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The Unscheduled Creditor in a Chapter 7 Case with Assets

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THE UNSCHEDULED CREDITOR IN A CHAPTER 7 CASE WITH ASSETS

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INTRODUCTION

A fundamental goal of federal bankruptcy law is to give debtors a fresh start.[1] This goal is accomplished through the discharge, the embodiment of the fresh start.[2] The discharge permanently enjoins creditors from attempting to collect from the debtor on most debts.[3]

The discharge is broad.[4] But there are exceptions.[5] Congress strived to carefully calibrate which debts are not discharged—known as the exceptions to discharge.[6] These exceptions reflect policy choices by Congress that tip the scale in favor of protecting certain creditors.[7] One such exception is for debts owed to creditors who did not receive notice of the bankruptcy case in time to permit timely action by the creditor to protect its rights.[8] Under this exception, the interest of protecting a creditor's right to file a claim outweighs a debtor's interest in a fresh start when the creditor lacks knowledge of the case.[9]

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[1] *See* Loc. Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) ("One of the primary purposes of the Bankruptcy Act is to . . . give[] the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt . . . ." (citations omitted) (internal quotation marks omitted)); Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) ("The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" (citations omitted)).

[2] *See* City of Chi. v. Fulton, 141 S. Ct. 585, 593 (2021) (Sotomayor, J., concurring) (quoting *Marrama*, 549 U.S. at 367); Judd v. Wolfe, 78 F.3d 110, 117 (3d Cir. 1996).

[3] *See* 11 U.S.C. § 524(a)(2); Taggart v. Lorenzen, 139 S. Ct. 1795, 1800 (2019) ("A discharge order 'operates as an injunction' that bars creditors from collecting any debt that has been discharged." (citation omitted)).

[4] *See* Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752, 1758 (2018).

[5] *See* 11 U.S.C. § 523(a) (setting forth the categories of nondischargeable debts); *Appling*, 138 S. Ct. at 1758; *Taggart*, 139 S. Ct. at 1800 ("Section 727, the statute cited in the discharge order, states that a discharge relieves the debtor 'from all debts that arose before the date of the order for relief,' '[e]xcept as provided in section 523.'" (citing 11 U.S.C. § 727(b)).

[6] *See, e.g.*, 11 U.S.C. § 523(a).

[7] *See* Cohen v. de la Cruz, 523 U.S. 213, 222 (1998).

[8] *See* 11 U.S.C. § 523(a)(3)(A).

[9] *See* Grogan v. Garner, 498 U.S. 279, 287 (1991); Beezley v. Cal. Land Title Co. (*In re* Beezley), 994 F.2d 1433, 1439–40 (9th Cir. 1993) (O'Scannlain, J., concurring) (recognizing "the balance struck between the rights of creditors on the one hand, and the policy of affording the debtor a fresh start on the other"); 4 COLLIER ON BANKRUPTCY ¶ 523.09[1] (Richard Levin & Henry J. Sommer eds., 16th ed. 2022) ("Section 523(a)(3) concerns itself with protecting a creditor's right to receive a distribution through the filing of a timely proof of claim . . . .").

Naturally, a debtor should exercise prudence in providing notice to all creditors. Mistakes and omissions happen, however.[10] And a debtor's failure to notify a certain creditor is not unusual.[11]

When this happens, a legal issue arises if the creditor learned of the case in time to file a tardy claim that would allow the creditor to participate in the distribution[12] with timely creditors.[13] Along this temporal spectrum, the issue courts have struggled with arises from a disagreement on a narrow question: is a debt discharged if a creditor learns of the case in time to permit filing a tardy claim and fully participate in the distribution with timely claims? The courts are

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[10] *See, e.g.*, Stone v. Caplan (*In re* Stone), 10 F.3d 285, 291 (5th Cir. 1994) (noting that the debtors' failure to list creditors was solely due to mistake or inadvertence); *accord* Dawson v. Unruh (*In re* Dawson), 209 B.R. 246, 249 (B.A.P. 10th Cir. 1997).

[11] Over a century ago, for example, one court recognized that "it is known by all who have had experience in bankruptcy practice, that many schedules are incomplete, especially the schedules of debts." Lamb v. Brown, 14 F. Cas. 988, 989 (D. Ind. 1875) (No. 8,011). The same is true today. Many commentators have addressed the recurring problem of omitted creditors in chapter 7 cases. *See, e.g.*, Lauren A. Helbling & Christopher M. Klein, *The Emerging Harmless Innocent Omission Defense to Nondischargeability Under Bankruptcy Code § 523(a)(3)(A): Making Sense of the Confusion over Reopening Cases and Amending Schedules to Add Omitted Debts*, 69 AM. BANKR. L.J. 33 (1995); Wayne Johnson, *Discharging Unscheduled Debts: Creating Equal Justice for Creditors by Restoring Integrity to Section 523(a)(3)*, 10 BANKR. DEV. J. 571 (1994); J. Neal Prevost, *We Left Them Off the List—Now What? Unscheduled Creditors in Chapter 7 Bankruptcies*, 54 LA. L. REV. 389 (1993). For example, one commentator specifically addressed omitted creditors in a chapter 7 no-asset case. *See* Sue Ann Slates, *The Unscheduled Creditor in a Chapter 7 No-Asset Case*, 64 AM. BANKR. L.J. 281 (1990). This Article examines a different aspect of this issue. *See id.* at 281. It addresses omitted creditors in a chapter 7 case with assets. *See* Helbling & Klein, *supra* note 11, at 63 ("What if the omitted creditor learned of the bankruptcy in time to file a tardy claim that actually was paid the same dividend as timely claims as permitted by § 726(a)(2)(C)?").

[12] *See* FED. R. BANKR. P. 3009 ("dividend checks" to be cut and mailed "as promptly as practicable").

[13] *See, e.g.*, Leadbetter v. Snyder (*In re* Snyder), 544 B.R. 905, 909 (Bankr. M.D. Fla. 2016) (recognizing the issue is whether the debt is discharged "where, even though creditors were not initially scheduled so that a timely proof of claim could have been filed, a claim was nevertheless filed on the creditor's behalf in time for distribution with creditors holding timely filed proofs of claim").

divided.[14] Bankruptcy courts have articulated two approaches,[15] and the courts continue to pick sides.[16] Some courts adopt the "plain language approach" and hold a debt is not discharged if the claim was not "timely" filed, e.g., before the deadline to file claims.[17] Other courts take a "distribution approach" and hold the debt is discharged if the claim is filed in time to receive a distribution, even if it is filed after the deadline to file claims.[18] Dischargeability[19] turns on a particular

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[14] *See, e.g.*, *id.*; *In re Beezley*, 994 F.2d at 1440 n.5 (O'Scannlain, J., concurring) ("A debate is currently raging among the bankruptcy courts of this circuit regarding this very issue."). There is also a circuit split on the effect of section 523(a)(3)(A) on an unscheduled debt in a no-asset case. *Compare* Colonial Sur. Co. v. Weizman, 564 F.3d 526, 530–31 (1st Cir. 2009) (holding a no-asset case does not excuse the debtor from listing the debt and notifying the creditor), *with* White v. Nielsen (*In re* Nielsen), 383 F.3d 922, 926–27 (9th Cir. 2004) (reasoning that the failure to list or notify the creditor "does not make the debt non-dischargeable in a no-assets, no-bar-date Chapter 7 bankruptcy because, in such a bankruptcy, there is no time limit for 'timely filing of a proof of claim,' so none are untimely"), Judd v. Wolfe, 78 F.3d 110, 114 (3d Cir. 1996) ("Because this is a 'no-asset' Chapter 7 case, the time for filing a claim has not, and never will, expire unless some exempt assets are discovered."), Zirnhelt v. Madaj (*In re* Madaj), 149 F.3d 467, 472 (6th Cir. 1998) ("In a no-asset Chapter 7 case, there is no date by which a proof of claim must be filed in order to be 'timely.'"), Watson v. Parker (*In re* Parker), 313 F.3d 1267, 1268–69 (10th Cir. 2002) (agreeing with the Third, Sixth, and Ninth Circuits that the debtor's intent in failing to schedule a debt is not relevant to the decision to reopen a case), Faden v. Ins. Co. of N. Am. (*In re* Faden), 96 F.3d 792, 797 (5th Cir. 1996) (holding a debt may be discharged in a no-asset case when debtor's failure to list the creditor resulted from "mere negligence or inadvertence"), Samuel v. Baitcher (*In re* Baitcher), 781 F.2d 1529, 1534 (11th Cir. 1986) ("We accept, as the Seventh Circuit does, that under the new law the old prophylactic rule does not in a no-asset case any more deny a discharge to one who has failed to schedule for reasons of honest mistake, not 'fraud or intentional design.'"), *and* Stark v. St. Mary's Hosp. (*In re* Stark), 717 F.2d 322, 323–34 (7th Cir. 1983) (per curiam).

[15] *See In re Snyder*, 544 B.R. at 909–10 ("Courts have taken two different approaches to this issue: the 'plain language approach' and the 'distribution approach.'" (footnote omitted)).

[16] *See, e.g.,* Creative Enters. HK, LTD., v. Simmons, (*In re* Simmons), No. 18-bk-03267, 2021 WL 3744890, at *2 (Bankr. M.D. Fla. Aug. 24, 2021) ("The Court agrees with the reasoning set forth in *Snyder* and will adopt the 'distribution approach.'").

[17] *See, e.g.*, *In re Snyder*, 544 B.R. at 909.

[18] *See, e.g.*, *id.* at 909–10; *see also* Helbling & Klein, *supra* note 11, at 63 ("What if the debtor pays the omitted creditor the same dividend as was received by creditors who were not omitted? What if the omitted creditor learned of the bankruptcy in time to file a tardy claim that actually was paid the same dividend as timely claims as permitted by § 726(a)(2)(C)?").

[19] "Dischargeability" is the declaratory judgment action to determine whether a debt is discharged. *See, e.g.*, Morrell v. Franchise Tax Bd. (*In re* Morrell), 218 B.R.

court's interpretation of "timely."[20] As a result, the approach a court adopts can lead to a result contrary to the policies under the Bankruptcy Code. A solution to this narrow split could also mean the difference between a creditor throwing good money after bad money.

This Article analyzes the following question. Is a debt discharged "if the omitted creditor learned of the bankruptcy in time to file a tardy claim that actually was paid the same dividend as timely claims as permitted by § 726(a)(2)(C)?"[21] This Article suggests, in the context of a liquidation, the debt may be discharged. This question is analyzed in three parts. First, this Article reviews the statutes applicable to omitted creditors and the history of the exception to discharge for omitted creditors. Then, this Article examines the caselaw adopting the plain language approach or the distribution approach. Lastly, before grappling with some implications arising under this split, this Article will address this question of statutory interpretation using principles of statutory construction commonly accepted and frequently cited by the Supreme Court[22] to clarify the issues surrounding the interpretation of the term "timely."[23]

87, 89 (Bankr. C.D. Cal. 1997) ("An Action to determine dischargeability has been likened to a declaratory judgment" and "does not seek money damages or have a *res judicata* effect for money damages in state court").

[20] *See* Eglin Fed. Credit Union v. Horlacher (*In re* Horlacher), 389 B.R. 257, 264 (Bankr. N.D. Fla. 2008) (noting the "questionable meaning of the term 'timely'"), *aff'd*, No. 08CV173, 2009 WL 903620 (N.D. Fla. Mar. 31, 2009); *see also* Samuel v. Baitcher (*In re* Baitcher), 781 F.2d 1529, 1532 (11th Cir. 1986) ("He interprets the statutory word 'timely' as meaning timely under the bankruptcy rules in the case of a bankruptcy with assets."); George H. Singer, *Section 523 of the Bankruptcy Code: The Fundamentals of Nondischargeability in Consumer Bankruptcy*, 71 AM. BANKR. L.J. 325, 362 (1997) ("An interpretive issue under the statute involves the meaning of the adverb 'timely.'"); Helbling & Klein, *supra* note 11, at 41 n.30 ("Although not apparently addressed by any case under the Code, this provision might affect nondischargeability actions under § 523(a)(3) if a tardy claim that meets the requirements of § 726(a)(2)(C) were to be regarded as timely for purposes of § 523(a)(3).").

[21] Helbling & Klein, *supra* note 11, at 63.

[22] *See* RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 649 (2012) ("The Bankruptcy Code standardizes an expansive (and sometimes unruly) area of law, and it is our obligation to interpret the Code clearly and predictably using well established principles of statutory construction.").

[23] *See* United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) (noting to arrive at a meaning, a court should select the permissible meaning that "produces a substantive effect that is compatible with the rest of the law").

I. BACKGROUND

This Part discusses a few fundamentals: the statutory, procedural, and historical background.[24] Examining the statutory regime applicable to liquidations and the historical development of the exception to discharge for omitted creditors is pertinent to this discussion because determining whether a claim is timely is a matter of statutory interpretation.[25]

A. Chapter 7: Relevant Concepts

Chapter 7 is the Code's liquidation proceeding.[26] Chapter 7 allows a debtor unable to pay their debts to have their assets liquidated

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[24] Statutory history is a useful tool in examining the text. *See, e.g.*, United States v. R.L.C., 503 U.S. 291, 298–99 (1992) (examining the textual evolution of a statutory provision); Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752, 1762 (2018) (tracing the statutory history of the phrase "statement respecting the debtor's financial condition" (citation omitted)); Union Bank v. Wolas, 502 U.S. 151, 156–57 (1991) (outlining the relevant history, including the addition and exclusion of certain language, of the Code's preference provision); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 256–60 (2012); WILLIAM N. ESKRIDGE, JR., ET AL., CASES AND MATERIALS ON STATUTORY INTERPRETATION 858 (WestLaw Acad. Publ'g, 1st ed. 2012) ("Statutory history (the formal evolution of a statute, as Congress amends it over the years) is always potentially relevant."). Statutory history by itself is not so controversial within the Court. *See, e.g.*, Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 231 (2007) (Scalia, J.) (refuting argument based on "statutory history"). Legislative history, however, is controversial within the Court. *See, e.g.*, United States v. Sotelo, 436 U.S. 268, 284–85 (1978) (Rehnquist, J., dissenting); Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 253–54 (2010) (Scalia, J., concurring in part and concurring in the judgment) (writing separately because of the Court's reliance on legislative history).

[25] *See* Mahakian v. William Maxwell Invs., LLC (*In re* Mahakian), 529 B.R. 268, 275 (B.A.P. 9th Cir. 2015) ("Our resolution of this case turns on the interpretation of § 523 (a)(3)(A)."); All Wheels Fin., Inc. v. Hurley (*In re* Hurley), No. 11-23485, 2012 WL 3597435, at *7 (Bankr. E.D. Wis. Aug. 20, 2012) ("Courts have interpreted the interplay between the two statutes differently."). *See generally* Zirnhelt v. Madaj (*In re* Madaj), 149 F.3d 467, 469 (6th Cir. 1998) (briefly summarizing the relevant provisions because the "law in this area is counter-intuitive, and requires a careful fitting together of the relevant sections of the Bankruptcy Code and Rules").

[26] *See* Harris v. Viegelahn, 575 U.S. 510, 513 (2015) ("Chapter 7 allows a debtor to make a clean break from his financial past, but at a steep price: prompt liquidation of the debtor's assets.").

and distributed to creditors.[27] Chapter 7 has two general goals.[28] The first is to afford the honest debtor a fresh start.[29] The second is to maximize the payment to creditors.[30]

First, from the individual debtor's standpoint, the principal benefit and the key to chapter 7 is the discharge.[31] If the individual debtor is honest and follows the rules of the Code in dealing with creditors and the bankruptcy court, including listing creditors and

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[27] *See id.*; Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 978 (2017) ("In Chapter 7, a trustee liquidates the debtor's assets and distributes them to creditors.").

[28] *See* Stellwagen v. Clum, 245 U.S. 605, 617 (1918) ("The federal system of bankruptcy is designed not only to distribute the property of the debtor, not by law exempted, fairly and equally among his creditors, but as a main purpose of the act, intends to aid the unfortunate debtor by giving him a fresh start in life . . . ."); N. River Ins. Co. v. Baskowitz (*In re* Baskowitz), 194 B.R. 839, 843 (Bankr. E.D. Mo. 1996) ("The dual purposes of a Chapter 7 bankruptcy case are to grant the honest debtor a discharge of his or her prepetition debts, and to provide a mechanism for the fair and orderly distribution of the debtor's assets that are subject to administration by the Trustee."). *See generally* Steven M. Constantin, *Friend or Foe? The Government's Split Mission in Consumer Bankruptcy Cases*, 100 N.C. L. REV. 1809, 1811–14 (2022) (providing a background on the key goals of the consumer bankruptcy system); Lawrence Ponoroff, *A Contemporary Approach to Ride-Through, Ipso Facto Clauses, and the Nondefaulting Debtor*, 21 NEV. L.J. 209, 213–19 (2020) (same).

[29] *See, e.g.*, Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 554–55 (1915).

[30] *See* Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) ("Chapter 7 authorizes a discharge of prepetition debts following the liquidation of the debtor's assets by a bankruptcy trustee, who then distributes the proceeds to creditors."); *Harris*, 575 U.S. at 513 ("A Chapter 7 trustee is then charged with . . . distributing the proceeds to the debtor's creditors." (citations omitted)).

[31] *See, e.g.*, Wetmore v. Markoe, 196 U.S. 68, 77 (1904) ("Systems of bankruptcy are designed to relieve the honest debtor from the weight of indebtedness which has become oppressive, and to permit him to have a fresh start in business or commercial life, freed from the obligation and responsibilities which may have resulted from business misfortunes."); Kokoszka v. Belford, 417 U.S. 642, 645–46 (1974); *Marrama*, 549 U.S. at 367 ("The principal purpose of the Bankruptcy Code is to grant a fresh start to the honest but unfortunate debtor." (citations omitted) (internal quotation marks omitted)); *Harris*, 575 U.S. at 513 ("The Bankruptcy Code provides diverse courses overburdened debtors may pursue to gain discharge of their financial obligations, and thereby a 'fresh start.'" (citation omitted)); Brown v. Felsen, 442 U.S. 127, 128 (1979) ("Through discharge, the Bankruptcy Act provides 'a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'" (quoting Loc. Loan Co. v. Hunt, 292 U.S. 234, 244 (1934)); *In re* Barnes, 969 F.2d 526, 527 (7th Cir. 1992) ("A petition for bankruptcy, at least when filed by the debtor, as in this case, is a plea for equitable protection. Discharge from debts is the principal relief sought.").

scheduling debts,[32] the debtor will get a discharge. This discharge provides a debtor "a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt"[33] and raises a permanent injunction against any act to collect a discharged debt,[34] subject to certain exceptions.[35]

Second, a chapter 7 case seeks to maximize the return to creditors by appointing a trustee who liquidates and distributes the debtor's available assets and their proceeds to the debtor's creditors under the priority scheme outlined in the Code.[36] The theme of chapter 7, at least from the creditors' perspective, is fair and equal treatment of creditors in accordance with these relative priorities.[37]

The discharge exceptions, the claim filing process, and the rules governing distribution exemplify these goals.

1. Exception for Unscheduled Debts

A debtor has a strong incentive to accurately schedule their debts and list all creditors; failure to fulfill his end of the bargain excepts the debt from discharge.[38] The list of creditors enables the

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[32] *See* 11 U.S.C. § 521(a)(1); *see also* Hanover Nat. Bank v. Moyses, 186 U.S. 181, 192 (1902) ("Creditors are bound by the proceedings in distribution on notice by publication and mail, and when jurisdiction has attached and been exercised to that extent, the court has jurisdiction to decree discharge, if sufficient opportunity to show cause to the contrary is afforded, on notice given in the same way.").

[33] Grogan v. Garner, 498 U.S. 279, 286 (1991) (quoting *Loc. Loan Co.*, 292 U.S. at 244).

[34] *See* 11 U.S.C. § 524(a)(2).

[35] *See* Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752, 1758 (2018) ("To that end, the Bankruptcy Code contains broad provisions for the discharge of debts, subject to exceptions.").

[36] *See id.*; 11 U.S.C. §§ 507(a), 726(a); *see also Marrama*, 549 U.S. at 367; *Harris*, 575 U.S. at 513.

[37] *See* Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co., 547 U.S. 651, 655 (2006) ("The Bankruptcy Code aims, in the main, to secure equal distribution among creditors."); Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 979 (2017).

