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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.