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In 1978, the Bankruptcy Reform Act repealed the Bankruptcy Act and established the Bankruptcy Code.[151] As noted above, section 523(a)(3)(A) provides that a discharge does not discharge any debt neither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

---

[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

---

[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,

---

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,

---

[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

---

[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

---

[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

---

[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"

---

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]

---

[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]

---

[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

---

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

---

[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]

---

[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

---

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

---

[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]

---

[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

---

[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 unscheduled 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

---

[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

---

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,

---

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

---

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,

---

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.

---

[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.