[38] *See* § 11 U.S.C. 521(a)(1); FED. R. BANKR. P. 1007; *In re* Sims, 572 B.R. 862, 863 (Bankr. W.D. Mich. 2017) (recognizing the duty to give timely and proper notice to all creditors merely creates "an incentive: a debtor's failure to give proper notice may allow an otherwise dischargeable debt to survive discharge"); Schouten v. Jakubiak (*In re* Jakubiak), 591 B.R. 364, 389 (Bankr. E.D. Wis. 2018) ("[Section] 523(a)(3) suggests that it also serves to incentivize debtors to schedule their creditors and debts completely and accurately by punishing debtors who neglect their duty under the Code to do so."); Amy Catherine Dinn, *A Debtor's Duty to Update the Court*, 55 S. TEX. L. REV. 627, 628–34 (2014) (describing some of the obligations of full disclosure under the Code). In addition to discharging a debt, other incentives

mailing of many notices, such as the notice fixing or setting the date for filing a proof of claim—the bar date.[39] An omitted creditor may be precluded from filing a claim and receiving a dividend because the creditor would not have notice of the bar date.[40]

The Code however protects the omitted creditor under section 523(a)(3)(A). Section 523 provides, in relevant part:

> (a) a discharge . . . does not discharge an individual debtor from any debt—
>
> . . . .
>
> (3) neither listed nor scheduled under section 521(a)(1) . . . in time to permit—
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> (A) . . . timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing . . . .[41]

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exist for accurate scheduling. *See* Beezley v Cal. Land Title Co. (*In re* Beezley), 994 F.2d 1433, 1439 & n.3 (9th Cir. 1993) (O'Scannlain, J., concurring) (noting a debtor ignoring their obligation to list all claims may risk denial of discharge or criminal penalties); *cf.* Licup v. Jefferson Ave. Temecula, LLC (*In re* Licup), No. 22-1111, 2023 WL 2134975, at *4 (B.A.P. 9th Cir. Feb. 21, 2023) ("But under Debtors' proposed construction, there is no incentive to ensure proper scheduling of debts or to provide notice to creditors."), *appeal filed* No. 23-60017 (9th Cir. Mar. 23, 2023). From a practical standpoint, the real benefit lies in the time, expense, and money saved halting any collection efforts in state court by a creditor who was not notified about the bankruptcy case. *See* LaBate & Conti, Inc. v. Davidson (*In re* Davidson), 36 B.R. 539, 544 (Bankr. D.N.J. 1983) ("Debtors are sufficiently motivated to list all creditors and debts by other incentives: they bear the unnecessary expense of reopening the case to add the creditor and may be liable for attorney's fees expended by the creditor in efforts to collect the debt prior to learning of the petition.").

[39] *See* 9 COLLIER ON BANKRUPTCY, *supra* note 9, ¶ 1007.02[1] (stating the list of creditors must include the name and address of each creditor, including all entities listed on the schedules); Omni Mfg., Inc. v. Smith (*In re* Smith), 21 F.3d 660, 663 (5th Cir. 1994) ("Omission of a creditor's name from the mailing matrix is just as impermissible as omission from the formal schedules."). In many cases, creditors are usually notified it is unnecessary to file proofs of claim. *See* discussion *infra* notes 57–59 and accompanying text.

[40] *See* Prevost, *supra* note 11, at 389 ("If a particular creditor is omitted from the list, he may be precluded from, inter alia, filing a claim, filing a request for a determination of dischargeability, or participating in his pro-rata portion of the debtor's estate (the dividend).").

[41] 11 U.S.C. § 523(a)(3)(A).

For the text of this exception to apply, two conditions must be met subject to an exception.[42] First, the debt was neither listed nor scheduled.[43] Second, the debt was neither listed nor scheduled in time to permit timely filing of a proof of claim.[44] Here lies the exception to the exception;[45] if the creditor knows of the case in time for timely filing, the debt will be discharged despite the failure to list the creditor or schedule the debt.[46]

This exception protects the right to receive a distribution through the filing of a claim, with a focus on the timeliness of the filing.[47]Timeliness is measured by the bar date in most cases.[48] But a chapter 7 case is different, and the bar date is not the last day to file a claim and receive a distribution.[49]

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[42] *See id.*

[43] *See id.*; Johnson, *supra* note 11, at 575; *see also infra* note 57 (discussing the list of creditors).

[44] *See* Johnson, *supra* note 11, at 575–76.

[45] *See* Hill v. Smith, 260 U.S. 592, 595 (1923) ("But there is an exception to the exception, 'unless the creditor had notice' . . . .").

[46] *See, e.g.*, *In re* Barnes, 969 F.2d 526, 528 (7th Cir. 1992) (creditor admitted during cross-examination they "knew about the filing very shortly after it was filed" (internal quotation marks omitted)); Yukon Self Storage Fund v. Green (*In re* Green), 876 F.2d 854, 855 (10th Cir. 1989) (although the creditor received no formal notice, creditor learned of the bankruptcy before bar date for filing complaints to determine dischargeability); 4 COLLIER ON BANKRUPTCY, *supra* note 9, ¶ 523.09[4][a]. *See generally* Singer, *supra* note 20, at 364–65 (discussing issues arising under the "notice or actual knowledge" language). If a creditor had knowledge of the case, then an amendment to properly schedule a debt serves no purpose; conversely, properly scheduling the debt makes the creditor's knowledge of the case irrelevant. *See, e.g.*, Johnson, *supra* note 11, at 576–77.

[47] *See* 4 COLLIER ON BANKRUPTCY, *supra* note 9, ¶ 523.09[1]; Helbling & Klein, *supra* note 11, at 41 ("[T]he demarcation between timely and tardy also becomes the critical point for determining whether a particular omitted debt is dischargeable or nondischargeable under § 523(a)(3)(A) for creditors who lack notice or actual knowledge of the case.").

[48] *See* discussion *infra* notes 51–54 and accompanying text.

[49] *See In re* McCutchen, 536 B.R. 930, 937 (Bankr. N.D. Okla. 2015) ("Even though it may be referred to as the claims 'bar date,' the claims deadline in a Chapter 7 case does not preclude the late filing of a claim."); *see also* FED. R. BANKR. P. 3009 ("checks" must be made as "promptly as practicable"). *But see* Helbling & Klein, *supra* note 11, at 40 ("It does not matter whether there are assets available for distribution. Nor, apparently, does it matter that a tardily filed claim actually is paid, under § 726(a)(2)(c), the same pro rata distribution as timely filed claims." (footnote omitted)); Johnson, *supra* note 11, at 589 n.99.

2. The Bar Date

The deadline to file a proof of claim is generally known as the bar date.[50] Although the Code contemplates a timeliness requirement for filing claims,[51] the Code does not establish a bar date.[52] The timeliness requirements are generally left to the Federal Rules of Bankruptcy Procedure.[53]

Rule 3002(c), for example, measures timeliness by establishing a bar date for filing certain claims in chapter 7 cases.[54] As discussed below in Section I.A.3, the bar date generally depends on the case having assets to distribute; for example, if no assets are available, then a bar date is not established.[55] But, as discussed below, even if assets are available to make distributions and a bar date is established, certain claims may be filed after the bar date despite its imposition under Rule 3002(c).[56]

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[50] *See* 4 COLLIER ON BANKRUPTCY, *supra* note 9, ¶ 501.02[5][a][i].

[51] *See* 11 U.S.C. §§ 501(b), (c) ("If a creditor does not timely file a proof of such creditor's claim . . . .").

[52] *See* Biscayne 12 Condo. Assoc. v. S. Atl. Fin. Corp. (*In re* S. Atl. Fin. Corp.), 767 F.2d 814, 817 (11th Cir. 1985); *In re* Circuit City Stores, Inc., 447 B.R. 475, 509 (Bankr. E.D. Va. 2009) ("*Timely* is not a defined term in the Bankruptcy Code."). *But cf.* 11 U.S.C. § 502(b)(9) (a claim of a governmental unit is timely filed if filed within 180 days of the order for relief); 4 COLLIER ON BANKRUPTCY, *supra* note 9, ¶ 501.02[5] ("In response to the 2020 COVID-19 pandemic, Congress . . . allow[ed] certain mortgage lenders to file CARES forbearance claims. The deadline for filing a . . . forbearance claim is determined with reference to the date that is 120 days after the expiration of the forbearance period of the subject loan." (citation omitted) (internal quotation marks omitted) (footnote omitted)).

[53] *See* 4 COLLIER ON BANKRUPTCY, *supra* note 9, ¶ 501.02[5]. *See generally* Mark Glover, Note, *Timely Filing in Chapter 13 Bankruptcy Cases: Does Rule 3002(c)'s Deadline Apply to Secured Creditors?*, 87 B.U. L. REV. 1231, 1235–36 (2007) (outlining the legislative history of the timeliness requirement for filing proofs of claim).

[54] *See* IRS v. Chavis (*In re* Chavis), 47 F.3d 818, 819–20 (6th Cir. 1995) ("Fed. R. Bankr. P. 3002(c) establishes a bar date for filing certain proofs of claim in chapter 7 and chapter 13 cases." (internal quotation marks omitted)).

[55] *See infra* notes 57–61 and accompanying text.

[56] *See In re* McCutchen, 536 B.R. 930, 937 (Bankr. N.D. Okla. 2015); *see also* discussion *infra* Section I.A.4.

3. The Claim Filing Process

Many chapter 7 cases begin as cases with no assets,[57] meaning no distribution will be made and claims need not be filed, i.e., no bar

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[57] When a chapter 7 case is commenced, a notice to that effect is sent to all creditors obtained from the schedules or from the list of creditors. *See* 3 COLLIER ON BANKRUPTCY, *supra* note 9, ¶ 342.02[1]; *see also* 11 U.S.C. § 342(a); FED. R. BANKR. P. 2002(f)–(g). The notice has important information about the case, including information about the bar date. But the Federal Rules of Bankruptcy Procedure distinguish the type of notice establishing the bar date required in a chapter 7 case; the type of notice depends on whether there are assets in the case. *See In re* Thompson, 177 B.R. 443, 447 (Bankr. E.D.N.Y. 1995) ("The timing for filings proofs of claims depends completely upon whether there are assets in the case."). Assets determine whether a bar date is established. Compare the following. If there are insufficient assets to pay creditors at the commencement of the case, then the initial notice given to creditors will include a statement informing creditors not to file a proof of claim; and will inform creditors that if sufficient assets become available to pay creditors, then creditors will receive a separate notice establishing a deadline to file proofs of claim. *See* FED. R. BANKR. P. 2002(e); 9 COLLIER ON BANKRUPTCY, *supra* note 9, ¶ 3002.03[6] ("Rule 3002(c)(5) supplements Rule 2002(e) by requiring that the clerk of the court notify creditors of the possibility of a dividend. The notice shall give creditors at least 90 days' notice of the fact, as well as the date by which proofs of claims must be filed."); 9 COLLIER ON BANKRUPTCY, *supra* note 9, ¶ 2002.06 ("Rule 2002(e) allows the clerk to issue what has become known as the 'no asset' or the 'report of no distribution' notice."). But if there are sufficient assets to pay creditors at the commencement of the case, then the initial notice given to creditors will set a bar date. *See* 9 COLLIER ON BANKRUPTCY, *supra* note 9, ¶ 2002.07 ("The notices of the time to file claims under Rule 3002(c) in chapter 7, 12 and 13 cases . . . are sent with the notice of the meeting of creditors at a time far in advance of the bar date."). In sum, if distributable assets are unavailable, then a bar date is not set, but if there are distributable assets, then the bar date is set. *See, e.g.*, Moss v. Burton & Norris (*In re* Moss), 267 B.R. 839, 844 (B.A.P. 8th Cir. 2001) ("[Generally], it is assumed that the chapter 7 case is a no-asset case and, when the notice of commencement of the case is issued, rather than stating a date for filing proofs of claim, the notice indicates the parties should not file a proof of claim."). Asset cases however are rare and vary by jurisdiction, in part owing to the varying state exemption laws. *See generally* Belisa Pang & Emile Shehada, *One Size Fits None: An Overdue Reform for Chapter 7 Trustees*, 131 YALE L.J. 976, 979–80, 988–93 (2022) (examining the trustee's role in a chapter 7 case and the factors causing the disparate percentage of consumer cases resulting in a distribution). And determining whether there are assets is not always readily apparent. For example, Official Form 101, Voluntary Petition for Individuals Filing for Bankruptcy, requires debtors who are filing under chapter 7 to disclose whether they estimate funds will be available to distribute to unsecured creditors. Yet even if a debtor estimates funds are available to distribute to unsecured creditors, this does not necessarily mean the bar date will be set because a debtor can file the schedules within fourteen days of the petition date. *See* FED. R. BANKR. P. 1007(c). And Rule 2002(e) provides that a notice can

date is established.[58] When this happens, creditors are informed a bar date will be set at a later date only if assets are located that can be liquidated to pay to creditors.[59]

Once a bar date is set, an unsecured creditor must file a claim to receive a distribution.[60] Section 502(a) allows a claim unless a party in interest objects.[61] A party may object if the claim was not timely filed.[62] Although the Code does not define "timely" or established a bar date,[63] the Federal Rules of Bankruptcy Procedure provide one source for defining a "timely" claim.[64] Rule 3002, as noted above,

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be provided informing creditors not to file claims "if it appears from the schedules" no assets are available. *See* FED. R. BANKR. P. 2002(e). Under these rules, an interesting question is whether a bar date can be set before the schedules are filed based on the disclosure of estimated assets and liabilities in the Voluntary Petition for Individuals Filing for Bankruptcy. The plain language of these rules suggests a bar date cannot be set without the schedules. One case has noted the schedule of assets and liabilities need not be filed with the petition, which meant notice of the commencement of the case cannot be given until the schedules are filed. *See* Lott Furniture, Inc. v. Ricks (*In re* Ricks), 253 B.R. 734, 736 n.7 (Bankr. M.D. La. 2000). In any event, for purposes of this discussion, the crucial fact is that, at some point, there was a deadline to file proofs of claim—a bar date.

[58] *See In re McCutchen*, 536 B.R. at 936.

[59] *See id.*

[60] *See id.* ("Then, and only then, does it become necessary for a creditor to file a claim if they wish to receive a distribution from the bankruptcy estate."); Amir Shachmurove, *Here Lions Roam: CISG as the Measure of a Claim's Value and Validity and a Debtor's Dischargeability*, 34 EMORY BANKR. DEV. J. 461, 472 (2018). One case has noted the bar date in a chapter 7 case can essentially be renewed and reactivated if a trustee notifies the court payment of a dividend appears possible, which would establish a new deadline for filing proofs of claim; meaning there can be more than one deadline. *See* Schouten v. Jakubiak (*In re* Jakubiak), 591 B.R. 364, 381–82 (Bankr. E.D. Wis. 2018).

[61] *See* 11 U.S.C. § 502(a).

[62] *See* 11 U.S.C. § 502(b)(9). The allowance of tardily filed claims was a contested issue prior to Congress's clarification of the law through the Bankruptcy Reform Act of 1994, which allowed tardily claims by adding section 502(b)(9). *See generally In re* Mid-Miami Diagnostics, L.L.P, 195 B.R. 20, 21–22 (Bankr. S.D.N.Y. 1996).

[63] *See In re* Circuit City Stores, Inc., 447 B.R. 475, 509 (Bankr. E.D. Va. 2009) ("*Timely* is not a defined term in the Bankruptcy Code."); *see also supra* notes 50–53 and accompanying text.

[64] *See* Johnson, *supra* note 11, at 582–84; Helbling & Klein, *supra* note 11, at 40–41. The bar date will depend on the case being an asset case or no asset case. *See* Helbling & Klein, *supra* note 11, at 41; *see also supra* notes 56–58 and accompanying text. *But see In re Jakubiak*, 591 B.R. at 382 (noting a bar date is always established in every case, and if assets are found the bar date is extended or a "new

states claims must be filed by the specified date to be considered "timely."[65] If a claim is disallowed, the creditor cannot participate in any distribution and will not receive a payment.[66] For this reason, in other chapters of the Code, timely filing is encouraged, if not essential.[67]

But the Code entitles certain claims in chapter 7 cases, as discussed below in Section I.A.4, that are not timely under the rules of

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deadline for filing proofs of claim" is set). For example, as noted by one commentator:

Under Rule 3002(c)(5), a bankruptcy court administering a chapter 7 case can issue a notice to creditors under Rule 2002(e) advising them not to file claims because dividends are unlikely. In such cases, no deadline to file a claim exists yet. Subsection (5) provides that upon later discovery of assets, a deadline shall be established. Therefore, a proof of claim is not untimely until assets are found, and a deadline is established.

Johnson, *supra* note 11, at 609 (footnotes omitted).

[65] *See* FED. R. BANKR. P. 3002(c); Shachmurove, *supra* note 60, at 471 ("Section 501 and Rules 3001, 3002, 3003, 3004, 3005, and 3006 specify how and when a proof must or may be filed; these timeliness requirements are intended to aid in the orderly and efficient administration of bankruptcy cases." (citation omitted) (internal quotation marks omitted)).

[66] *See In re* Jemal, 496 B.R. 697, 704 (Bankr. E.D.N.Y. 2013) ("In Chapters 11 and 13, unlike Chapter 7, no statutory scheme provides for distribution to no-notice creditors, and the need to promptly identify claims so that they can be dealt with in a plan makes it important to prevent no-notice creditors from 'waiting indefinitely to file a claim.'" (citations omitted)).

[67] *See* Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 389 (1993) (comparing the policies of chapter 7 and chapter 11); 9 COLLIER ON BANKRUPTCY, *supra* note 9, ¶ 3002.03[1] ("The time for filing claims fixed by Rule 3002(c) works like a statute of limitations in that a claim filed later will not (absent a surplus) entitle its holder to receive distributions from the estate."). *See generally* Jennie D. Latta, *"What You Don't Know May Hurt You"—Time Limits Under the Bankruptcy Code and Rules*, 28 U. MEM. L. REV. 911, 927–31 (1998) (discussing the time limits for filing a proof of claim).

bankruptcy procedure to receive a distribution.[68] An objection to a claim in a chapter 7 case made on the basis of timeliness is futile.[69]

4. Distribution

The priorities in section 726(a) determine the order in which assets will be distributed in a chapter 7 case.[70] Timely claims filed by unsecured creditors receive a distribution after higher priority creditors.[71] Tardy claims receive a distribution after timely claims.[72]

That said, the Code provides an exception for tardy claims filed by creditors who did not know about the case in time to file a claim by the bar date.[73] The Code protects this omitted creditor under section

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[68] *See In re* McCutchen, 536 B.R. 930, 937 (Bankr. N.D. Okla. 2015); *In re* Columbia Ribbon & Carbon Mfg. Co., 54 B.R. 714, 718 (Bankr. S.D.N.Y. 1985) ("Glaringly absent from Rule 3002(c) is any provision relating to the time within which the claims of no-notice creditors are to be filed."). A prior version of Rule 3002(c)(6) "provided that in a chapter 7 liquidation case, if a surplus remains after all claims allowed have been paid in full, the court may grant an extension of time for the filing of claims against the surplus not filed within the time hereinabove prescribed." *In re* Cisneros, No. 17-33497, 2018 WL 4473621, at *4 (Bankr. N.D. Ohio Sept. 27, 2018) (quoting FED. R. BANKR. P. 3002(c)(6) (1995) (alteration omitted) (internal quotation marks omitted).

[69] *See* Perry v. First Citizens Fed. Credit Union, 304 B.R. 14, 19 (D. Mass.) ("Thus in Chapter 7 cases, unlike Chapter 11, 12, and 13 cases, some untimely proofs of claim are allowed."), *aff'd sub nom.* Perry v. First Citizens Fed. Credit Union (*In re* Perry), 391 F.3d 282 (1st Cir. 2004).

[70] *See* 11 U.S.C. § 726(a).

[71] *See* § 726(a)(2); *see also* Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 979 (2017) ("Secured creditors are highest on the priority list . . . . Special classes of creditors . . . come next in a listed order. Then come low-priority creditors, including general unsecured creditors." (citations omitted)).

