repeatedly recognized a problem that only Congress can remedy.[240] In fact, this is a problem that Congress, itself, created.[241] Amending § 523 to include unpaid pre-petition bankruptcy attorneys' fees in the list of exemptions is a practical and appropriate solution. The amount of money at stake in litigation of this sort may be small, but the implications are large, pervading each of the many thousands of Chapter 7 bankruptcies reaching the federal court system each year.[242] Amending the Code to provide an express exemption to discharge for unpaid, pre-petition bankruptcy attorney's fees would address judicial concerns, end litigation of this issue, and redirect attorneys' attention towards their clients' best interests and away from their ability to pay.

B. Ensuring Access to the Bankruptcy System

While bankruptcy attorneys wish to earn a good living from fees paid by their clients, their clients want good advice and representation for a reasonable fee.[243] Under the current Bankruptcy Code, however, this ideal could not be further from the grasp of the indigent debtor who is unable to advance the costs of pre-petition legal fees.[244] In the absence of a provision excluding pre-petition attorney fees from discharge, bankruptcy attorneys are discouraged from representing debtors who are too poor to pay the costs of pre-petition legal services in advance.[245] Because none of the popular fee arrangements providing for payment of pre-petition legal fees are guaranteed to escape discharge, many indigent debtors are pre-

240. *See In re Hines*, 147 F.3d at 1190; *In re Voglio*, 191 B.R. at 426 (urging Congress to provide a remedy for the problems surrounding the payment of pre-petition attorneys' fees).

241. *In re Hines*, 147 F.3d at 1189 (noting the absence of express statutory treatment of attorneys' fees and that Congress has failed to correct its oversight); *In re* Perry, 225 B.R. 497, 498 (Bankr. D. Colo. 1998) ("Congress has failed to set out explicit rules regarding the treatment of attorneys fees in Chapter 7 cases.").

242. *See In re Hines*, 147 F.3d at 1186.

243. *See* Braucher, *supra* note 46, at 165.

244. *See, e.g., In re* PASCO, 220 B.R. 119, 120 (Bankr. D. Colo. 1998) (noting that the current state of the caselaw prevents a Chapter 7 debtor from waiting to pay pre-petition attorney fees until post-petition). This, in turn, effectively precludes debtors from filing bankruptcy absent an initial payment for services. *Id.* Serious implications arise as a result, including "limiting indigent debtors' access to bankruptcy relief and, perhaps, increasing the number of pro se bankruptcy debtors." *Id.*

245. *See supra* note 23; *In re* Nieves, 246 B.R. 866, 873 (Bankr. E.D. Wis. 2000) ("This court fully recognizes that debtors . . . who cannot afford to pay attorney's fees before filing for bankruptcy may have difficulty in obtaining legal counsel.").

cluded from seeking the advice of bankruptcy counsel and accessing the remedies provided by the system.[246]

Critics have cited the rise in the number of Chapter 7 filings as evidence of adequate access to the bankruptcy system.[247] In addition, these critics have also challenged others to cite statistics in support of a contrary position.[248] Yet, the rise in the number of bankruptcy filings suggests nothing other than the fact that more and more people currently find it difficult to deal with the financial burdens of a credit-based economy.[249] Moreover, the call for statistics supporting a contrary conclusion is a futile one. There is no way to accurately determine exactly how many debtors have been, and continue to be, discouraged from utlizing the bankruptcy system due to an inability to afford a bankruptcy attorney. One cannot compile statistics on what debtors might have done; one can only compile statistics on what debtors actually did.

Critics also suggest that equal access to legal counsel is relatively inconsequential given the existence of alternatives such as debt counseling[250] or "do-it-yourself" bankruptcy kits.[251] Although these alternatives may provide important bankruptcy information, their efficacy presumes a level of debtor competence that may not, in fact, exist. Theoretically, every debtor has access to the bankruptcy system because anyone can file *pro se*. Yet, the ability to file bankruptcy means nothing if the debtor's ignorance precludes him from maximizing the strategic advantages available under the bankruptcy rules.

Allowing the bankruptcy system to continue to function in its current state is counter-productive. The structure of the current system deprives the neediest debtors of significant remedies. Amending § 523 of the Code to exempt unpaid, pre-petition bankruptcy attorney's fees would enhance indigent debtors' ability to access the aid of an attorney, thereby ensuring equal access to the bankruptcy system.[252] It would effectively remove attorneys' disincentives to represent extremely poor debtors by allowing these debtors to pay the pre-petition costs of their case post-petition, with

246. *Id.*
247. *See, e.g.*, Morse, *supra* note 7, at 604.
248. *Id.*
249. *See supra* note 220.
250. Lander, *supra* note 28, at 174-84.
251. *See, e.g.*, Morse, *supra* note 7, at 604.
252. *See In re* Perry, 225 B.R. 497, 500 (Bankr. D. Colo. 1998).

no concern for discharge.[253] Most importantly, it would open the bankruptcy system to all debtors; even the most indigent debtor would theoretically have access to a bankruptcy attorney because he would not be forced to pay pre-petition legal expenses in advance.