[72] *See* 11 U.S.C. § 502(b)(9); 4 COLLIER ON BANKRUPTCY, *supra* note 9, ¶ 502.03[10][c] ("Under section 726(a), tardily filed claims in chapter 7 cases are not disallowed, necessarily, for distribution purposes but, rather, are generally subordinated to distributions on timely filed claims of the same priority."). Third in line are claims filed after the bar date by a creditor who had notice or knowledge of the case in time for timely filing. *See* 11 U.S.C. § 726(a)(3). This category of claims is subordinated because the tardy filing results from the creditor's failure to act, unlike the second category of claims in section 726(a)(2)(C), when the tardy filing does *not* result from the creditor's failure to act. *See* 6 COLLIER ON BANKRUPTCY, *supra* note 9, ¶ 726.02[3]; *In re* Davis, 430 B.R. 62, 63–64 (Bankr. W.D.N.Y. 2010).

[73] *See In re* Trib. Co., 506 B.R. 613, 618 (Bankr. D. Del. 2013) ("The plain language of § 502(b)(9) does not extend allowance of certain tardy claims under § 726(a) to cases other than those filed under chapter 7."); *In re* Jemal, 496 B.R. 697, 702 (Bankr. E.D.N.Y. 2013); 11 U.S.C. § 103(b) ("Subchapters I and II of chapter 7 of this title apply only in a case under such chapter.").

726(a)(2) by including them with timely claims.[74] Section 726 provides, in relevant part:

> (a) . . . property of the estate shall be distributed—
>
> > (2) second, in payment of any allowed unsecured claim . . . proof of which is—
> >
> > > (A) timely filed[; or]
> > >
> > > . . .
> > >
> > > (C) tardily filed . . . if—
> > >
> > > (i) the creditor . . . did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim[; and]
> > >
> > > (ii) proof of such claim is filed in time to permit payment of such claim . . . .[75]

The tardily filed claim will receive a distribution with timely claims if two conditions are met: the creditor did not have notice or knowledge of the case for timely filing and the claim is filed in time to permit payment.[76] This governing statute provides another source for defining "timely."

This provision permits distributions to claims filed in time to permit payment if their tardiness was because they lacked knowledge of the case.[77] But the specific time a distribution will occur is unknowable early in the case, and it depends on the estate.[78]

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[74] *See* 11 U.S.C. § 726(a)(2)(C)(i)–(ii).

[75] *Id.*

[76] *See id.*

[77] Section 726(a)(2)(C) has one main purpose:

> The purpose of § 726(a)(2)(C) is to permit distribution to creditors that tardily file claims if their tardiness was due to lack of notice or knowledge of the case. Though it is in the interest of the estate to encourage timely filing, when tardy filing is not the result of a failure to act by the creditor, the normal subordination penalty of § 726(a)(3) should not apply.

In re Jemal, 496 B.R. at 702 (citations omitted) (internal quotation marks omitted) (alteration omitted).

[78] *See, e.g.*, Naylor v. Farrell (*In re* Farrell), 610 B.R. 317, 322 (Bankr. C.D. Cal. 2019) ("[T]he waterfall of distributions by Ms. Naylor from bankruptcy estate property pursuant to 11 U.S.C. § 726 remains unknowable at this point in time.").

B. Historical Background

Bankruptcy laws have historically bound creditors by the proceedings on notice and protected creditors who lacked notice from being bound by the proceedings.[79] The Bankruptcy Act of 1898 enacted section 17a(3), a discharge exception similar to section 523(a)(3)(A).[80] Section 17a(3) generally applied when a creditor was not scheduled by the debtor and thus did not know of the bankruptcy case in time to file a claim.[81]

The Supreme Court strictly interpreted section 17a(3). But the Court's interpretation appears to have caused a circuit split. Congress then legislatively overruled the Supreme Court and possibly the caselaw relying on the Court's precedent. These events are considered below.

1. The Bankruptcy Act

The Bankruptcy Act of 1898 "ushered in the modern era of liberal debtor treatment in United States bankruptcy laws."[82] This Act excepted very few debts from the discharge.[83] Among the few exceptions was section 17a(3).[84] Section 17 provided, in relevant part:

> a discharge in bankruptcy shall release a bankrupt from all of his provable debts . . . except such as . . . have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy.[85]

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[79] *See, e.g.*, Hanover Nat. Bank v. Moyses, 186 U.S. 181, 192 (1902). Notice to creditors has appeared in all of the prior acts preceding the Code. *See, e.g.*, BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 238 (First Harvard Univ. Press paperback ed. 2009) ("Unlike modern bankruptcy law, which requires individual notice of the proceedings to creditors, the Act of 1800 permitted publication notice in a single local newspaper.").

[80] *See* Schouten v. Jakubiak (*In re* Jakubiak), 591 B.R. 364, 383 (Bankr. E.D. Wis. 2018).

[81] *See* Lott Furniture, Inc. v. Ricks (*In re* Ricks), 253 B.R. 734, 748 (Bankr. M.D. La. 2000).

[82] Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 24 (1995).

[83] *See id.*

[84] *See* Bankruptcy Act of 1898, Pub. L. No. 55-541, § 17a(3), 30 Stat. 544, 550.

[85] *Id.*; *accord In re Ricks*, 253 B.R. at 748; Colonial Sur. Co. v. Weizman, 564 F.3d 526, 531 (1st Cir. 2009); *In re* Jordan, 21 B.R. 318, 320 (Bankr. E.D.N.Y. 1982).

This language was not as permissive.[86] For example, the statute used "duly"[87] regarding the scheduling of a debt.[88]

Shortly after its enactment, in 1904, the Supreme Court in *Birkett* strictly interpreted section 17a(3).[89] In *Birkett*, the issue was whether the debt of a creditor was discharged.[90] The creditor was not listed, a discharge was granted, and between the discharge and a distribution, the creditor learned of the case in time to file a claim and participate in any distribution.[91] The court entered judgment excepting the debt from discharge because the creditor learned of the case after the discharge.[92] Debtor appealed.[93]

On further appeal, the debtor argued the creditor's rights were not affected by the lack of notice because the creditor learned of the case in time to file a claim.[94] The Court of Appeals of New York,[95]

This exception reflected a "significant change from the Bankruptcy Act of 1867." *In re Jakubiak*, 591 B.R. at 384.

[86] *See* GARRARD GLENN, THE RIGHTS AND REMEDIES OF CREDITORS RESPECTING THEIR DEBTOR'S PROPERTY § 553, at 442 (Little, Brown, & Co. 1915) ("This provision has been liberally construed in favor of the creditor . . . .").

[87] *Cf.* Mass. Dep't of Revenue v. Shek (*In re* Shek), 947 F.3d 770, 779–80 (11th Cir. 2020) (rejecting the government's argument the tax debt was excepted from discharge because the tax "return" was not "duly filed," meaning timely filed).

[88] The Code removed any temporal requirement for listing or scheduling. *See* 11 U.S.C. § 523(a)(3)(A) ("neither listed nor scheduled . . ."); *Weizman*, 564 F.3d at 531 (recognizing the Code used "slightly more permissive" language).

[89] *See* Columbia Bank v. Birkett, 73 N.Y.S. 704, 705 (N.Y. Sup. Ct.), *aff'd mem.*, 73 N.Y.S. 1132 (N.Y. App. Div. 1901), *aff'd*, 66 N.E. 652 (N.Y. 1903), *aff'd*, 195 U.S. 345, 350 (1904).

[90] *See Birkett*, 195 U.S. at 349–50.

[91] *See Weizman*, 564 F.3d at 531.

[92] *See Birkett*, 73 N.Y.S. at 705.

[93] *Birkett*, 73 N.Y.S 1132.

[94] *See Birkett*, 66 N.E. at 652. The debtor also argued the creditor's rights were not affected because it could have requested to have the discharge revoked. *See id.*

[95] Before 1970, the state courts generally determined the dischargeability of debts and bankruptcy courts determined whether the debtor was entitled to receive a discharge. *See* Fed. Ins. Co. v. Gilson (*In re* Gilson), 250 B.R. 226, 238 (Bankr. E.D. Va. 2000). Although bankruptcy courts had concurrent jurisdiction with the state courts to decide whether debts were excepted from discharge, in practice, "bankruptcy courts generally refrained from deciding whether particular debts were excepted [from discharge] and instead allowed those questions to be litigated in the state courts." Grogan v. Garner, 498 U.S. 279, 284 n.10 (1991). Dischargeability of a debt owed to a creditor omitted from the schedules appears to have hinged on whether the debtor asked to amend his schedules and to extend the time to file claims before he asked for a determination of dischargeability. *See In re* Robinson, 2 B.R. 127, 129 (Bankr. D. Or. 1979); *In re* Strano, 248 B.R. 493, 498 (Bankr. D.N.J. 2000)

the State of New York's highest court, dismissed this argument because the creditor failed to enjoy the opportunities provided by the Act, such as the selection of a trustee,[96] and the debt could not be proved after the discharge.[97] The court affirmed.[98]

Judge Vann dissented and wrote separately to emphasize the creditor's actual knowledge and the purpose of section 17a(3).[99] Judge Vann, the sole dissenter, began by noting the creditor learned of the case five months before the bar date and thus knew about the case in time to prove its claim and have it allowed.[100]

After establishing the creditor's actual knowledge in time to file a claim, Judge Vann narrowed the discussion to the "real meaning of" section 17a(3).[101] First, Judge Vann stated this exception aims to enable a creditor to share in the distribution of the estate because the statute merely states, "in time for proof and allowance," without providing the date when notice must be given or knowledge must be acquired to take the debt out of the exception.[102] Then, Judge Vann noted if a creditor knows about the case in time to file a claim and share in the distribution, then the debt is discharged, whether or not the creditor files a claim.[103] Judge Vann reasoned choosing any other date, other than the date in time to file a claim and share in the distribution,

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(citing *Grogan*, 498 U.S. at 284 n.10); *see also In re* Robertson, 13 B.R. 726, 732 n.7 (Bankr. E.D. Va. 1981).

[96] *See Birkett*, 66 N.E. at 653 ("The plaintiff enjoyed none of the opportunities provided by the act for the creditors of a debtor who is seeking a discharge from his debts—such as the selection of a trustee, or the examination of the bankrupt, as preliminary to opposition to the discharge.").

[97] *See id.* ("Can we say that such debts as may be proved within a year from the adjudication in bankruptcy are discharged? I think, clearly, not.").

[98] *See id.*

[99] *See id.* at 653–55 (Vann, J., dissenting).

[100] *See id.* at 653 (Vann, J., dissenting).

[101] *See id.* at 655 (Vann, J., dissenting).

[102] *See id.* (Vann, J., dissenting). Under the Bankruptcy Act, claims could be proved and allowed against a bankrupt's estate at any time within one year after the date the petition was filed. *See id.* at 653–54 (Vann, J., dissenting); *see also* Bankruptcy Act of 1898, Pub. L. No. 55-541, § 57n, 30 Stat. 544, 561.

[103] *See Birkett*, 66 N.E. at 655 (Vann, J., dissenting). Judge Vann cited *Fider v. Mannheim*, 81 N.W. 2 (1899), as directly on point. In *Fider*, the creditor filed an action on a promissory note and the debtor raised the discharge as a defense. *Id.* at 3. Because the original creditor transferred the promissory note to a different creditor, the debtor listed the debt as being held by the original creditor. *See id.* The current creditor did not receive notice. *Id. Fider* held the debt was discharged partly because the creditor who held the promissory note had knowledge of the case with ample time to prove his claim if he desired to do so, even though the creditor was not listed, and no notice was given to him. *See id.*

would be arbitrary and without foundation in the language of the statute.[104]

Judge Vann criticized the majority's holding as undermining the goal of relieving honest debtors from the burdens of their debts.[105] Since the creditor knew of the case in time to share in the distribution, Judge Vann concluded the judgment should be reversed.[106] Debtor appealed to the Supreme Court.[107]

The Court began by describing the debtor's duties over the exposition of affairs, property, and creditors.[108] Toward this end, the Court noted filing a schedule of property and a list of creditors[109] benefits creditors, not the debtor.[110]

The debtor renewed his argument that the creditor knew about the case in time to prove his claim—an issue Congress contemplated by discharging debts held by a creditor with "knowledge of the proceedings."[111] But the Court rejected this argument because the trial court found the creditor did not have notice and the discharge was entered before the creditor knew about the case.[112] The Court reasoned "actual knowledge" does not only mean knowledge in time to file a claim and receive a distribution, but it also means knowledge in time to permit full participation by the creditor, including the ability to object to the granting of a discharge.[113]

The Court emphasized the creditor's remedy, through section 17, is natural.[114] A creditor should not be deprived because of a

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[104] *See Birkett*, 66 N.E. at 655 (Vann, J., dissenting).

[105] *See id.* (Vann, J., dissenting).

[106] *See id.* (Vann, J., dissenting).

[107] Birkett v. Columbia Bank, 195 U.S. 345, 349 (1904).

[108] *See id.*

[109] *See id.*

[110] *See id.* at 350.

[111] *See id.* at 349–50 ("[A]nd provided against it by other provisions of the law; especially by that which makes it the duty of the referee to give notice to creditors, and by that which imposes the duty on the bankrupt to appear at the meeting of creditors, for examination." (citation omitted)).

[112] *See id.* at 350.

[113] *See id.* ("[Actual knowledge] in time to avail a creditor of the benefits of the law,-in time to give him an equal opportunity with other creditors," but "not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate, or to deprive him of dividends . . ."). The Court cited section 65 of the Act, which addressed the payment of dividends on "allowed claims." *E.g., In re* Fashion Spear, Inc., 15 B.R. 137, 140 (Bankr. W.D. Pa. 1981); *accord* Bankruptcy Act of 1898, Pub. L. No. 55-541, § 65, 30 Stat. 544, 564.

[114] *See Birkett*, 195 U.S. at 350.

debtor's neglect or default in bankruptcy.[115] The Court held a debt is discharged unless the creditor did not receive notice in time to participate in the administration of the estate.[116] The Court unanimously affirmed.[117]

Almost forty years later, the United States Court of Appeals for the Second Circuit in *Milando*,[118] following the Court's guidance in *Birkett*, strictly applied section 17a(3) and held this exception precluded discharge of a debt omitted from the original schedules.[119]

In *Milando*, the debtor had inadvertently omitted a judgment creditor from the original schedules.[120] At some point after the debtor's bankruptcy, the creditor sued in state court to reach newly acquired assets.[121] The debtor then tried to reopen the bankruptcy case to amend the schedules and include the creditor.[122] The court reopened the case.[123] The court then provided in a no-asset case the debtor should be allowed to amend his schedules.[124] Lastly, the court determined the debts in the amended schedules would be discharged while allowing the creditor to challenge the granting of a discharge "on the merits."[125] Creditor appealed.[126]

Milando reversed and held the omitted debt was not discharged even though no assets were available to distribute.[127] The Second Circuit reasoned the debt could not be discharged because any claim must be filed by the bar date.[128] Under the facts on appeal, that time had

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[115] *See id.*

[116] *See id.*

[117] *See id.* at 351.

[118] Milando v. Perrone, 157 F.2d 1002 (2d Cir. 1946).

[119] *See id.* at 1004.

[120] *See id.* at 1003 ("The claim was omitted because of lack of knowledge of the judgment on which it was based . . . .").

[121] *See id.*

[122] *See id.*

[123] *See id.* ("The order appealed from confirms the reopening of the proceedings, previously ordered ex parte . . . .").

[124] *See id.* ("[T]hat if no unadministered assets are disclosed at the first meeting the bankrupt's petition to amend shall be granted . . . .").

[125] *Id.* ("[A]nd that the case shall then proceed 'in the usual course according to law,' with opportunity to the bankrupt to seek discharge 'of a scope commensurate with his amended schedules,' and to the creditor 'to oppose the granting of such a discharge on the merits.'"). Generally, a creditor could seek to revoke the granting of a discharge.

[126] *See id.*

[127] *See id.* at 1004.

[128] *See id.*

"long since elapsed."[129] *Milando* relied on *Birkett* and noted its holding applied despite the case having no assets because doing so departs from the clear statutory language by inserting an exception not found in the statute.[130] The Second Circuit also premised its holding on the justification that a debtor who seeks to discharge his debts should comply with the provisions of the statute.[131] Courts interpreted *Milando* as holding that once the bar date expires, any omitted debts are precluded from being discharged, even though there are no assets to distribute.[132]

Soon after, the United States Court of Appeals for the Fifth Circuit in *Robinson*[133] considered the bankruptcy court's power to extend the bar date,[134] which was linked to the dischargeability of a claim

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[129] *See id.* *Milando* recognized the time for filing claims cannot be extended except to "prevent a fraud or an injustice." *See id.* (quoting Pepper v. Litton 308 U.S. 295, 304 n.11 (1939)). *Milando* however explained this language in *Pepper* was dictum, and therefore it should not be taken as a final stamp of approval on propositions unnecessary to the Court's decision. *See id.* *Milando* also stated the Chandler Act of 1938 curtailed the equitable powers employed to address problems arising out the administration of bankruptcy estates. *See id.* Courts extended this reasoning to determine whether a case should be reopened if the exceptions did not achieve results opposed to the clear language of section 17a(3). *See* Slates, *supra* note 11, at 284–85 (examining prior bankruptcy rules for filing a claim, *Milando*, and *In re Jordan*, 21 B.R. 318 (Bankr. E.D.N.Y. 1982)). But *Milando* also recognized the possible exception to reopen the case if the Second Circuit would enjoin the state court action under "unusual circumstances" or where "special embarrassment arises." *Milando*, 157 F.2d at 1004 (quoting Ciavrella v. Salituri, 153 F.2d 343, 433 (2d Cir. 1946)).

[130] *See Milando*, 157 F.2d at 1003–04; *see also* discussion *infra* Section II.B analyzing the plain language approach.

[131] *See id.* at 1004 ("It is only just that he who seeks the protection of a statutory bar against payment of his debts be required to bring himself within the provisions of the statutory grant." (citing Hill v. Smith, 260 U.S. 592, 595 (1929)).

[132] *See* Slates, *supra* note 11, at 295 ("The opposing minority view is typified in *Milando* which denies amendments by strictly construing the time set for filing proofs of claim as tantamount to a statute of limitations.").

[133] Robinson v. Mann, 339 F.2d 547 (5th Cir. 1964).

[134] One commentator has recognized *Robinson* did not address section 17a(3). *See* Johnson, *supra* note 11, at 606 ("Unlike in *Milando*, the *Robinson* court never mentioned section 17a(3). The statutory analysis focused solely on the question of judicial power to extend the section 57(n) filing deadline. Thus, *Robinson* technically represents a 'liberal' interpretation of filing deadlines, not of section 17a(3) or section 523(a)(3).").

under section 17a(3).[135] *Robinson* falls on the other side of this split and illustrates a liberal approach of the rules governing deadlines.[136]

In *Robinson*, the debtor's attorney erroneously concluded the creditor only had a security interest in the debtor's property that was securing the debt; meaning the creditor only had *in rem* rights against the property.[137] For this reason, the attorney did not list the creditor on the schedules.[138] After the first meeting of the creditors, the debtor "was apparently without the services of an attorney."[139] Because of the debtor's pro se status, it was suggested he employ a second attorney.[140] After retaining a new attorney, this attorney concluded the debtor did, in fact, have personal—*in personam*—liability on the erroneously omitted debt from the schedules by the previous attorney.[141] This new attorney intended to amend the schedules to include this omitted creditor.[142]

The amendment was denied as futile because the bar date lapsed.[143] After an appeal, the district court affirmed.[144] An appeal to the Fifth Circuit ensued.[145]

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[135] *See* Helbling & Klein, *supra* note 11, at 55–56 ("The failure-to-list provision set forth in Bankruptcy Act § 17(a)(3) was thereafter rigidly applied until the Fifth Circuit found some room to maneuver in *Robinson* by fashioning a legal fiction, the *nunc pro tunc* amendment, based upon the bankruptcy court's equitable powers." (footnote omitted)).

[136] *See* Slates, *supra* note 11, at 290 ("The liberal rule is illustrated in *Robinson v. Mann*, where the court held bankruptcy courts have discretion to invoke their equity powers to allow amendment of schedules after the expiration of the claims period under exceptional circumstances." (footnote omitted)).

[137] *See Robinson*, 339 F.2d at 549; *see, e.g.*, Johnson v. Home State Bank, 501 U.S. 78, 84 (1991) (discussing *Long v. Bullard*, 117 U.S. 617 (1886), and the discharge extinguishing "only one mode of enforcing a claim—namely, an action against the debtor *in personam*—while leaving intact another—namely, an action against the debtor *in rem*").

[138] *See Robinson*, 339 F.3d at 549.

[139] *Id.*

[140] *See id.*

[141] *See id.* ("Since the property had been conveyed to the minor children, the attorney intentionally failed to list the debt on the creditors schedules. In point of fact, the bank has no lien and appellant is personally liable on the note.").

[142] *See id.*

[143] *See id.*; *see also* Milando v. Perrone, 157 F.2d 1002, 1004 (2d Cir. 1946) (holding a debt is excepted from discharge if the bar date has lapsed because the schedules cannot be amended).

[144] *See Robinson*, 339 F.2d at 549.

[145] *See id.* at 548.

Robinson first recognized filing claims after the bar date is generally not allowed.[146] The Fifth Circuit then noted courts held this principle has been applied to prevent a debtor from amending his schedules after the bar date.[147] That said, the Fifth Circuit also recognized the Panel was bound by precedent, which would allow an amendment of the schedules after the bar date in "exceptional circumstances."[148] *Robinson* then held a bankruptcy court had discretion to exercise its equitable powers in allowing a debtor to amend his schedules after expiration of the bar date under "exceptional circumstances appealing to the equitable discretion of the bankruptcy court" by considering the reason for the omission, the disruption to the courts, and the prejudice to creditors.[149] *Robinson* supported its holding by explaining the statute's purpose was to "prod creditors to seasonably present their claim, not to force bankrupts to seasonably present their amendments."[150]

In sum, the exception to discharge for omitted creditors under the Bankruptcy Act caused a similar split in the courts. Courts following the liberal rule held bankruptcy courts had the discretion to invoke their equitable powers to allow amendments to the schedules, which would extend the bar date. Courts strictly applying section 17a(3) refused to allow an amendment after the bar date.

2. The Bankruptcy Code

In 1978, the Bankruptcy Reform Act repealed the Bankruptcy Act and established the Bankruptcy Code.[151] As noted above, section 523(a)(3)(A) provides that a discharge does not discharge any debt neither listed nor scheduled in time to permit timely filing a claim.[152]

The statutory language of section 523(a)(3)(A) differed substantively from section 17a(3).[153] The removal of "duly" and the

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[146] *Id.* at 549 (citation omitted).

[147] *See id.*

[148] *See id.* at 550 (citing Phillips v. Tarrier Co., 93 F.2d 674 (5th Cir. 1938)). *Milando* also cited *Phillips* for the proposition that an "amendment [is] useless and should not be allowed" if the debtor's purpose in discharging a debt and barring a creditor's lawsuit cannot be established. *See Milando*,157 F.2d at 1003 (citing *Phillips*).

[149] *See Robinson*, 339 F.3d at 550.

[150] *See id.*

[151] *See* Tabb, *supra* note 82, at 32; The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, *reprinted in* 1978 U.S.C.C.A.N. 5787, et seq.

[152] 11 U.S.C. § 523(a)(3)(A).

[153] *See* Prevost, *supra* note 11, at 396.

addition of "in time to permit" and "in time for such timely filing," was important permissive language.[154]

The legislative history also highlights the commands of section 523(a)(3)(A).[155] Congress appears to have addressed *Birkett* and the split between *Milando* and *Robinson*. The reports by the House and Senate stated unscheduled debts are excepted from discharge and noted section 523(a)(3) was "derived from section 17a(3)" but clarified "some uncertainties generated by the case law construing 17a(3). The debt is excepted from discharge if it was not scheduled in time to permit timely action by the creditor to protect his rights, unless the creditor had notice or actual knowledge of the case."[156] A "clearer pronouncement of the legislative intent appears in the final floor statements made by Representative Edwards and Senator DeConcini immediately prior to enactment of the new law: The provision is intended to overrule" *Birkett*.[157]

Whatever one may glean from these materials, it at least reveals Congress intended (i) to clarify some uncertainties in the caselaw, (ii) to discharge debts that were not scheduled in time to permit timely action by the creditor to protect its rights, and (iii) to overrule *Birkett*.

First, the clarification of the uncertainties generated by the caselaw construing section 17a(3) is open to debate.[158] At least one commentator appears to suggest the uncertainties were created by *Robinson*.[159] But Judge O'Scannlain's concurrence in *Beezley* stated the

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[154] *See* Colonial Sur. Co. v. Weizman, 564 F.3d 526, 531 (1st Cir. 2009); Helbling & Klein, *supra* note 11, at 57.

[155] *See, e.g.*, William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 387 n.168 (1991) (noting "most of Congress' overrides of Supreme Court decisions that are more than ten years old have been in ambitious statutory recodifications," such as the Bankruptcy Reform Act of 1978).

[156] Eglin Fed. Credit Union v. Horlacher (*In re* Horlacher), 389 B.R. 257, 265 (Bankr. N.D. Fla. 2008) (citation omitted); *accord* Stone v. Caplan (*In re* Stone), 10 F.3d 285, 290 (5th Cir. 1994).

[157] Bougie v. Livingston (*In re* Livingston), No. 15CV00036, 2016 U.S. Dist. LEXIS 888, at *9 (W.D. Va. Jan. 4, 2016) (citations omitted) (internal quotation marks omitted).

[158] *See* Schouten v. Jakubiak (*In re* Jakubiak), 591 B.R. 364, 385 n.4 (Bankr. E.D. Wis. 2018) ("The reports do not explain to what 'uncertainties' in the case law they refer . . . ."); Omni Mfg., Inc. v. Smith (*In re* Smith), 21 F.3d 660, 663 n.1 (5th Cir. 1994) (noting "one may argue academically what Congress intended to do and what it actually accomplished by the minor word changes between" section 523(a)(3) and section 17a(3)).

[159] Helbling & Klein, *supra* note 11, at 57 ("Those 'uncertainties generated by the case law' were, of course, the uncertainties created by *Robinson*."); *accord In re Jakubiak*, 591 B.R. at 385 n.4 ("[The] uncertainties generated by the case law were,

"formal statements of both the House and Senate leaders responsible for the final shape of the new Bankruptcy Code leave no doubt as to which uncertainties were intended to be clarified: Section 523(a)(3) is intended to overrule *Birkett v. Columbia Bank*, 195 U.S. 345 (1904)."[160]

Second, Congress continued to favor notice to the creditor for timely action to protect his rights rather than excepting a debt from discharge.[161]

Third, by overruling *Birkett*, Congress replaced the rather vague language of section 17a(3) with the language of section 523(a)(3)(A).[162] This language displaced *Birkett*'s holding that "knowledge" meant "knowledge" to give a creditor an equal opportunity to participate in the administration of the case on par with other creditors.[163] Instead, Congress chose to discharge an unscheduled debt if the creditor knew about the case in time to file a claim.[164] "Knowledge" of the case in time to file a claim appears to be the most sensible reading of these legislative pronouncements.[165]

Unsurprisingly, the legislative statements did not aid the courts, and the split in courts following either *Robinson* or *Milando* continued,

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of course, the uncertainties created by *Robinson v. Mann*, 339 F.2d 457 (5th Cir. 1964), in which, flagrantly ignoring *Birkett*, the Fifth Circuit held that schedules could be amended *nunc pro tunc* in extraordinary circumstances . . . ." (citation omitted) (alterations omitted) (internal quotation marks omitted)); *see also* Eglin Fed. Credit Union v. Horlacher (*In re* Horlacher), No. 08CV173, 2009 WL 903620, at *3 n.6 (N.D. Fla. Mar. 31, 2009) ("Although the court acknowledges . . . Congress intended to overrule *Birkett* by limiting the rights of a creditor . . . to only the right to participate in asset distribution, the court notes the reports do not contain the same expression of intent regarding adoption of *Robinson*." (citations omitted)); Johnson, *supra* note 11, at 616 ("Furthermore, the reference to *Birkett* in the House report is cryptic at best."). One court recognized the "new Bankruptcy Code" abolished the *Birkett* rule but left for later decision whether the rule in *Robinson v. Mann* governing amendments should survive. *See In re* Robinson, 2 B.R. 127, 129 (Bankr. D. Or. 1979).

[160] Beezley v. Cal. Land Title Co. (*In re* Beezley), 994 F.2d 1433, 1439 n.4 (9th Cir. 1993) (O'Scannlain, J., concurring) (citation omitted) (alteration omitted) (internal quotation marks omitted); *accord* Lott Furniture, Inc. v. Ricks (*In re* Ricks), 253 B.R. 734, 749 (Bankr. M.D. La. 2000).

[161] *See* Hauge v. Skaar, Torson & Cox (*In re* Hauge), 232 B.R. 141, 147 (Bankr. D. Minn. 1999) ("The statute countenances two different modes of creditor participation: by sharing in a distribution from an asset-bearing estate, and by obtaining a determination of dischargeability on debts within the scope of 11 U.S.C. § 523(c).").

[162] *See In re Jakubiak*, 591 B.R. at 386.

[163] *See id.*

[164] *See id.*

[165] *See id.*

"even though *Milando* had interpreted § 17a(3) as *Birkett* did, and Congress intended to overrule *Birkett*" by enacting section 523(a)(3)(A).[166] In sum, these legislative materials have compelled disparate results with some courts applying *Milando* and some applying *Robinson* when addressing section 523(a)(3)(A).[167] And the resort to these materials may influence a court's decision to apply the plain meaning approach or the distribution approach.

II. THE SPLIT IN COURTS: PLAIN MEANING? DISTRIBUTION?

With this background, this Article now reviews the split. This Article first describes the facts under this issue. Then, this Article will examine the plain language approach and the distribution approach.

A. Facts

The issue arises in a case under chapter 7.[168] The debtor fails to include the creditor in the documents generally filed with the petition, such as the schedules and list of creditors.[169] At some point,

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[166] Eglin Fed. Credit Union v. Horlacher (*In re* Horlacher), 389 B.R. 257, 265 (Bankr. N.D. Fla. 2008).

[167] *See, e.g.*, *In re* Hendricks, 87 B.R. 114, 116 (Bankr. C.D. Cal. 1988) ("After highlighting the divergent views as expressed by the *Milando* and *Robinson* holdings, the [Bankruptcy Appellate Panel] followed the *Milando* view and affirmed the trial court because the bar date had elapsed, thereby denying the creditor the opportunity to file its claim." (citation omitted)); Spilka v. Bosse (*In re* Bosse), 122 B.R. 410, 415 (Bankr. C.D. Cal. 1990) ("The Appellate Panel discussed both *Milando v. Perrone* and *Robinson v. Mann* and chose to follow the Second Circuit's strict approach that courts are bound by the clear language of § 523(a)(3)(A), holding that the debt was nondischargeable . . . ." (citation omitted)); Homestate Ins. Brokers of Alaska, Inc. v. Brosman (*In re* Brosman), 119 B.R. 212, 214 (Bankr. D. Alaska 1990) ("[T]he Fifth Circuit's view in *Robinson v. Mann* represents a much better reasoned approach to the problem of unscheduled creditors as it allows an honest but mistaken debtor a fresh start.").

[168] Some cases initially commence as a chapter 12 or 13 case, but due to a conversion, ultimately become a chapter 7 case with a bar date. *See, e.g.*, Purcell v. Khan (*In re* Purcell), 362 B.R. 465, 468 (Bankr. E.D. Cal. 2007) ("The case was originally filed under Chapter 13 . . . . Plaintiff converted his case to Chapter 7 on February 23, 1998. A bar date was set for the filing of claims.").

[169] *See, e.g.*, Creative Enters. HK, LTD., v. Simmons, (*In re* Simmons), No. 18-bk-03267, 2021 WL 3744890, at *1 (Bankr. M.D. Fla. Aug. 24, 2021) ("The Debtors did not list the Plaintiff as a creditor in their schedules."); Croix Oil Co. v. Mai Yer Moua (*In re* Mai Yer Moua), 457 B.R. 755, 757 (Bankr. D. Minn. 2011) ("The Defendant's debt schedules did not include an entry for a claim in favor of the Plaintiff.

notice is given to creditors that funds are available for distribution; this notice establishes the bar date.[170] But our omitted creditor does not receive this notice because the debtor did not include information about the creditor or the related debt in the documents filed with the petition.[171]

Despite this failure to include the creditor, our omitted creditor learned of the bankruptcy case after the bar date but before creditors have received a distribution.[172] By filing a claim, is the claim "timely" filed? By failing to file a claim, did the creditor have notice or actual knowledge in time to permit "timely" filing?

Nor were the Plaintiff's name and address included on the address matrix for notice to creditors that the Defendant's counsel included in the initial filing."). Including a creditor in the documents filed with the petition generally means filing a list of creditors, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs under 11 U.S.C. § 521(a)(1). The "list of" all "creditors" is known as the "matrix." *See* FED. R. BANKR. P. 1007(a). Together, these disclosures are designed to ensure notice to parties in interest of various events in the bankruptcy case. *See In re* Vrusho, 634 B.R. 660, 667 (Bankr. D.N.H. 2021). The value of the discharge thus depends on the careful preparation of these filing. *See* 4 COLLIER ON BANKRUPTCY, *supra* note 9, ¶ 521.03[3].

[170] *See supra* note 57 (noting the establishment of the bar date varies by case, but what matters "is that, at some point, there was a deadline to file proofs of claim—a bar date").

[171] *See, e.g.*, W. Valley Med. Partners, LLC v. Menaker (*In re* Menaker), 603 B.R. 628, 633 (Bankr. C.D. Cal. 2019) ("The holder of one of the debtor's obligations did not receive notice of the filing of the case or of the bar date because the debtor failed to schedule the debt on his bankruptcy schedules or include the name and address of the creditor in his master mailing list." (citing Mahakian v. William Maxwell Invs., LLC (*In re* Mahakian), 529 B.R. 268, 271 (B.A.P. 9th Cir. 2015)); Keenom v. All Am. Mktg. (*In re* Keenom), 231 B.R. 116, 119 (Bankr. M.D. Ga. 1999) ("[U]naware that Debtors had filed bankruptcy, [creditor] sent [debtor] a letter informing him that no payment had been received . . . and that if the account was not satisfied within fifteen days of his receiving the letter the account would be turned over to an attorney for collection.").

[172] A creditor may learn of the bankruptcy case in a multitude of different ways. *See, e.g.*, Leadbetter v. Snyder (*In re* Snyder), 544 B.R. 905, 907 (Bankr. M.D. Fla. 2016) (creditor learned of the bankruptcy case during lawsuit in state court). Alternatively, the debtor may also amend his schedules to include an omitted debt, which provides the creditor with notice. FED. R. BANKR. P. 1009. But if the creditor had "notice or actual knowledge of the case" in time for a timely filing of a proof of claim, the debt will be discharged even though the debt was not listed or scheduled, listed or scheduled improperly, or listed or scheduled tardily. *See* 4 COLLIER ON BANKRUPTCY, *supra* note 9, ¶ 523.09[4][a]; *see also supra* notes 41–46 and accompanying text.

Here lies the disagreement in the caselaw: whether a claim filed *after the bar date* but *before a distribution* is "timely."[173] The interpretive issue is whether "timely" refers to the bar date or to the filing of a claim in time to share in the distribution.[174]

Courts declaring the debt nondischargeable generally rely on the plain "timely" language in section 523(a)(3).[175] Courts declaring the debt dischargeable generally rely on section 523(a)(3)(A) protecting the right to share in the distribution, which is accomplished under section 726(a)(2)(C), meaning the claim was filed "in time for such *timely* filing."[176]

B. Plain Language Approach

Cases following the plain language approach generally rely on the clear language of section 523(a)(3)(A) and interpret "timely" based on the bar date.[177] These courts generally reason a debt is nondischargeable even if the creditor had knowledge in time to file a tardily proof of claim under section 726(a)(2)(C) and participate in a distribution because holding otherwise would render "timely" under section 523(a)(3)(A) meaningless.[178]

In *Bosse*, for example, the bankruptcy court rejected the interplay between section 523(a)(3)(A) and section 726(a)(2)(C) because the latter supplements the relief for an omitted creditor.[179] *Bosse* noted section 726(a)(2)(C) permits a creditor to share in the distribution of assets and limits the risk of failed collection efforts outside of

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[173] *See In re Mahakian*, 529 B.R. at 275 n.4 ("Some courts have approached § 523(a)(3)(A) by focusing on whether a party has an opportunity to participate in distributions rather than by focusing on the plain language of the statute."); *see also* Premier W. Bank v. Rajnus (*In re* Rajnus), No. 03-64227, 2007 Bankr. LEXIS 3109, at *7 (Bankr. D. Or. Aug. 31, 2007) ("Two views have evolved. The 'strict' view holds that because a claims bar-date was set, the statute's plain terms compel a finding of nondischargeability. Under the 'liberal' view, the court weighs equitable factors in deciding whether to discharge the debt.").

[174] *See* Lodder v. Zions First Nat'l Bank, N.A. (*In re* Lodder), No. 11-1275, 2012 WL 1997869, at *1 (Bankr. N.D. Cal. June 2, 2012) ("The Bank interprets the phrase 'timely filing of a proof of claim' as meaning 'by the claims bar date' whereas Lodde[r] interprets it as meaning 'in time to receive a dividend.'"); *see also In re Rajnus*, 2007 Bankr. LEXIS 3109, at *7 n.4.

[175] *See In re Snyder*, 544 B.R. at 910.

[176] *See id.*

[177] *See id.*

[178] *See id.*

[179] *See* Spilka v. Bosse (*In re* Bosse), 122 B.R. 410, 416 (Bankr. C.D. Cal. 1990).

bankruptcy.[180] *Bosse* generally relied on the plain language of section 523(a)(3)(A) and reasoned that reading the statute any other way would be meaningless.[181] Thus, these courts reason if the bar date is established and a creditor learns of the case after bar date, then the debt is not discharged, even if distributions are never made,[182] or distributions are only made to priority creditors and to pay administrative

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[180] *See id.* The bankruptcy court recognized the caselaw holding a creditor with a nondischargeable claim may participate in distribution. *See id.* at 416, n.3.

[181] *See id.* at 416.

[182] *See* Hauge v. Skaar, Torson & Cox (*In re* Hauge), 232 B.R. 141, 147–48 (Bankr. D. Minn. 1999) (explaining section 523(a)(3)(A) does not apply in a "no-asset" case because the deadline has not been "fixed" (citing Peterson v. Anderson (*In re* Anderson), 72 B.R. 783 (Bankr. D. Minn. 1987)). *But see* D & L Repair, Inc. v. Sandoval (*In re* Sandoval), 102 B.R. 220, 222 (Bankr. D.N.M. 1989) ("Courts have a little more trouble coming to the same conclusion when an asset notice has been sent fixing a time for filing claims, even if the case is later determined to be a no asset case." (citing Laczko v. Gentran, Inc. (*In re* Laczko), 37 B.R. 676 (B.A.P. 9th Cir. 1984), *aff'd mem.*, 772 F.2d 912 (9th Cir. 1985); *In re* Iannacone, 21 B.R. 153 (Bankr. D. Mass. 1982))). *Sandoval* began as an asset case, meaning the bar date was fixed at the commencement of the case. *See In re Sandavol*, 102 B.R. at 221. The creditor filed a claim after the bar date after learning of the case. *See id.* After the creditor filed a claim, the trustee filed a report of no distribution, meaning the case ended up as a "no-asset" case. *Sandoval* opposes *Hauge* because both cases started as an asset case, established a bar date at the beginning of the case, but ended up as cases with no assets and no distribution. *See In re Sandoval*, 102 B.R. at 221; *In re Hauge*, 232 B.R. at 146. In *Sandoval*, despite the "fixing" of the bar date, the debt was discharged. *See In re Sandoval*, 102 B.R. at 222. Yet in *Hauge*, despite the "fixing" of the bar date, the debt was excepted from discharge. *See In re Hauge*, 232 B.R. at 150; *see also* Helbling & Klein, *supra* note 11, at 42 ("The analysis of no-asset cases with bar dates is the same as for asset cases: omitted debts are not discharged unless the omitted creditors had notice or actual knowledge of the case in time to file a timely proof of claim.").

expenses.[183] They premise this point of law on section 523(a)(3)(A)'s clear and unambiguous language.[184]

Some courts also reason section 523(a)(3)(A) protects a creditor's right to *participate* in the estate and the process of a distribution.[185] In *Mai Yer Moua*, for example, the bankruptcy court recognized the statute must be applied toward the *process* of bankruptcy to remedy the harm caused by a creditor's failure to participate.[186] That said, the court noted sharing in a distribution is only way, of many, a creditor participates in the bankruptcy process.[187] These courts reason the right to meaningfully participate[188] in the bankruptcy process also

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[183] *See In re Hauge*, 232 B.R. at 156; *In re Bosse*, 122 B.R. at 415; Purcell v. Khan (*In re* Purcell), 362 B.R. 465, 473 (Bankr. E.D. Cal. 2007); Schlueter v. State Farm Mut. Ins. Co. (*In re* Schlueter), 391 B.R. 112, 116 (B.A.P. 10th Cir. 2008); Mahakian v. William Maxwell Invs., LLC (*In re* Mahakian), 529 B.R. 268, 275 (B.A.P. 9th Cir. 2015); Grantz v. Fashion Show Mall, LLC, 584 F. Supp. 3d 915, 918–25 (D. Nev. 2022) (holding the unsecured *non*priority debt was nondischargeable despite the sole creditor to receive a distribution held an unsecured priority debt); *cf. In re* Feldman, 261 B.R. 568, 575–78 (Bankr. E.D.N.Y. 2001) (debt excepted from discharge because the creditor did not receive notice under the principles of due process even though the creditor was entitled to second distribution under section 726(a)(2)(C)). *Purcell* and *Grantz* were essentially no-asset cases with respect to unsecured nonpriority claims because those claims did not receive a distribution.