At least two courts have suggested that providing indigent debtors with access to the remedies of the bankruptcy system is not the only relevant public policy concern.[254] These courts note that there is an equally compelling public interest in providing an honest debtor with a fresh financial start;[255] this, they believe, precludes the creation of an exception to discharge for pre-petition attorney fees.[256] While the perpetuation of debt undoubtedly inhibits a true "fresh start," debtors are certainly no better off *pro se*. What these courts fail to acknowledge is that indigent debtors are unlikely to reap maximum benefits from their "fresh start" without the assistance of a bankruptcy attorney. It is unlikely that these debtors have the ability to decipher the complexities of the bankruptcy system on their own.[257] Instead, they need effective professional assistance in order to make informed choices, based on their unique circumstances and concerns, so they can obtain adequate and appropriate relief.[258]

C. Relieving the Tension Between the Attorney's Interests and Those of the Client

As the Preamble to the ABA Model Rules of Professional Conduct states: "Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an upright

253. *See* Hessinger & Assocs. v. United States Tr. (*In re* Biggar), 110 F.3d 685, 685-87 (9th Cir. 1997) (declining to address the attorney's policy argument that the availability of fee arrangements calling for post-petition payment of pre-petition legal fees allows debtors access to legal counsel from whom they would otherwise be effectively barred).

254. Hessinger & Assocs. v. United States Tr. (*In re* Biggar), 185 B.R. 825, 829 (N.D. Cal. 1995).

255. *Id.*

256. JASPER, *supra* note 1, at 1 ("Bankruptcy is designed to give an individual a 'fresh start' by discharging, i.e., canceling, certain debts.").

257. BUCHBINDER, *supra* note 1, at *Preface* (exemplifying the complexities of Bankruptcy law by stating that his primary intent in writing his book was as a "basic primer for attorneys .... to demystify bankruptcy law and practice for non-bankruptcy attorneys").

258. Lander, *supra* note 28, at 163.

person while earning a satisfactory living."[259] The ethical dilemmas facing an attorney representing a consumer no-asset Chapter 7 debtor are no exception.[260] If attorneys are to make a living, securing paying clients becomes a primary goal.[261]

Recognition of an attorney's self-interest in securing paying clients is particularly important when a debtor lacks sufficient funds to pay a pre-petition retainer.[262] The attorney would like the business, but typically she will not take the case unless she can find a way to secure payment of her fees. In some cases, self interest even compels the attorney to advise debtors to file Chapter 13[263] or other high percentage payment plans when Chapter 7 would actually better serve the debtor.[264] Until Congress adds pre-petition debtor's attorney's fees to the existing list of exemptions from discharge, this conflict of interest will continue to surface, unduly influencing bankruptcy recommendations made to debtors.

V. CONCLUSION

A primary goal of the bankruptcy system is to respond to the financial pressures facing the neediest debtors. In its current state,

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259. *Preamble* to ABA MODEL RULES OF PROF'L CONDUCT 8 (1995); *see* Braucher, *supra* note 46, at 172.

260. *See* Braucher, *supra* note 46, at 172; Jay Lawrence Westbrook, *Fees and Inherent Conflicts of Interest*, 1 AM. BANKR. INST. L. REV. 287, 296 (1993); *see generally* DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? (1974) (addressing attorney-client conflicts of interest).

261. Braucher, *supra* note 46, at 172.

262. *In re* Haynes, 216 B.R. 440, 444-45 (Bankr. D. Colo. 1997).

263. JASPER, *supra* note 1, at 80 (defining Chapter 13 as the section of the Bankruptcy Code applicable to regular income debtors and involving the reorganization of their financial affairs). As a general rule, pre-petition attorney fees in Chapter 13 do not have to be paid up front. This decreases the attorney's anxiety over securing a pre-petition retainer. Braucher, *supra* note 46, at 175. If the debtor cannot meet the obligations set forth in his Chapter 13 payment plan, the attorney is free to discontinue her services; in other words, attorneys are not forced to work without compensation in a typical Chapter 13 situation. *Id.* Furthermore, Chapter 13 legal services are typically offered on an "easy credit" basis, "requiring little or nothing down, with the attorney's fees rolled into one monthly payment to the trustee, often made by payroll deduction. This makes it easier to sell Chapter 13 immediately and at a higher price to the debtor." *Id.* Thus, while the Chapter 13 option opens the doors of bankruptcy to debtors who cannot pay a retainer for pre-petition fees, it is not necessarily the most appropriate option or the best means of serving the debtors' financial interests.

264. *In re Haynes*, 216 B.R. at 444-45 (noting that the court has heard many bankruptcy attorneys admit that they filed Chapter 13 instead of Chapter 7, where Chapter 7 would have better served the debtor, solely because of debtors' lack of funds to pay their attorney fees); *see also In re* Leitner, 221 B.R. 502, 505 (Bankr. D. Neb. 1998) ("The selection of the appropriate bankruptcy chapter should not be influenced by the need to pay attorney fees."); Braucher, *supra* note 46, at 174 ("A lawyer's self-interest sometimes dictates not only using Chapter 13, but also putting clients into high percentage plans.").

however, the Code has a radically different effect: it precludes these debtors from accessing the system. Amending § 523 of the Bankruptcy Code to allow post-petition payment of pre-petition legal fees would foster a more open, more egalitarian bankruptcy system. Guaranteeing payment of attorneys' pre-petition legal expenses would open the bankruptcy system to all debtors—not just those able to advance a pre-petition retainer. This would provide each debtor with an equal opportunity to seek the advice of counsel and, ultimately, to receive an effective and beneficial fresh start.

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