[184] *See, e.g.*, *In re Mahakian*, 529 B.R. at 275; Croix Oil Co. v. Mai Yer Moua (*In re* Mai Yer Moua), 457 B.R. 755, 759 (Bankr. D. Minn. 2011).

[185] *See, e.g.*, *In re Mai Yer Moua*, 457 B.R. at 763.

[186] *See id.* at 756–58.

[187] *See id.* at 758 (citing Peterson v. Anderson (*In re* Anderson), 72 B.R. 783 (Bankr. D. Minn. 1987)). *Anderson* identified these rights a creditor is denied by failing to receive notice of the case:

(1) participating in the election of a trustee;
(2) asking questions of the debtor at the meeting of creditors;
(3) objecting to the debtor's claims of exempt property;
(4) timely filing a complaint objecting to discharge;
(5) timely filing a proof of claim and participating in any distribution; and
(6) timely filing a complaint to determine whether a debt is dischargeable under 11 U.S.C. § 523(a)(2), (4) or (6).

In re Anderson, 72 B.R. at 786. At the same time, *Anderson* importantly noted the *plain language* of section 523(a)(3) only incorporates the fifth and sixth rights identified above. *See id.* "For whatever reason, Congress chose not to provide a remedy for creditors whose only loss was" something other than filing a timely proof of claim and participating in any distribution. *See id.*; *see also* Beezley v. Cal. Land Title Co. (*In re* Beezley), 994 F.2d 1433, 1435 (9th Cir. 1993) (O'Scannlain, J., concurring) (noting the entire thrust of section 523(a)(3)(A) "is to protect the creditor's right to file a proof of claim, and so to participate in any distribution of the assets").

[188] This language, see *In re Mai Yer Moua*, 457 B.R. at 760, is like *Birkett*, which held "knowledge" entails knowledge in time for the creditor participate in the

includes taking any beneficial action, such as objecting to other claims of creditors or objecting to administrative expenses.[189]

Courts also reason "timely" and "tardily" are materially different terms reflecting a differentiating distinction that must be enforced as it reads.[190] Lastly, one court has pointed to the administrative conundrum of determining what filing "in time to receive payment"

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administration of the affairs of the estate. *See id.*; Birkett v. Columbia Bank, 195 U.S. 345, 350 (1904); *see also* Bougie v. Livingston (*In re* Livingston), No. 15CV00036, 2016 U.S. Dist. LEXIS 888, at *7 (W.D. Va. Jan. 4, 2016) ("The problem with [this strict and mechanical] interpretation, however, is that it mirrors the Supreme Court's holding in *Birkett v. Columbia Bank*, 195 U.S. 345 (1904), which Congress intended to legislatively overrule when it passed the 1978 Bankruptcy Reform Act." (citing *Mai Yer Moua* as interpreting section 523(a)(3)(A) in a strictly mechanical way) (other citations omitted)). The issue *Mai Yer Moua* was grappling with appears to be whether section 523(a)(3)(A) intended to protect the right to *participate* in the administration of the estate or the right to *share* in a distribution. *See, e.g.*, *In re Mai Yer Moua*, 457 B.R. at 762. Although *Mai Yer Moua* recognized section 523(a)(3)(A) protects the creditor's right to timely file a proof of claim, the court appears to suggest this means something *more* than sharing in a distribution and entails participating in the bankruptcy case and all the rights to participate granted by filing a proof of claim. *See id.* at 763.

[189] *See In re Mai Yer Moua*, 457 B.R. at 758; Hauge v. Skaar, Torson & Cox (*In re* Hauge), 232 B.R. 141, 146–47 (Bankr. D. Minn. 1999); Purcell v. Khan (*In re* Purcell), 362 B.R. 465, 476 (Bankr. E.D. Cal. 2007). In *Purcell*, the only distributions were to pay (i) administrative expenses, (ii) and priority claims, i.e., tax debts owed to the Internal Revenue Service. *See In re Purcell*, 362 B.R. at 469. *Purcell* may be read as insinuating that unsecured claims could have been paid if the administrative expenses were lower and could have been challenged by other creditors. *See id.* at 476 ("Creditors with notice of the bankruptcy also have the right to object to the trustee's administration of estate assets and the expenses incurred in doing so."). The court in *Purcell* elaborated on its reasoning for concluding section 523(a)(3) protects something *more* than getting paid, such as objecting to administrative expenses:

The right of participation in the distribution encompasses rights other than the right to receive a distribution or dividend . . . . Creditors often play a role in gathering and transmitting information about the bankruptcy case to the trustee, other creditors and the court . . . . [T]hey also furnish the bankruptcy court with information that allows the court to render decisions that result in both a fair and equitable distribution of the assets of the bankruptcy estate to creditors and affords the debtor a fresh start that is justly earned. Creditors can thus assist in the proper functioning of the bankruptcy system.

Id.

[190] *See In re Hauge*, 232 B.R. at 149, n.10; *In re Mai Yer Moua*, 457 B.R. at 760–61.

means if checks had been cut, which may obligate the trustee to redo and renotice everything every time a tardy claim is filed.[191]

In sum, courts following the plain language approach do so for four main reasons. First, any interpretation beyond the plain and unambiguous language would render "timely" meaningless. Second, the bar date activates the word "timely." Third, section 523(a)(3)(A) protects the right to *participate* in a distribution, which includes something more than the right to *share* in a distribution. Lastly, these courts reason there is a meaningful distinction between "timely" and "tardily" claims.

C. Distribution Approach

The majority of cases have adopted the distribution approach. These courts mainly interpret the statute in a holistic manner and conclude section 523(a)(3)(A) must be read alongside section 726(a)(2)(C).[192] These courts also provide a litany of other reasons for determining the debt is discharged.[193] For example, they reason the exceptions to discharge must be construed to promote the central purpose of the Code of providing the debtor a fresh start.[194] Courts also reason the only right protected under section 523(a)(3)(A) is the right to file a claim and share in a distribution; and if the creditor knew of the case in time to do so, then the debt is discharged.[195]

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[191] *See In re Mai Yer Moua*, 457 B.R. at 761–62 ("[The distribution approach] does not recognize the legal limitations on a trustee's powers or the practical burden on a trustee's operation that its conclusory prescriptions imply."). In *Hurley*, the court addressed the administrative problems raised by *Mai Yer Moua* and suggested a court could perhaps "interpret the proof of claim as not making the deadline for distribution" thus giving the word "timely" a literal meaning rendering the specific time the claim is filed in the spectrum of the case as dispositive. *See* All Wheels Fin., Inc. v. Hurley (*In re* Hurley), No. 12-2205, 2012 WL 3597435, at *3 n.2 (Bankr. E.D. Wis. Aug. 20, 2012) (citing *In re Mai Yer Moua*, 457 B.R. at 761–62); *see also In re* Columbia Ribbon & Carbon Mfg. Co., 54 B.R. 714, 719 (Bankr. S.D.N.Y. 1985) (establishing as a general rule that creditors who lacked knowledge "may file a claim entitled to *pari passu* distribution status at anytime before the final distribution is made").

[192] *See* Leadbetter v. Snyder (*In re* Snyder), 544 B.R. 905, 910 (Bankr. M.D. Fla. 2016).

[193] *See, e.g.*, Lott Furniture, Inc. v. Ricks (*In re* Ricks), 253 B.R. 734, 737–47 (Bankr. M.D. La. 2000).

[194] *See In re Snyder*, 544 B.R. at 910.

[195] *See id.*

The caselaw largely relies on the interaction of sections 523(a)(3)(A) and 726(a)(2)(C).[196] In *Hendricks*, for example, the bankruptcy court addressed timeliness under section 726(a)(2)(C).[197] Although the dischargeability issue was not before the court, *Hendricks* reasoned section 726(a)(2)(C) allows a creditor to participate in distribution if (i) the creditor did not have notice of the case in time to file a claim and (ii) the claim was filed in time for distribution.[198] The court indicated the debt would be discharged if the conditions under section 726(a)(2)(C) were satisfied.[199] Thus, these courts reason if a creditor learns of the case after bar date but in time to file a claim and participate by sharing in the distribution, then the debt is discharged because a claim was timely filed.[200]

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[196] *See, e.g.*, Butt v. Hartford Ins. Co. (*In re* Butt), 68 B.R. 1001, 1003 (Bankr. C.D. Ill. 1987); *In re* Hendricks, 87 B.R. 114, 116 (Bankr. C.D. Cal. 1988).

[197] *See In re Hendricks*, 87 B.R. at 116.

[198] *See id.*

[199] *See id.* (the court was perplexed at the caselaw that failed to address the applicability of section 726(a)(2)(C) in determining dischargeability).

[200] *See id.*; *In re Butt*, 68 B.R. at 1003 ("However, this Court must consider the interaction of Section 523(a)(3) and Section 726(a)(2)(C) and decide whether a creditor who receives a distribution pursuant to Section 726(a)(2)(C) may object to the dischargeability of a debt pursuant to Section 523(a)(3)."); *In re* Grove, 100 B.R. 417, 421–22 n.4 (Bankr. C.D. Ill. 1989) ("And, as this Court has previously held in [*In re Butt*], a creditor who receives a distribution pursuant to Section 726(a)(2)(C) cannot object to dischargeability under Section 523(a)(3)."); D & L Repair, Inc. v. Sandoval (*In re* Sandoval), 102 B.R. 220, 222 (Bankr. D.N.M. 1989); Homestate Ins. Brokers of Alaska, Inc. v. Brosman (*In re* Brosman), 119 B.R. 212, 212–13 (Bankr. D. Alaska 1990) ("One problem with [*Laczko v. Gentran, Inc.* (*In re Laczko*), 37 B.R. 676 (Bankr. 9th Cir. 1984), *aff'd mem.*, 772 F.2d 912 (9th Cir. 1985)] is its failure to reconcile 11 U.S.C. § 523(a)(3) with 11 U.S.C. § 726(a)(2)(C)."); S. Pac. Land Co. v. Kuhr (*In re* Kuhr), 132 B.R. 421, 424 (Bankr. E.D. Cal. 1991) ("'Timely' under section 523(a)(3) can only mean filed in time to receive on an equal footing distribution of any dividends paid pursuant to section 726(a). Any other meaning defies logic and common sense."); Lott Furniture, Inc. v. Ricks (*In re* Ricks), 253 B.R. 734, 743–47 (Bankr. M.D. La. 2000); Kowalski v. Romano (*In re* Romano), 59 F. App'x 709, 714 (6th Cir. 2003); Eglin Fed. Credit Union v. Horlacher (*In re* Horlacher), 389 B.R. 257, 262–63 (Bankr. N.D. Fla. 2008), *aff'd*, No. 08CV173, 2009 WL 903620 (N.D. Fla. Mar. 31, 2009); Am. President Lines Ltd. v. Hatley (*In re* Hatley), No. 09-5088, 2010 WL 200825, at *3–4 (Bankr. E.D. Tenn. Jan. 12, 2010); All Wheels Fin., Inc. v. Hurley (*In re* Hurley), No. 12-2205, 2012 WL 3597435, at *2 (Bankr. E.D. Wis. Aug. 20, 2012); Leadbetter v. Snyder (*In re* Snyder), 544 B.R. 905, 909–10 (Bankr. M.D. Fla. 2016) ("So the issue before the Court is whether § 523(a)(3)(A) should be read in tandem with § 726(a)(2)(C), making claims dischargeable in cases where, even though creditors were not initially scheduled so that a timely proof of claim could have been filed, a claim was nevertheless filed . . . in time for distribution . . . ."); Creative Enters. HK, LTD. v. Simmons (*In re* Simmons),

Some courts also reason section 523(a)(3)(A) protects a creditor's right to fully participate by *sharing* in the distribution.[201] In *Romano*, for example, the United States Court of Appeals for the Sixth Circuit noted a creditor with knowledge of a bankruptcy case has many rights, such as questioning the debtor at the meeting of creditors.[202] That said, *Romano* stated section 523(a)(3)(A) is only concerned with one right: the right to receive a payment, which is accomplished by filing a claim.[203] *Romano* held the right to share in a distribution is the key to dischargeability determinations under section 523(a)(3)(A).[204] These courts thus reason section 523(a)(3)(A) limits the requirement of notice to the protection of only one right—the right to file a claim entitling a creditor to share in the distribution by receiving a payment.[205] A conclusion otherwise creates harsh results and allows a

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No. 18-bk-03267, 2021 WL 3744890, at *2 (Bankr. M.D. Fla. Aug. 24, 2021); *cf.* Bougie v. Livingston (*In re* Livingston), No. 15CV00036, 2016 U.S. Dist. LEXIS 888, at *1 (W.D. Va. Jan. 4, 2016). In *Simmons*, the trustee had made no distributions. Based on the docket in *In re Simmons*, the trustee filed a "Trustee's Final Report" on August 12, 2022. The "deadline to file a proof of claim was set as February 14, 2019." *In re Simmons*, 2021 WL 3744890, at *1. This means a creditor in the *Snyder* case had approximately 1,275 days after the bar date to file a claim in time to receive a distribution.

[201] *See, e.g.*, *In re Romano*, 59 F. App'x 709 at 714.

[202] *See id.* The Sixth Circuit relied on *In re Ricks*, 253 B.R. 734 and *In re Kuhr*, 132 B.R. at 424. In *Ricks*, the court identified the following rights granted to creditors:

(1) examining the debtor at the meeting of creditors;
(2) objecting to the debtor's exemptions of property;
(3) objecting to the debtor's discharge;
(4) voting in the election of a trustee;
(5) standing to be heard in connection with settlements and compromises involving other claims and assets of the estate; and
(6) participating in the distribution of the estate.

In re Ricks, 253 B.R. at 739 (footnotes omitted); *accord* Peterson v. Anderson (*In re* Anderson), 72 B.R. 783, 786 (Bankr. D. Minn. 1987).

[203] *See In re Romano*, 59 F. App'x at 714.

[204] *See id.* ("Thus, the purpose of § 523(a)(3) must be the protection of the unscheduled creditor's right to share in the distribution.").

[205] *See id.*; *In re Hendricks*, 87 B.R. at 116; *In re Butt*, 68 B.R. at 1003 ("Under Section 523(a)(3)(A) the prejudice is limited to failure to participate in the dividend." (citing *In re* Zablocki, 36 B.R. 779, 783 (Bankr. D. Conn. 1984) ("However, § 523(a)(3) evinces a legislative determination that only two creditor's rights, to participate in a dividend and to obtain a determination of dischargeability, are of such paramount importance that only their loss mandates exception of a late-scheduled debt from discharge.")); *In re Kuhr*, 132 B.R. at 423; *In re Ricks*, 253 B.R. at 739–44; *In re Hurley*, 2012 WL 3597435, at *3 ("[T]he word must be applied to protect certain rights for the creditor, i.e., to collect from the estate.").

creditor to have it both ways.[206] The claim would be treated as timely for purposes of a distribution but treated as untimely for purposes of excepting the debt from discharge.[207]

Similarly, courts reason section 523(a)(3)(A) must be read in the context of chapter 7.[208] In *Ricks*, for example, the court pointed to the fact section 523(a)(3)(A) applies to chapters other than chapter 7; the court reasoned a static definition of "timely" as used in chapter 11, which preconditions distributions on the timeliness of a claim, ignored the statutory fact that a bar date plays a different role in chapter 7 cases.[209] The court explained, unlike other chapters, "tardily" and "timely" claims are afforded the same protection in chapter 7 cases;[210] ignoring this protection exalts form over substance.[211] At bottom, *Ricks* reasoned the crux of the question is whether the creditor knew of the bankruptcy by the relevant Tuesday to file a claim by that relevant Tuesday.[212] Thus, these courts also premise their holding that a debt

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[206] *See, e.g.*, *In re Butt*, 68 B.R. at 1003.

[207] *See id.*

[208] *See, e.g.*, *In re Ricks*, 253 B.R. at 745–47; *In re Hurley*, 2012 WL 3597435, at *2 ("In chapter 7 cases, however, unlike chapter 11, 12, and 13 cases, some untimely filed proofs of claim are allowed and can receive distributions from the estate.").

[209] *See In re Ricks*, 253 B.R. at 745.

[210] *See id.* at 746–47 ("Section 726(a) must distinguish between 'timely' and 'tardily' filed claims, because generally speaking, the distributive priority scheme is constructed upon a time line, and the filing of claims is described according to and along that time line."). For example, *Ricks* noted applying a controlling definition of "timely" as used in section 726(a)(2)—filed by the bar date—to the meaning of the term in section 523(a)(3)(A) ignores the difference between chapter 7 and other chapters of the Code. *See id.* In chapters 11, 12, and 13, a "timely" filed claim must be filed by the bar date, and is a precondition to distribution, which hinges on allowance. *See id.* The word "tardily" does not require the word "timely," as used in section 523(a)(3)(A), to mean filed before the bar date "because the word 'tardily' was chosen due to the need for being able to describe which claims were going to be treated as timely and which were not, within a proceeding" that proceeds in a linear fashion.

[211] *See id.* at 746.

[212] *See id.* This reference comes from the oft spoken saying by "Popeye's good friend," J. Wellington Wimpy, "who always promised, 'I'll gladly pay you Tuesday' for a hamburger today." *See* Chevy Chase Bank, F.S.B. v. Briese (*In re* Briese), 196 B.R. 440, 450 (Bankr. W.D. Wis. 1996); *In re* Cook, 322 B.R. 336, 339 n.5 (Bankr. N.D. Ohio 2005). Because Wimpy does not "have the money when Tuesday rolls around," Rice, Heitman & Davis, S.C. v. Sasse (*In re* Sasse), 438 B.R. 631, 648 (Bankr. W.D. Wis. 2010), this reference is often associated with extensions of credit and contractual promises to repay. *See, e.g.*, Tepper v. Amos Fin., LLC, 898 F.3d 364, 365 (3d Cir. 2018).

is discharged if a claim is filed before the distribution, even if the debtor filed the claim on behalf of the creditor,[213] by analyzing timeliness in the context of a liquidation under chapter 7.[214]

Courts adopting the distribution approach also narrowly construe section 523(a)(3)(A),[215] to include tardy claims because doing so serves the purpose of providing a debtor a fresh start.[216] Similarly, some courts premise their holding that a debt is discharged[217] because section 726(a)(2)(C) ameliorates the prejudice a creditor received by not initially receiving notice of the bankruptcy.[218]

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[213] *See* Am. President Lines Ltd. v. Hatley (*In re* Hatley), No. 09-5088, 2010 WL 200825, at *3 (Bankr. E.D. Tenn. Jan. 12, 2010) ("There is no requirement in [section 523(a)(3)(A)] that the debt be scheduled or listed in time to permit timely filing *by the creditor*, only timely filed *period.* Accordingly, the plain language of the statute does not provide for an exception from discharge in this case."). *But see* Mahakian v. William Maxwell Invs., LLC (*In re* Mahakian), 529 B.R. 268, 275 (B.A.P. 9th Cir. 2015) ("This section applies only to 'tardily filed' claims filed under § 501(a). Section 501(a) refers to claims filed by creditors and indenture trustees. [Creditor] did not submit a 'tardily filed' [claim] in this case."). In *Ricks*, the debtor filed a claim on behalf of the creditor. *See In re Ricks*, 253 B.R. at 737 n.8. *Ricks* did not consider "whether it is only claims filed tardily *by the creditor* that fall into the coverage of § 726(a)(2)(C), but point[ed] out that the only tardily filed claims that are referred to within § 726(a)(2)(C) are those filed under § 501(a)." *Id.*

[214] *See* S. Pac. Land Co. v. Kuhr (*In re* Kuhr), 132 B.R. 421, 423 (Bankr. E.D. Cal. 1991) ("The section does not define 'timely,' so the word must be analyzed in terms of the situation being addressed by the provision."); *In re Ricks*, 253 B.R. at 746–47; Eglin Fed. Credit Union v. Horlacher (*In re* Horlacher), 389 B.R. 257, 263 (Bankr. N.D. Fla. 2008) ("Section 726(a)(2)(C) acknowledges this difference between a chapter 7 case and a chapter 11 or 13. It allows a chapter 7 creditor to participate in distribution if the creditor had no knowledge of the bar date and files a claim after the set 90 day deadline but before distribution of the estate."); All Wheels Fin., Inc. v. Hurley (*In re* Hurley), No. 12-2205, 2012 WL 3597435, at *2 (Bankr. E.D. Wis. Aug. 20, 2012) ("Courts holding a debt excepted from discharge when the creditor cannot file a 'timely' claim are interpreting the word as it is used in Fed. R. Bankr.P. 3002 . . . . But 'timely' is not a word of art . . . .").

[215] *See, e.g.*, Kowalski v. Romano (*In re* Romano), 59 F. App'x 709, 714 (6th Cir. 2003).

[216] *See In re Hatley*, 2010 WL 200825, at *3 (citing *In re Romano*, 59 F. App'x at 714); *see also* Homestate Ins. Brokers of Alaska, Inc. v. Brosman (*In re* Brosman), 119 B.R. 212, 215–16 (Bankr. D. Alaska 1990).

[217] *See, e.g.*, *In re Kuhr*, 68 B.R. at 424.

[218] *See id.*; *see also* Butt v. Hartford Ins. Co. (*In re* Butt), 68 B.R. 1001, 1003 (Bankr. C.D. Ill. 1987); *In re Ricks*, 253 B.R. at 751; *In re Horlacher*, 389 B.R. at 263 ("In a chapter 7 case, as long as there has been no distribution of assets, there is no harm or prejudice to the creditor in allowing a claim that is filed after the typical bar date for filing."); Johnson, *supra*, note 11, at 614 n.266 ("Both *Kuhr* and *Brosman*

Lastly, some courts rely on legislative history.[219] These courts reason Congress legislatively overruled *Birkett* to the extent *Birkett* held section 17a(3) protected the creditor's right to participate in all aspects of the bankruptcy case.[220] Instead, Congress intended to protect only one right: the right to file a claim and participate in the distribution.[221] Likewise, some courts apply *Robinson*, which did not rely on *Birkett*, and refuse to apply the strict approach in *Milando* because of *Milando*'s reliance on *Birkett*, which was overruled.[222]

One final case is worth mentioning that does not technically fall under the distribution approach.[223] In *Livingston*, the district court reversed the bankruptcy court's judgment that the debt was not discharged because it was not properly listed or scheduled in time to file a timely claim and held the bankruptcy court applied the wrong test in determining whether the debt was discharged.[224]

Livingston, citing cases adopting the plain language approach, refused to apply section 523(a)(3)(A) in a strictly mechanical manner because doing so would mirror the holding in *Birkett*, which Congress overruled, and would be an outcome undermining expressed congressional intent.[225] Instead, *Livingston* adopted an equitable test[226] for

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suggest a conflict exists between §§ 523(a)(3) and 726(a)."); *cf. In re* Reed, No. 08-20229, 2009 WL 1231761, at *2–3 (Bankr. N.D. Tex. Apr. 30, 2009).

[219] *See, e.g.*, *In re Horlacher*, 389 B.R. at 264 ("Given the questionable meaning of the term "timely" in § 523(a)(3)(A), the Court will look to the legislative history of the enactment of § 523(a)(3)(A) . . . .").

[220] *See, e.g.*, *In re Ricks*, 253 B.R. at 749–50; *In re Butt*, 68 B.R. at 1003.

[221] *See, e.g.*, *In re Ricks*, 253 B.R. at 750.

[222] *See* Homestate Ins. Brokers of Alaska, Inc. v. Brosman (*In re* Brosman), 119 B.R. 212, 214 (Bankr. D. Alaska 1990); *In re Horlacher*, 389 B.R. at 265 ("Following the enactment of § 523(a)(3)(A), the courts continued to be split and follow the reasoning of either the liberal *Robinson* decision or the strict *Milando* decision (even though *Milando* had interpreted § 17a(3) as *Birkett* did, and Congress intended to overrule *Birkett* with its enactment of § 523(a)(3)(A))."); Leadbetter v. Snyder (*In re* Snyder), 544 B.R. 905, 910 n.21 (Bankr. M.D. Fla. 2016).

[223] *See* Bougie v. Livingston (*In re* Livingston), No. 15CV00036, 2016 U.S. Dist. LEXIS 888, at *1 (W.D. Va. Jan. 4, 2016).

[224] *See id.*

[225] *See id.* at *6–10, 12–13.

[226] *See id.* at *13–14 ("On remand, the bankruptcy court should apply the three-part test articulated in *Stone*, considering '1) the reasons the debtor failed to list the creditor, 2) the amount of disruption which would likely occur, and 3) any prejudice suffered by the listed creditors and the unlisted creditor in question.'" (quoting Stone v. Caplan (*In re* Stone), 10 F.3d 285, 290 (5th Cir. 1994)); *see also In re* Reed, No. 08-20229, 2009 WL 1231761, at *2 (Bankr. N.D. Tex. Apr. 30, 2009) (applying *Stone* factors).

determining whether the debt is dischargeable.[227] *Livingston* however rejected the interplay of sections 726(a)(2)(C) and 523(a)(3)(A), because timely and tardily mean two different things and such an interpretation would be a strained reading of "timely" under section 523(a)(3)(A).[228]

But *Livingston* suggested section 726(a)(2)(C) should be used as a factor under the equitable test in determining whether the creditor suffered any prejudice.[229] The court also held a creditor reigns too much power if the creditor could choose whether he would prefer to participate in the distribution or have his claim declared nondischargeable and would undermine the Code's purpose of providing the "honest but unfortunate debtor a fresh start."[230]

In sum, courts adopting the distribution approach do so for six main reasons. First, they reason claims filed in time to permit payment under section 726(a)(2)(C) are timely. Second, most courts focus on the specific right protected: the right to file a proof of claim entitling a creditor to share in the distribution by receiving a payment. Third, the courts analyze timeliness in the context of a liquidation under chapter 7. Fourth, some courts narrowly construe the exception to discharge to provide the debtor a fresh start. Fifth, some courts reason these creditors are not prejudiced because their right to participate in any distribution has not been harmed. Finally, some courts rely on legislative materials to interpret section 523(a)(3)(A).

III. ANALYZING "TIMELY"

An unscheduled debt is excepted from discharge unless the creditor had notice or knowledge of the bankruptcy case in time to permit timely filing. Dischargeability likely rests on the judicial interpretation of the language "in time for such timely filing."[231] As a result, it is crucial to understand the possible rules of statutory construction applicable to this language. This Part lays out interpretive issues from

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[227] *See In re Livingston*, 2016 U.S. Dist. LEXIS 888, at *10 ("The Fifth Circuit reviewed this legislative history in *Stone* and concluded that when the legislature had enacted § 523(a), it had essentially affirmed the equitable three-part test that had been articulated by the *Robinson* court.").

[228] *See id.* at *15–16.

[229] *See id.* at *16–17.

[230] *See id.* at *16 (internal quotation marks omitted) (quoting Nunnery v. Rountree (*In re* Rountree), 478 F.3d 215, 220 (4th Cir. 2007) (quoting Loc. Loan v. Hunt, 292 U.S. 234, 244 (1934))).

[231] *See* Johnson, *supra* note 11, at 575 (citations omitted) (internal quotation marks omitted).

a statutory perspective. Then, this Part will discuss possible implications under this divide in the caselaw.

A. Statutory Interpretation

Whether a claim is "timely" is a question of statutory interpretation to be answered under the principles the Supreme Court has applied when interpreting the Code. When presented with a question of statutory interpretation under the Code, the Court instructs us to look at the text, structure, policy, and, if necessary, legislative history to determine Congressional intent.[232]

1. Text

Resolving a dispute over the meaning of a statute must start "where all such inquiries must begin: with the language of the statute itself."[233] The Court embraces a "plain meaning" approach in resolving issues in the statutory text.[234] Revealing a term's plain meaning—the facially apparent and obvious meaning—is generally determined by reference to the language itself, the specific context the language is used, and the broader context of the statute as a whole.[235] If the meaning of the language is plain, the inquiry ends; since the sole function of the courts is to enforce the statute according to its terms.[236]

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[232] *See* Karen M. Gebbia-Pinetti, *Interpreting the Bankruptcy Code: An Empirical Study of the Supreme Court's Bankruptcy Decisions*, 3 CHAP. L. REV. 173, 275–86 (2000).

[233] United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989).

[234] *See id.*

[235] *See, e.g.*, Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 236 (2010); Burgess v. United States, 553 U.S. 124, 130 (2008) ("As a rule, [a] definition which declares what a term 'means' . . . excludes any meaning that is not stated." (alteration in original) (citation omitted)); Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 70 (2011) (citing Leocal v. Ashcroft, 543 U.S. 1, 12 (2004)); *see also* Merit Mgmt. Grp. v. FTI Consulting, Inc., 138 S. Ct. 1752, 1759 (2018) ("Our analysis begins with the text of § 546(e), and we look to both 'the language itself [and] the specific context in which that language is used . . . .'" (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." (citations omitted)))); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988).

[236] *See Ron Pair*, 489 U.S. at 241.

The relevant phrase is "timely filing."[237] But "timely" is not defined.[238] When confronted with undefined terms or phrases, the Court generally gives the language its ordinary meaning at the time the statute was enacted.[239] To do so, a court will assume the legislature uses words in their ordinary sense by consulting dictionaries or relying on their own linguistic experience or intuition to decide the most reasonable meaning of the word,[240] given the context in which it is used

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[237] This Article mainly focuses on "timely." The operative statutory language includes "a discharge . . . does not discharge . . . any debt . . . neither listed nor scheduled . . . in time to permit . . . timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing . . . ." Section 523(a)(3)(A)'s language is "convoluted." Beezley v. Cal. Land Title Co. (*In re* Beezley), 994 F.2d 1433, 1436 (9th Cir. 1993) (O'Scannlain, J., concurring) (paraphrasing section 523(a)(3)(A): a discharge does not cover an unsecheduled debt if the failure to schedule deprives the creditor of the opportunity to file a timely claim). In any event, for sake of completeness, "in" is a preposition, which joins "time," *see, e.g.*, *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480–82 (2021) (analyzing the singular article "a" in a statute), and "to permit" "timely filing of a proof of claim" serves as the main goal of the preceding prepositional phrase; it describes the creditor's action of filing a proof of claim within a specified period. *See* Kientz v. Comm'r, SSA, 954 F.3d 1277, 1282 (10th Cir. 2020) ("A prepositional phrase consists of a preposition, its object, and any words that modify the object." (citation omitted)).

[238] *In re* Circuit City Stores, Inc., 447 B.R. 475, 509 (Bankr. E.D. Va. 2009) ("*Timely* is not a defined term in the Bankruptcy Code.").

[239] *See* Kemp v. United States, 142 S. Ct. 1856, 1862 (2022); Sandifer v. U.S. Steel Corp., 571 U.S. 220, 227 (2014); FCC v. AT & T Inc., 562 U.S. 397, 403 (2011) ("When a statute does not define a term, we typically 'give the phrase its ordinary meaning.'" (citation omitted)); Stevens v. Whitmore (*In re* Stevens), 15 F.4th 1214, 1217 (9th Cir. 2021). Generally, the Court gleans the "ordinary meaning" of the language at the time of enactment. *See, e.g.*, Baker Botts L.L.P. v. ASARCO LLC, 576 U.S. 121, 128 n.2 (2015) ("Congress added the phrase 'reasonable compensation for the services rendered' to federal bankruptcy law in 1934. We look to the ordinary meaning of those words at that time." (citation omitted)); Perrin v. United States, 444 U.S. 37, 42 (1979). Congress enacted the Code in 1978. For this reason, this Article looks at the ordinary meaning of the term when Congress enacted the statute. *Cf.* Hartzler v. Mayorkas, No. 20-cv-3802, 2022 WL 15419995, at *35 (D.D.C. Oct. 27, 2022) ("Completing a task in a 'timely manner' means 'without delay,' and does not necessarily imply the imposition of a deadline or completing the task prior to a set deadline."), *appeal filed*, No. 22-5310 (D.C. Cir. Nov. 29, 2022). *But see* KLS Diversified Master Fund, L.P. v. McDevitt, 507 F. Supp. 3d 508, 544 (S.D.N.Y. 2020) (collecting definitions of "timely" that indicate meeting a deadline), *aff'd*, No. 21-1263, 2022 WL 2759055 (2d Cir. July 13, 2022).

[240] *See In re Stevens*, 15 F.4th at 1217–18.

and applied.[241] The ordinary meaning[242] of "timely" may highlight a distinction between "timely" and "promptly."[243]

The dictionary definitions indicate "timely" may be an adjective as well as an adverb, suggesting it is susceptible to ambiguity.[244] The ordinary meaning of the adjective "timely" is "[o]ccurring at a suitable or opportune time; well-timed."[245] On the other hand, the adverb "promptly" is generally defined as "[o]n time; punctual" and "[d]one without delay."[246] It seems reasonable that Congress would have used "promptly" if it had intended strict deadlines rather than "timely," which means at a suitable time.

The ordinary meaning of the adverb "timely" however is "[o]pportunely; in time."[247] This definition may imply a sensitivity to a deadline, but only if a deadline is established.[248] Yet section

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[241] To overcome the assumption that a word is used in its ordinary sense, there must be evidence of the word acquiring a specialized or technical meaning. *See* ESKRIDGE, JR. et al., *supra* note 24, at 328–32; SCALIA & GARNER, *supra* note 24, at 73–77.

[242] But a word can have a plain meaning that is used in a technical sense and thus not ordinary. *See, e.g.*, United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989). (interpreting "such claim"). *See generally* William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, U. CHI. L. REV. 539, 541–46 (2017) (analyzing the invocation of the plain meaning rule to decline invoking other sources of interpretation and clarifying that there is a difference between a plain meaning and an ordinary meaning).

[243] *See, e.g.*, 11 U.S.C. § 765(a)(1) ("[T]o file a proof of such customer's claim promptly . . . .").

[244] *See* BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 895 (Oxford Univ. Press 3d ed. 2011) ("Because *timely* may be an adverb as well as an adjective in [American English], phrases such as *in a timely fashion* and *in a timely manner* are wordy and should be shortened.").

[245] *Timely*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1346 (William Morris & New College eds., Houghton Mifflin Co. 1976); *accord Timely*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Within a specified deadline; in good time; seasonable."); *Timely*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. unabr. 1987) (defining timely as "suitable, seasonable, opportune, well-timed").

[246] *Promptly*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 245, at 1047.

[247] *Timely*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 245, at 1346.

[248] *Cf.* Faith Int'l Adoptions v. Pompeo, 345 F. Supp. 3d 1314, 1332 (W.D. Wash. 2018) ("Timely completion of a task thus involves obtaining a positive outcome, but this only implies a strict deadline if one has been established elsewhere."). For example, the Tax Code appears to use "timely" as an adverb. *See, e.g.*, C.I.R. v. Lundy, 516 U.S. 235, 247 (1996) ("Under § 6512(b)(3)(B), which is the provision that does apply, the Tax Court is instructed to consider only the timeliness of a claim

523(a)(3) does not establish a deadline.[249] And the adverbial use of timely is generally recognized as archaic.[250] Even if "timely" is used as an adverb, the statute should be read within an eye toward liquidations by construing words and phrases considering other relevant statutory provisions governing liquidations.[251] This may be done by reference to criteria outside the statute.[252] Thus, if the adverb controls

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filed 'on the date of the mailing of the notice of deficiency,' not the timeliness of any claim that the taxpayer might actually file.").

[249] *See In re* Columbia Ribbon & Carbon Mfg. Co., 54 B.R. 714, 718 (Bankr. S.D.N.Y. 1985) (suggesting the rule fixing a specified period after the creditors learns of the case could be drafted to say a "late claim that otherwise qualifies for distribution under § 726(a)(2)(C) of the Code must be filed within 90 days after the date of discovery of the bankruptcy case").

[250] *See* GARNER, *supra* note 244, at 895 ("This adverbial use of *timely* is archaic in [British English].").

[251] *Cf.* Balt. v. Hechinger Liquidation Tr. (*In re* Hechinger Inv. Co. of Del., Inc.), 335 F.3d 243, 259–60 (3d Cir. 2003) (Nygaard, J., dissenting) ("Again, the key is that 'under' cannot be read in isolation, it must be read as part of the phrase 'under a plan.'"); Palos Cmty. Hosp. v. Humana Ins. Co., Inc., 183 N.E.3d 677, 684 (Ill. 2021) ("If, as here, a motion for substitution of judge as of right is filed before trial or hearing begins and before the judge has ruled on a substantial issue in the case, it is timely."), *reh'g denied,* (Dec. 6, 2021).

[252] When the Code generally requires "timely" action, timeliness is determined by reference to other provisions. *See In re Columbia*, 54 B.R. at 718 (noting the Advisory Committee Note to Rule 3002 references distributions on late filed claims); *In re* Farmland Indus., Inc., 336 B.R. 415, 420 (Bankr. W.D. Mo. 2005); *cf.* Carroll v. AMJ, Inc. (*In re* Innovative Commc'n Corp.), No. 07-30012, 2014 WL 128204, at *1 n.1 (D.V.I. Jan. 14, 2014) ("In interpreting the statute, this Court has looked to [local bankruptcy rules of procedure] to determine whether a party's motion to withdraw is timely."); Irvin v. Faller, 531 B.R. 704, 706 (W.D. Ky. 2015) ("Courts, however, have generally defined timely as 'as soon as possible after the moving party is aware of grounds for withdrawal of reference' or 'at the first reasonable opportunity after the moving party is aware of grounds for withdrawal of reference.'" (citation omitted)); Dryden v. Nevada, No. 16-cv-01227, 2021 WL 9217680, at *1 (D. Nev. Dec. 28, 2021) ("However, the District Court in Hawaii found that courts generally interpret '"timely" to mean within the time set in the subpoena for compliance.'" (quoting Santiago v. Hawaii, No. 16-00583, 2017 WL 11448442, at *1 (D. Haw. Aug. 25, 2017))). Determining what "timely" means should thus depend on the facts of the case. *See In re* Rumsey Mfg. Corp., 9 F.R.D. 93, 98 (W.D.N.Y.), *aff'd in part, rev'd in part sub nom. McAvoy v. United States*, 178 F.2d 353 (2d Cir. 1949); Boyajian v. DeFusco (*In re* Giorgio), 50 B.R. 327, 328 (D.R.I. 1985) ("In our jurisprudence generally, the word 'timely' means 'at the first reasonable opportunity.'" (citation omitted)). At bottom, "timely" should not reward a lack of diligence. *See In re Giorgio*, 50 B.R. at 329 ("As the maxim has it: *tempus enim modus tollendi obligationes et actiones, quia tempus currit contra desides et sui juris contemptores.*"); HENRY CAMPBELL BLACK, A DICTIONARY OF LAW 1157 (St. Paul, Minn., West 1891) ("*Tempus enim modus tollendi obligationes et actiones, quia tempus currit*

and there is an implicit timeliness requirement established elsewhere,[253] that is, happening in time, then the deadline may depend on the type of case.[254]

In sum, these definitions show the ordinary meaning of "timely" may be understood as an attributive adjective[255] describing or modifying the noun "filing," attaching a characteristic to the filing as *being* timely. Still, "timely" can also be interpreted as an adverb qualifying the action of the filing *happening* at a specific time. An analysis of the text ends here; the plain language suggests "timely" should be determined based on the needs of the case.[256]

For purposes of this Article, the analysis will continue. Courts have also found timely in this context ambiguous and note the plain meaning of the statute produces harsh results.[257] At the same time,

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contra desides et sui juris contemptores. For time is a means of destroying obligations and actions, because time runs against the slothful and contemners of their own rights.").

[253] *Cf.* Kontrick v. Ryan, 540 U.S. 443, 448 (2004) ("No statute, however, specifies a time limit for filing a complaint objecting to the debtor's discharge.").

[254] *See In re Columbia*, 54 B.R. at 718 (noting Rule 3002 does not provide a deadline for creditors to file a claim after the bar date because doing so would conflict with section 726(a)(2)(C)); *see also* discussion *infra* Section III.A.2. Section 726(a)(2)(C) is not subject to laches, for example, because separation of powers principles indicate federal courts cannot apply "laches to bar a federal statutory claim that is timely filed under an express federal statute." N. Dakota v. Bala (*In re* Racing Servs., Inc.), 619 B.R. 681, 687–88 (B.A.P. 8th Cir. 2020) (quoting *In re* Jemal, 496 B.R. 697, 703 (Bankr. E.D.N.Y. 2013)). When there is a conflict between the Code and the Bankruptcy Rules, the Code wins. *See* Smith v. U.S. Bank Nat'l Assoc. (*In re* Smith), 999 F.3d 452, 456 (6th Cir. 2021); SLW Cap., LLC v. Mansaray Ruffin (*In re* Mansaray-Ruffin), 530 F.3d 230, 235 (3d Cir. 2008); Smart Word Techs., LLC v. Juno Online Servs., Inc. (*In re* Smart World Techs., LLC), 423 F.3d 166, 181 (2d Cir. 2005). Because a claim filed under section 726(a)(2)(C) is timely, the Bankruptcy Rules should not be able to abrogate the Code.

[255] An "attributive adjective" immediately precedes the noun it modifies. *In re* Swetic, 493 B.R. 635, 639 (Bankr. M.D. Fla. 2013).

[256] *Cf.* Withers v. Schneider Nat'l Carriers, Inc., 13 F. Supp. 3d 686, 691 (E.D. Tex. 2014) ("Timeliness is determined in every trial court on a case by case basis."); *In re Columbia*, 54 B.R. at 718 (recognizing "§ 726(a)(2)(C) was either viewed as a statute of limitation or as a matter of substantive law" by the Advisory Committee).

[257] *Compare* Grantz v. Fashion Show Mall, LLC, 584 F. Supp. 3d 915, 919 (D. Nev. 2022) ("The Ninth Circuit Bankruptcy Appellate Panel has held that § 523(a)(3)(A) is clear and not ambiguous . . . ." (citation omitted) (internal quotation marks omitted)), *with* Stone v. Caplan (*In re* Stone), 10 F.3d 285, 289 (5th Cir. 1994) ("Though the words in section 523(a)(3)(A) are rational, they are not unambiguous."), *and* Beezley v. Cal. Land Title Co. (*In re* Beezley), 994 F.2d 1433, 1436 (9th Cir. 1993) (O'Scannlain, J., concurring) (terming language of section 523(a)(3) "convoluted"). The language has also been recognized to lead to unnecessary results.

even if the statutory language first appears plain, application of the statute may reveal its ambiguity.[258] Here, the statutory scheme for chapter 7 cases places a significant challenge on the use of "timely." Thus, this Article will proceed to analyze the applicable provisions of the Code and its object and policy.

2. Holistic Interpretation

Statutory interpretation is holistic.[259] As the Court has often advised, a provision that may seem ambiguous in isolation is often clarified by the rest of the statutory scheme "because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."[260] When analyzing the text of a statute, the Court reads the words of the statute in context and presumes that the statutory scheme is coherent and internally consistent in the way its provisions work together.[261]

Generally, considering how the disputed term is used in a strongly connected provision may be appropriate: the presumption that same or similar terms should be interpreted in the same way.[262] But "timely" is employed throughout the Code.[263] This canon of

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See, e.g., Homestate Ins. Brokers of Alaska, Inc. v. Brosman (*In re* Brosman), 119 B.R. 212, 214 (Bankr. D. Alaska 1990) (acknowledging some of the caselaw interpreting section 523(a)(3)(A) lead to an unnecessarily harsh result); Mahakian v. William Maxwell Invs., LLC (*In re* Mahakian), 529 B.R. 268, 275 (B.A.P. 9th Cir. 2015) ("Although application of the plain text of § 523(a)(3)(A) may lead to harsh results, courts may not 'soften the import of Congress' chosen words.'" (quoting Lamie v. U.S. Tr., 540 U.S. 526, 538 (2004)).

[258] *See* Rake v. Wade, 508 U.S. 464, 474–75 (1993) ("[S]tatutory terms are often 'clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes [their] meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law'" (citation omitted) (alteration in original)); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132–33 (2000) ("The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.").

[259] *See* United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988); *see also* Hall v. United States, 566 U.S. 506, 516 (2012).

[260] *Timbers*, 484 U.S. at 371; *accord* SCALIA & GARNER, *supra* note 24, at 167–69.

[261] *See* ESKRIDGE, JR. et al., *supra* note 24, at 343.

[262] *See, e.g.*, Ratzlaf v. United States, 510 U.S. 135, 143 (1994); Dewsnup v. Timm, 502 U.S. 410, 417 n.3 (1992) ("[W]e express no opinion as to whether the words 'allowed secured claim' have different meaning in other provisions of the Bankruptcy Code.").

[263] *See, e.g.*, *In re* Farmland Indus., Inc., 336 B.R. 415, 420 (Bankr. W.D. Mo. 2005) (noting "timely . . . appears some 80 or so time in the bankruptcy code without

construction may be of little value in interpreting the statute.[264] Rather, the key here is that a holistic rule of interpretation means "timely" must be read in the context of the scheme it is being used, e.g., liquidations.

The Federal Rules of Bankruptcy Procedure define "timely" based on the specific deadline applicable to the case.[265] In a reorganization, for example, the word "timely" assuredly refers to the bar date.[266] But this definition of "timely," as used in a reorganization, is inapposite in the context of a liquidation.[267] Unlike other chapters of the Code,[268] filing a proof of claim in a liquidation proceeding, absent other circumstances, is solely done to share in a distribution.[269] Section 726(a)(2)(C) recognizes this right to participate by allowing a creditor to file a claim in time to permit payment, which is treated as "timely."[270] Sections 523(a)(3)(A) and 726(a)(2)(C) have identical language,[271] which demonstrates the close connection between distributions and the exception for creditors who lacked notice.[272] To the extent "timely" under the Bankruptcy Rules conflicts with the Code,

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further definition . . . ."); *see also* Envt'l Def. v. Duke Energy Corp., 549 U.S. 561, 574 (2007) ("[W]ords have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section." (citation omitted)).

[264] *See Envt'l Def.*, 549 U.S. at 574.

[265] *See* Helbling & Klein, *supra* note 11, at 40 ("Timeliness is measured by the so-called 'bar date' or the last date to file proofs of claim as established under Bankruptcy Rule 3002(c).").

[266] *See, e.g.*, Eglin Fed. Credit Union v. Horlacher (*In re* Horlacher), 389 B.R. 257, 263 (Bankr. N.D. Fla. 2008) ("In chapter 11 and chapter 13 cases, this filing deadline is necessary to establish a time line in order to get a plan confirmed, get creditors paid, and get a case closed.").

[267] *See* S. Pac. Land Co. v. Kuhr (*In re* Kuhr), 132 B.R. 421, 423 (Bankr. E.D. Cal. 1991).

[268] *See, e.g.*, NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984) ("The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources.").

[269] *See, e.g.*, *In re Horlacher*, 389 B.R. at 263.

[270] *See, e.g.*, *id.* at 268. *But see* Johnson, *supra* note 11, at 590 n.99 (noting section 726 does not alter the elements of nondischargeability under section 523(a)(3)(A)).

[271] *See In re* Sunland, Inc., 534 B.R. 793, 798 (Bankr. D.N.M. 2015) ("Section 726(a)(2)(C) is the counterpart to § 523(a)(3)(A) for Chapter 7 cases, and the pertinent language of the two sections is identical.").

[272] *Cf.* Merit Mgmt. Grp. v. FTI Consulting, Inc., 138 S. Ct. 1752, 1759 (2018) ("In this case, the relevant section heading demonstrates the close connection between the transfer that the trustee seeks to avoid and the transfer that is exempted from that avoiding power pursuant to the safe harbor.").

the Code wins.[273] This analysis relies on the language of the statute; applying section 726(a)(3) is still the act of a court of law and not an exercise of equitable power.[274] Thus, in the context of a chapter 7 case with assets, "timely" under section 523(a)(3)(A) may mean filed in time to permit payment.

a. Receiverships and Probates

A holistic interpretation need not be limited to the Code.[275] Similarly, liquidations are not limited to bankruptcy. Statutes dealing with the same subject should be interpreted harmoniously because the statute at issue may model itself on another statute or use the same terminology and address the same issue as the statute being interpreted.[276] Thus, other laws dealing with distributions and liquidations may provide greater insight.

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[273] *In re* Chilson, 525 B.R. 130, 133 (Bankr. D.N.M. 2015) ("Furthermore, it is axiomatic that in the event of a conflict between the Code and the Rules, the Code wins."); *accord* United States v. Cardinal Mine Supply, Inc., 916 F.2d 1087, 1089 (6th Cir. 1990) ("We cannot have a statute that specifically allows payment of tardily filed claims and rules that prohibit their filing. Accordingly, to the extent that Rule 9006 contradicts the statute, it cannot stand."); *In re* Osman, 164 B.R. 709, 714 (Bankr. S.D. Ga. 1993) ("Generally, the Federal Rules of Bankruptcy Procedure . . . have the force and effect of law. However, an exception to this principle arises where a rule is inconsistent with a provision of the Bankruptcy Code, in which case the Code must prevail over the inconsistent procedural rule." (citation omitted)); *see also supra* note 254.

[274] *See* Johnson, *supra* note 11, at 585 n.70, 590 n.99 (first noting the "decision to apply § 726 is still the act of a court of law and not the exercise of equitable power" but later noting section 726(a) does not "alter the elements of nondischargeability under § 523(a)(3), nor does it provide bankruptcy courts with the equitable power to extend the *deadline* for filing a timely proof of claim" (emphasis added)); *cf.* Spilka v. Bosse (*In re* Bosse), 122 B.R. 410, 416 (Bankr. C.D. Cal. 1990) (holding bankruptcy courts must follow express statutory authority to same extent as courts of law).

[275] *See* Molzof v. United States, 502 U.S. 301, 307 (1992) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word . . . ." (first alteration in original) (quoting Morissette v. United States, 342 U.S. 246, 263 (1952))); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1990) (Scalia, J., concurring in the judgment) (noting the meaning of terms on the statute books should be interpreted in a manner "most compatible with the surrounding body of law into which the provision must be integrated").

[276] *See* SCALIA & GARNER, *supra* note 24, at 252–55 (discussing the related-statutes canon, meaning laws leading with the same subject should be interpreted harmoniously). A related rule of statutory construction is the borrowed statute rule. *See* Eskridge, *supra* note 24, at 575–79; *see also* John L. Flynn, *Mixed-Motive Causation Under the ADA: Linked Statutes, Fuzzy Thinking, and Clear Statements*, 83 GEO. L.J.

For example, the rules governing the liquidation of a financial institution after the Federal Deposit Insurance Corporation has been appointed receiver have similar exceptions for creditors who lacked notice.[277] The FDIC must publish and mail notice of a liquidation to all creditors to allow them a certain period for filing claims.[278] Claims filed after the bar date are disallowed, and if a claimant does not seek a judicial determination of a disallowed claim, the claimant has no "further rights or remedies with respect to such claim," i.e., the debt is discharged.[279]

Like section 726(a)(2)(C),[280] these insolvency receiverships have an identical exception to the bar date filing requirement.[281] Under

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2009, 2037 n.143 (1995) ("Strictly speaking, the Borrowed Statute Rule applies only to statutes borrowed from other jurisdictions, while the Rule of Statutes in Pari Materia states the same principle for statutes from the same jurisdiction."). The borrowed statute rule generally provides that when Congress "borrows" the text of a statute it "borrows" settled interpretations placed on that statute, with certain exceptions. *See, e.g.*, Shannon v. United States, 512 U.S. 573, 581 (1994) ("[When Congress] has borrowed from the statutes of a State provisions which had received in that State a known and settled construction . . . that construction must be deemed to have been adopted by Congress . . . ." (citation omitted)); Lorillard v. Pons, 434 U.S. 575, 581 (1978); *see also In re* OTC Net, Inc., 34 B.R. 658, 660 (Bankr. D. Colo. 1983) ("And the priorities of distribution [in a Securities Investor Protection Act liquidation] are set forth by that section as the same as those in 11 U.S.C. § 726.").

[277] *See, e.g.*, Heno v. FDIC, 20 F.3d 1204, 1206 (1st Cir. 1994).

[278] *See id.*

[279] *See id.* at 1207; Seaway Bank & Tr. Co. v. J&A Series I, LLC, 962 F.3d 926, 930 (7th Cir. 2020) (noting courts lack authority to review claims unless they endure the administrative claim process); Superior Bank, FSB v. Boyd (*In re* Lewis), 398 F.3d 735, 740 (6th Cir. 2005); *see also* Hollace T. Cohen, *Orderly Liquidation Authority: A New Insolvency Regime to Address Systemic Risk*, 45 U. RICH. L. REV. 1143, 1172–74 (2011); Kenneth J. Caputo, *Customer Claims in SIPA Liquidations: Claims Filing and the Impact of Ordinary Bankruptcy Standards on Post-Bar Date Claim Amendments in SIPA Proceedings*, 20 AM. BANKR. INST. L. REV. 235, 237–47 (2012) (discussing liquidations and the claim process under the Securities Investor Protection Act).

[280] *Compare* 11 U.S.C. § 726(a)(2)(C)(i)–(ii) (exception for late-filed claims due to lack of notice that are filed in time to permit payment), *with* 12 U.S.C. § 1821(d)(5)(C)(ii)(I)–(II) (same), 12 U.S.C. § 5390(a)(3)(C)(ii)(I)–(II) (same), 12 U.S.C. § 1787(b)(5)(C)(ii)(I)–(II) (same), *and* 12 C.F.R. § 380.35(b)(2)(ii) (2022) ("A claim is 'filed in time to permit payment' when it is filed before a final distribution is made by the receiver.").

[281] *See Heno*, 20 F.3d at 1207; *In re Lewis*, 398 F.3d at 740 ("Claims filed after the date specified in the notice must be disallowed unless 'the claimant did not receive notice of the appointment of the receiver in time to file such claim before such date.'" (citation omitted); Miller v. FDIC, 738 F.3d 836, 842 (7th Cir. 2013) ("But the statute also contains an exception for claimants who do not actually receive the

this exception, late-filed claims are permitted "*only if* 'the claimant did not have notice of the appointment of the receiver in time to file [a claim by the bar date]; and such claim is filed in time to permit payment of such claim.'"[282] Congress intended for late-filed claims to be disallowed unless the claimant did not have notice of the bar date and a claim is filed in time to permit payment.[283] Thus, timely means filed before a final distribution.

Likewise, some receiverships under state law have a similar rule.[284] Generally, claims against the assets of a receivership estate must be filed by the bar date.[285] Claims not filed by the bar date do not receive any share of the assets.[286] For example, under the Uniform Commercial Real Estate Receivership Act, a creditor must submit a claim to the receiver by the bar date.[287] Creditors submitting untimely claims do not receive a distribution unless the court orders

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notice of the deadline in the mail and time remains to allow payment of the claim. In that situation the FDIC may still consider the claim." (citation omitted)).

[282] *Heno*, 20 F.3d at 1207 (citing § 1821(d)(5)(C)(ii)). Congress clearly contemplated the receiver to defer to the late-coming claimant. *Contra* Croix Oil Co. v. Mai Yer Moua (In re Mai Yer Moua), 457 B.R. 755, 762 (Bankr. D. Minn. 2011) ("But what if a tardily-filed claim comes in after the trustee has filed a final report and proposed distribution, or has noticed one to creditors, but the checks have not been cut? Should the trustee be under an (uncompensated) obligation to redo and renotice everything . . . ?").

[283] *See, e.g.*, *Heno,* 20 F.3d at 1207. The FDIC also rejected comments suggesting "that an 'excusable neglect' exception to late-filed claims like the Bankruptcy Code should be used." Certain Orderly Liquidation Authority Provisions Under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 Fed. Reg. 41626, 41636 (July 15, 2011) (to be codified at 12 C.F.R. pt 380).

[284] *See* Commodity Futures Trading Comm'n v. Lake Shore Asset Mgmt. Ltd., 646 F.3d 401, 404 (7th Cir. 2011) (recognizing the "similarity between an insolvency receivership and a bankruptcy proceeding"). Receiverships are not limited to state law. Federal receiverships grounded in federal common law, although uncommon, are a remedy available to creditors after satisfying the jurisdictional requirements for entry into a federal court, which gives a court ancillary jurisdiction to appoint a receiver. *See* Tabb, *supra* note 82, at 21–23.

[285] *See Lake Shore*, 646 F.3d at 403 ("[T]he receiver sent a notice to Lake Shore's creditors, including Andbanc, telling them they had to file a claim with the receiver within 45 days or be excluded from the distribution of the receivership's assets.").

[286] *See id.* at 404.

[287] UNIF. COM. REAL EST. RECEIVERSHIP ACT § 20(b) (Unif. L. Comm'n 2015). The Uniform Commercial Real Estate Receivership Act has a rule for estates with insufficient assets, i.e., no-asset cases; in such cases, unsecured creditors need not file claims unless it is discovered later that the receivership generated receipts more than the amounts needed to satisfy secured claims. *See id.* § 20, cmt. 6.

otherwise.[288] But a court may allow an untimely claim if, for example, the creditor gained knowledge of the receivership after the bar date.[289] This indicates if a distribution has not been made, the creditor who lacked notice may file a claim and receive a distribution.[290] So in some cases an untimely claim is treated as timely.[291]

There is a similar rule for probate proceedings in some jurisdictions. Virtually all jurisdictions have nonclaim statutes in their probate codes.[292] A nonclaim statute mandates timely filing of a claim, and if not timely filed, the claim is forever barred.[293] But a minority of jurisdictions have an exception[294] for unfiled claims.[295] In these states, a precondition to a tardy filing by a claimant who lacked notice is filing the claim before a distribution.[296] Thus, in some states a claim is timely if it is filed before a distribution.

These principles may provide greater insight in deciding whether a claim filed after the bar date but before a distribution is timely in a chapter 7 case.

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[288] *See id.* § 20, cmt. 2.

[289] *Id.*

[290] *See, e.g.*, *SEC v. Hardy*, 803 F.2d 1034, 1039 n.5 (9th Cir. 1986). In *Hardy*, the Ninth Circuit recognized the possible suggestion that the deadline for filing claims in an equity receivership "should be flexibly applied where the assets have not been distributed." *See id.*

[291] *See* 75 C.J.S. *Receivers* § 274, Westlaw (database updated Nov. 2022) ("[T]he court may, in its discretion, permit a creditor to come in and prove his or her claim thereafter, at any time before actual distribution, or even after partial payments, if there is a surplus in the hands of the receiver, so as not to interfere with payments already made." (footnotes omitted)).

[292] *See* Tulsa Pro. Collection Servs., Inc. v. Pope, 485 U.S. 478, 479 (1988). One case has noted the due process concerns expressed in *Pope* apply by analogy to debts held by omitted creditors in a chapter 7 case. *See* Schouten v. Jakubiak (*In re* Jakubiak), 591 B.R. 364, 392–93 (Bankr. E.D. Wis. 2018).

[293] *See Pope*, 485 U.S. at 479–81; *see also* Mark Reutlinger, *State Action, Due Process, and the New Nonclaim Statutes: Can No Notice Be Good Notice If Some Notice Is Not?*, 24 REAL PROP. PROB. & TR. J. 433, 434–40 (1990).

[294] *See* 31 Am. Jur. 2d *Executors and Administrators* § 482, Westlaw (database updated Nov. 2022) ("In the absence of any statutory authorization, a court may not extend the time for filing a claim fixed by the nonclaim statute.").

[295] *See, e.g.*, Debra A. Falender, *Notice to Creditors in Estate Proceedings: What Process Is Due?*, 63 N.C. L. REV. 659, 660 n.7, 667 n.38, & 669 n.49 (1985). The existence of such statutes does not appear to be universal. *See id.*

[296] *See id.* at 667 n.38 ("Other states extend the time for filing claims under certain circumstances, but require filing before distribution to avoid forfeit of the claim.").

3. Purpose and Narrow Construction

Interpreting "timely" to include claims filed in time to permit payment supports the policy of providing debtors a fresh start.[297] If a plain construction[298] of this exception to discharge means the purpose of section 523(a)(3)(A) is limited to the protection of the right to share in the distribution, then "timely" should mean in time to exercise that right.[299] But under the Dodd-Frank Wall Street Reform and Consumer Protection Act the purpose of allowing late-filed claims ensures the meaningful opportunity for claimants to participate in the claims process, which could mean something more than merely sharing in the distribution.[300] Under the Code, however, interpreting "timely" in furtherance of protecting the right to share in the distribution may support the dischargeability of the debt if the creditor learns of the case in time to permit filing a claim and sharing in the distribution.

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[297] *See* Kowalski v. Romano (*In re* Romano), 59 F. App'x 709, 714 (6th Cir. 2003).

[298] *But see* Jonathon S. Byington, *The Fresh Start Canon*, 69 FLA. L. REV. 115, 116–17 (2017) (examining the tension between the exceptions to discharge and the fresh start policy). It is true the Court has stated the "exceptions to discharge should be confined to those plainly expressed." *See* Kawaauhau v. Geiger, 523 U.S. 57, 61–62 (1998) (citation omitted) (internal quotation marks omitted). But the Court has also recognized that this principle is consistent with the exceptions to discharge that benefit a typically more honest creditor. *See* Bullock v. BankChampaign, N.A., 569 U.S. 267, 275–76 (2013) (collecting exceptions to discharge dealing with fault, governmental, and spousal creditors). Section 523(a)(3)(A) does not necessarily benefit an honest creditor if the debtor through mistake and inadvertence omitted a creditor. *See* 11 U.S.C. § 523(a)(3)(A). And a confined construction—not extending the statutory language to meet a particular set of facts—would be consistent with the doctrine of *Gleason*. *See* United States v. Sotelo, 436 U.S. 268, 285–86 (1978) (Rehnquist, J., dissenting) (citing Gleason v. Thaw, 236 U.S. 558, 562 (1915) (refusing to hold that the services of an attorney fall under the contours of "property" for the fraud exception to discharge)). Confining the exceptions to discharge to those plainly expressed may merely mean excepting from discharge the debts Congress plainly chose to except from discharge. *See* Schwab v. Reilly, 560 U.S. 770, 790 n.17 (2010).

[299] *See, e.g.*, *In re Romano*, 59 F. App'x at 714.

[300] As discussed *supra* Section III.2.a, the orderly liquidation of certain financial institutions allow certain tardy claims. The purpose of allowing these ensures a "meaningful opportunity for claimants to participate in the claims process . . . ." *See* Covered Broker-Dealer Provisions Under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 85 Fed. Reg. 53645, 53656 (Aug. 31, 2020). Participating in the claims process could mean something *more* than sharing in the distribution. *See supra* notes 185–89 and accompanying text.

4. Legislative History

The legislative history may also provide some limited support. Since the Code was not enacted by a simple legislative procedure, one commentator has suggested consulting the floor statements first, then the Senate Report, and finally the House Report to glean legislative intent.[301] The Court has also treated the floor statements by "Representative Edwards and his counterpart floor manager Senator DeConcini" on the Bankruptcy Reform Act of 1978 as "persuasive evidence of congressional intent."[302]

The floor statements by Representative Edwards and Senator DeConcini express their intent to overrule *Birkett*.[303] Likewise, the reports submitted by the Senate and House Judiciary Committee indicate section 523(a)(3) excepts "a debt from discharge if it was not scheduled in time to permit timely action by the creditor to protect his rights."[304]

Ascertaining the intent in the reports to clarify some "uncertainties" generated by the caselaw "construing 17a(3)" is difficult to identify.[305] The uncertainties generated in the caselaw may have been created by *Robinson*,[306] but Congress did not overrule *Robinson* or *Milando*. Congress does not employ methods of stealth in abrogating prior bankruptcy practice. For example, there was no reluctance in overruling other lower court decisions.[307] Because the floor statements are persuasive evidence of congressional intent, the overruling of *Birkett* is the clearest pronouncement of legislative intent from these materials.

In sum, depending on what is the "clearer pronouncement" of legislative intent, the legislative history may be useful,[308] in determining the right protected under section 523(a)(3)(A).

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[301] *See* Kenneth N. Klee, *Legislative History of the New Bankruptcy Law*, 28 DEPAUL L. REV. 941, 957–58 (1979).

[302] Begier v. I.R.S., 496 U.S. 53, 64 n.5 (1990).

[303] Schouten v. Jakubiak (*In re* Jakubiak), 591 B.R. 364, 385 (Bankr. E.D. Wis. 2018) (citations omitted).

[304] *Id.* (citations omitted) (internal quotation marks omitted).

[305] *Id.* at 385 n.4 (citations omitted).

[306] *See id.*; Helbling & Klein, *supra* note 11, at 57; Lott Furniture, Inc. v. Ricks (*In re* Ricks), 253 B.R. 734, 750 n.62 (Bankr. M.D. La. 2000) ("It could be that Congress meant to strike a new path with statutory language that overrules both *Birkett* and *Robinson*.").

[307] *See, e.g.*, S. Rep. No. 95-989, at 88 (1978) (overruling "*Dubay v. Williams*, 417 F.2d 1277 (9th Cir. 1966)"); H.R. Rep. No. 95-595, at 374 (1977) (same).

[308] Legislative history should not be relied on if it is ambiguous or imprecise. *See, e.g.*, Marrama v. Citizens Bank of Mass., 549 U.S. 365, 371–72 (2007).

B. Implications

The window of opportunity to give notice to an omitted creditor after the bar date but before a distribution has slowly begun to plague the courts on questions of dischargeability. This Article does not purport to have a complete answer to the questions raised. It does, however, aspire to advance the conversation by offering observations given the current standoff.

First, and most importantly, the plain language approach assumes the right to *participate* in a distribution of the estate includes something more than receiving a dividend.[309] According to some courts, meaningful participation would include the right to object to the claims of other creditors and the right to object to administrative expenses.[310] This participation could increase the available distribution to all creditors.[311] So if a creditor cannot participate and increase the dividend to all creditors, the creditor has been deprived of its rights and its debt is not discharged.[312]

But this premise invites the question: how do we know the creditor would successfully increase the dividend available to all creditors? Not only that, a trustee has a duty to object to claims, which would increase any dividend.[313] But assuming the truth of this premise, the creditors who did file claims should have already exercised their rights to increase the dividend.[314] Creditors with timely—though minuscule—claims may not have been as motivated to backstop the trustee and increase the dividend. Even so, this premise rewards timely creditors who fiddled while the bankruptcy court fires burned.[315] As the maxim has it: for time is a means of destroying obligations and

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[309] *See, e.g.*, Purcell v. Khan (*In re* Purcell), 362 B.R. 465, 476 (Bankr. E.D. Cal. 2007); Croix Oil Co. v. Mai Yer Moua (*In re* Mai Yer Moua), 457 B.R. 755, 763 (Bankr. D. Minn. 2011).

[310] *See In re Purcell*, 362 B.R. at 476; *In re Mai Yer Moua*, 457 B.R. at 760 ("[Section] 523(a)(3)(A) protects a right to meaningfully participate in the estate, actual administrative performance is the context that has to be considered in determining the congressional intent behind its words."). *But see* Eglin Fed. Credit Union v. Horlacher (*In re* Horlacher), No. 08CV173, 2009 WL 903620, at *3 n.6 (N.D. Fla. Mar. 31, 2009) (noting Congress intended the right to participate in asset distribution by overruling the right to participate in all aspects of the administration of the estate).

[311] *See In re Purcell*, 362 B.R. at 476.

[312] *See id.*; *see also In re Mai Yer Moua*, 457 B.R. at 763.

[313] *See, e.g.*, 11 U.S.C. § 704 (a)(5).

[314] *See, e.g.*, Morris v. Zimmer (*In re* Zimmer), 623 B.R. 139 147–50 (Bankr. W.D. Pa. 2020) (addressing the creditors' standing to object to claims partly because disallowance would produce a greater distribution).

[315] *Cf.* Boyajian v. DeFusco (*In re* Giorgio), 50 B.R. 327, 329 (D.R.I. 1985).

actions, because time runs against the slothful and contemners of their own rights.[316]

Second, *Taggart*'s standard for determining whether the discharge order's injunction has been violated will be implicated.[317] In *Taggart*, the Court held a creditor cannot be held in contempt for violating the discharge injunction if there is an "objectively reasonable basis for concluding that the creditor's conduct might be lawful."[318] The inquiry is on the objectiveness of the violation.[319] The split in courts and the lack of any binding precedent may provide a creditor with an objectively reasonable basis for concluding the debt was not discharged, meaning any attempts to collect the debt would be lawful.

On top of that, the extent of a debt's dischargeability may also be challenged. Would dischargeability be pro rata? Courts have rejected "pro rata dischargeability" arguments.[320] These courts acknowledge this result produces a harsh result.[321] Some courts also

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[316] *See id.*; *see also* BLACK, *supra* note 252, at 1157.

[317] *See* Taggart v. Lorenzen, 139 S. Ct. 1795, 1799 (2019) ("In other words, civil contempt may be appropriate if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful.").

[318] *Id.* at 1801.

[319] *See, e.g.*, Orlandi v. Leavitt Fam. Ltd. P'ship (*In re* Orlandi), 612 B.R. 372, 382–83 (B.A.P. 6th Cir. 2020) (acknowledging the clear split of authority and the lack of any controlling law provides an objectively reasonable basis for concluding the collection action was lawful); *In re* Shuey, 606 B.R. 760, 771 (Bankr. N.D. Ill. 2019) ("It is difficult to state with conviction that Creditor's belief was objectively unreasonable *given that he can cite to authority that supports his position.*" (emphasis added)).

[320] *See, e.g.*, Croix Oil Co. v. Mai Yer Moua (*In re* Mai Yer Moua), 457 B.R. 755, 763 n.12 (Bankr. D. Minn. 2011); Licup v. Jefferson Ave. Temecula, LLC (*In re* Licup), No. 22-1111, 2023 WL 2134975, at *4 (B.A.P. 9th Cir. Feb. 21, 2023) (citing Mountain W. Fed. Credit Union v. Stradinger (*In re* Stradinger), No. 07-00024, 2007 WL 2319812, at *8 (Bankr. D. Mont. Aug. 9, 2007)). *But see* Ladnier v. Ladnier (*In re* Ladnier), 130 B.R. 335, 338 (Bankr. S.D. Ala. 1991) ("Balancing the debtor's right to a fresh start with the creditor's right to payment of a debt, this Court finds that equity demands the Defendant receive an amount equal to a *pro rata* share of the distribution . . . ."). If the debt was satisfied in full through distribution, then nondischargeability may become moot. *See* Thompson v. Roland (*In re* Roland), 294 B.R. 244, 249 (Bankr. S.D.N.Y. 2003) ("In the absence of an enforceable obligation, there is no 'debt' that can be non-dischargeable."); Spilka v. Bosse (*In re* Bosse), 122 B.R. 410, 416 n.3 (Bankr. C.D. Cal. 1990) (noting a creditor holding a nondischargeable claim can participate in any distribution but acknowledging *In re Farmer*, 786 F.2d 618, 621 (4th Cir. 1986) and *In re Overmyer*, 26 B.R. 755, 758 (Bankr. S.D.N.Y. 1982) as authority to the contrary).

[321] *See, e.g.*, Duerkop v. Jongquist (*In re* Jongquist), 125 B.R. 558, 560 (Bankr. D. Minn. 1991).

question the incentive to schedule a creditor.[322] However, the incentive to schedule creditors in a no-asset case should apply equally in a case with assets.[323] In other words, it is worth considering what incentivizes a debtor to schedule and list creditors in a case with no assets since scheduling has no impact on dischargeability,[324] and determing if those incentives apply to a case with assets. Moreover, extending this reasoning further, a creditor could file a claim after the bar date but in time to permit payment knowing its debt is still nondischargeable. If the debtor acquires assets postpetition, then the creditor beats other prepetition creditors because of mistake or inadvertence.[325]

Lastly, Rule 3002(c)(6) was amended December 1, 2022,[326] and it now allows the court to extend the bar date on the creditor's motion if notice did not give them a "reasonable time" to file a claim.[327] A creditor moving for an extension of the bar date in a chapter 7 case when notice was insufficient is unlikely. An extension is not necessary because any claim is treated timely.[328] Perhaps a creditor

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[322] *See In re Mai Yer Moua*, 457 B.R. at 762 ("The Defendant's interpretation shifts the impact of a separate statutory onus entirely away from the debtor in bankruptcy—the party originally at fault—and onto a non-culpable creditor."); *see also In re Licup*, 2023 WL 2134975, at *4 ("But under Debtors' proposed construction, there is no incentive to ensure proper scheduling of debts or to provide notice to creditors.").

[323] *See supra* note 38. *But see In re Licup*, 2023 WL 2134975, at *4.

[324] *See* Beezley v. Cal. Land Title Co. (*In re* Beezley), 994 F.2d 1433, 1436–37 (9th Cir. 1993) (O'Scannlain, J., concurring) (explaining scheduling has no impact on dischargeability under section 523(a)(3)(A) in a case with no assets).

[325] *Cf. In re Licup*, 2023 WL 2134975, at *4 (noting "that a creditor's net recovery on a nondischargeable debt is often less than the full amount of its claim, given the difficulties and expense in collection. Part of the balance struck by Congress involves creditors receiving an assured distributive share from . . . [the] estate").

[326] Rule 3002(c)(6) was amended to resolve a conflict in the caselaw. *Compare In re* Helios & Matheson Analytics, Inc., 629 B.R. 772 (Bankr. S.D.N.Y. 2021) (noting an extension of the bar date is warranted if the creditor lacked notice because of a debtor's failure to include the creditor in the matrix), *with In re* Wulff, 598 B.R. 459 (Bankr. E.D. Wis. 2019) (noting an extension of the bar date was unavailable because the matrix was not filed untimely). *See In re* MPAC Home Improvement & Constr., LLC, No. 19-41940, 2021 WL 1748080, at *2 (Bankr. D. Mass. May 3, 2021) (describing the conflict under Rule 3002(c)(6)). The phrase "because the debtor failed to timely file the list of creditors' names and addresses required by Rule 1007(a)" was removed.

[327] *See* FED. R. BANKR. P. 3002(c)(6).

[328] *See* 11 U.S.C. § 726(a)(2)(C); *see also In re MPAC Home Imp.*, 2021 WL 1748080, at *3 ("It is not necessary for this Court to reach whether Rule 3002(c)(6)(A) is applicable, however, because § 726(a)(2)(C) is applicable and

could file such a motion for an underlying motive: providing notice to the trustee to hold off on making a distribution while it prepares to file a claim. But if the creditor lacked knowledge of the case before the bar date,[329] then a creditor can rest on the exception to discharge and decline the opportunity to ask for an extension of the bar date, opening the door to collect from a debtor postpetition under the plain language approach.

But if a creditor successfully extends the bar date under Rule 3002(c)(6), would the extension apply to all creditors?[330] The Rule does not expressly limit an extension of time to only the specific creditors who filed the motion.[331] If the terms of the extension order are not limited to the creditor, perhaps a debtor could piggy-back off the extension and amend his schedules to provide notice to *other* omitted creditors. This could threaten those creditors who were relying on section 523(a)(3)(A) to collect from the debtor postpetition. Or does the bar date extend only as to that creditor?[332] If so, does each creditor have their own specific bar date? If each creditor has their own bar

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affords similar relief to that sought by the Sim/Sekelsky Creditors."); *In re* Feldman, 261 B.R. 568, 575 (Bankr. E.D.N.Y. 2001).

[329] A debtor may file a claim on behalf of the creditor but may face the same "timely" issue. *See* 11 U.S.C. § 501(c); Mahakian v. William Maxwell Invs., LLC (*In re* Mahakian), 529 B.R. 268, 275–76 (B.A.P. 9th Cir. 2015). *But see* Am. President Lines Ltd. v. Hatley (*In re* Hatley), No. 09-5088, 2010 WL 200825, at *3–5 (Bankr. E.D. Tenn. Jan. 12, 2010); Leadbetter v. Snyder (*In re* Snyder), 544 B.R. 905, 907–08 (Bankr. M.D. Fla. 2016).

[330] *Cf. In re* Rhodes, 88 B.R. 464, 466 (Bankr. N.D. Ga. 1988) ("[A]ny extension granted pursuant to Rule 3002(c)(6) should be given to all creditors to give them a chance to share in the distribution from a surplus and not merely to the creditor who requested the extension."); *In re* Watkins, 365 B.R. 574, 577 (Bankr. W.D. Pa. 2007) (noting the caselaw holds an order granting an extension of time to file a complaint to determine dischargeable or object to discharge extends the time for creditors other than the moving party). The Rule in *Rhodes* was a prior version of Rule 3002(c)(6). *See supra* note 68.

[331] *Cf. In re* Wijewickrama, No. 16-CV-00347, 2018 WL 2212983, at *4 (W.D.N.C. Mar. 15, 2018) ("The Bankruptcy Rules do not expressly limit an extension of time to only the specific creditors who filed the motion."). *Compare id.* (analyzing Rule 4004's language that "the court may for cause extend the time fixed under this subdivision"), *with* FED. R. BANKR. P. 3002(c)(6) ("[T]he court may extend the time . . . ."), *and* FED. R. BANKR. P. 9006)(b)(3) ("The court may enlarge the time for taking action under [Rule 3002(c)] only to the extent and under the conditions stated in [Rule 3002(c)].").

[332] *See In re* Helios & Matheson Analytics, Inc., 629 B.R. 772, 779 (Bankr. S.D.N.Y. 2021) ("Rule 3002(c)(6) provides the court with discretion to extend the bar date as to that creditor[.]" (citation omitted) (internal quotation marks omitted)).

date, then timeliness should be assessed against the date each creditor received notice.

Long story short: the plain language approach provides a creditor with a sword of Damocles,[333] having the power of participating in the distribution or having its debt declared nondischargeable, or both. The "value of a sword of Damocles is that it hangs—not that it drops."[334] A creditor with this much power flouts the Code's purpose of providing the honest but unfortunate debtor a fresh start.[335]

CONCLUSION

Courts have found Congress failed to cure the caselaw under *Birkett*. The divide under section 523(a)(3)(A) persists. Some hold the language is clear and unambiguous. Most cases find the language convoluted and address timeliness based on the nature of a liquidation proceeding and discharge debts held by creditors who can share in a distribution.

A careful application of the rules of statutory construction may resolve these difficulties. In the end, the focus should be shifted to liquidations. If the debtor pays the omitted creditor the same dividend as other creditors, the debt should be discharged.[336] But without binding precedent, the dischargeability issue will continue to cause disagreements and differences in opinion.

Festering underneath this inquiry lies bankruptcy law's fundamental dilemma: is it a "system for picking a debtor's bones in a more orderly fashion? Or is it an economic and social safety net that allows debtors to return to the world? The fact that it is both has never slowed debate that it should be primarily one or the other."[337] Given this dilemma, courts and litigants should scrutinize section 523(a)(3)(A) to

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[333] The Sword of Damocles is a parable in which Damocles has a sword dangling over his head hung by a single-horsehair, signifying the ever-present peril held by those in power of not knowing when the sword will drop. *See* State v. Parson, 844 A.2d 178, 180 n.2 (R.I. 2004).

[334] Arnett v. Kennedy, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting); *see also In re* Beasley, 22 B.R. 773, 774 (Bankr. W.D. Tenn. 1982) ("Section 1322(b)(9) may not be used by a creditor as a sword of Damocles to hang over a debtor's head during the long duration of a wage earner plan.").

[335] *See* Bougie v. Livingston (*In re* Livingston), No. 15CV00036, 2016 U.S. Dist. LEXIS 888, at *17 (W.D. Va. Jan. 4, 2016); *see also* Slates, *supra* note 11, at 293–94.

[336] *See* Helbling & Klein, *supra* note 11, at 63 ("What if the omitted creditor learned of the bankruptcy in time to file a tardy claim that actually was paid the same dividend as timely claims as permitted by § 726(a)(2)(C)?").

[337] MANN, *supra* note 79, at 255.

reconcile the tension between a creditor's right to timely file a proof of claim on the one hand, and the debtor's right to a fresh start on the other, with an eye toward the purpose of a liquidation.

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