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ARTICLES

BITING THE BULLET: A BIPARTISAN SOLUTION TO INCREASE DEBTORS' ACCESS TO CHAPTER 7 RELIEF WHILE EXEMPTING FIREARMS IN A BANKRUPTCY CASE

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INTRODUCTION

Imagine an individual who is too broke to file for bankruptcy relief.[1] This irony is far too often a reality in America, especially for people living in underserved communities. Debtors are simply unable to skimp and save up even a thousand dollars to pay their bankruptcy attorney.[2] Paying their bankruptcy

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1. *See, e.g.*, Paul Kiel, *What Happens When You Can't Afford to Go Bankrupt*, THE WASH. POST (Mar. 2, 2018, 3:28 PM), https://www.washingtonpost.com/outlook/what-happens-when-you-cant-afford-to-go-bankrupt/2018/03/02/343fd882-1d8e-11e8-9de1-147dd2df3829_story.html [https://perma.cc/RBV9-CY3K] [hereinafter Kiel, *Can't Afford*]; Paul Kiel, *Many People Are Too Broke for Bankruptcy. A New Report Suggests Some Fixes*, PROPUBLICA (Apr. 15, 2019, 5:00 AM), https://www.propublica.org/article/many-people-are-too-broke-for-bankruptcy-a-new-report-suggests-some-fixes [https://perma.cc/Z9F6-SQ2E] [hereinafter Kiel, *Too Broke*].
2. *See id.*

attorney upfront in full is the only ticket to seeking Chapter 7 bankruptcy relief.[3] For a variety of reasons, Chapter 7 bankruptcy relief is the most advantageous type for a majority of poor and middle-class individuals and families.[4] It provides these individuals and families with an expedient, fresh financial start in life.[5] In fact, this fresh start is one of the main reasons our bankruptcy system exists.[6]

Without access to funds to pay their attorney, these folks have only one option when it comes to bankruptcy relief; and having one option is not a choice—it is a mandate.[7] These individuals are left to file a Chapter 13 bankruptcy case, which allows for the payment of a debtor's attorney in postpetition installments over time, usually three to five years.[8] It is certainly an option, but likely not the best one, and it is far more expensive than a simple Chapter 7 bankruptcy.[9]

More than half of those individuals who file for bankruptcy under Chapter 13 have their cases dismissed due to the inability to pay over time.[10] If a debtor misses one or more monthly payments over the repayment period in a Chapter 13 case, they are at risk of having their bankruptcy case dismissed without any benefit from the bankruptcy discharge.[11] In other words, they will be in worse shape than when they began the bankruptcy process.[12] While a Chapter 13 bankruptcy case offers debtors some relief, it is a far cry from the type of relief that is afforded to debtors under a Chapter 7 bankruptcy.[13]

This Article will examine the history of current practices regarding debtors'

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3. *See* Kiel, *Can't Afford*, *supra* note 1 ("[M]ost bankruptcy lawyers require that clients pay in full before filing, because otherwise their bills would be erased, too.").

4. *See id.*

5. *See id.*

6. *See* Elizabeth Warren, *Fixing Our Bankruptcy System to Give People a Second Chance*, WARREN DEMOCRATS, https://elizabethwarren.com/plans/bankruptcy-reform [https://perma.cc/93H5-CVPP] (last visited July 10, 2022) [hereinafter Warren].

7. *See* Kiel, *Can't Afford*, *supra* note 1.

8. *See id.*

9. *See id.* (noting that legal fees in a Chapter 13 case are more than twice as much as legal fees in a Chapter 7 case).

10. U.S. COURTS, 2021 REPORT OF STATISTICS REQUIRED BY THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 (2021), *Table 6: U.S. Bankruptcy Courts–Nonbusiness Bankruptcy Cases of Individual Debtors Terminated Under Chapter 13 by Dismissal or Plan Completion During the 12-Month Period Ending December 31, 2020, as Required by 28 U.S.C. 159(c)*, https://www.uscourts.gov/sites/default/files/data_tables/bapcpa_6_1231.2020.pdf [https://perma.cc/9FFV-BMSG] [hereinafter *BAPCPA Table 6*] (showing that more than half of Chapter 13 cases were dismissed and finding that a majority of those cases were dismissed due to the failure of debtors to make plan payments).

11. 11 U.S.C. § 1307(c)(4).

12. These debtors will have paid their attorney's fees and court costs but will not have received the greatest benefit of a bankruptcy case: the discharge. *See, e.g.*, Kiel, *Can't Afford*, *supra* note 1.

13. *See id.*

payment of bankruptcy attorney's fees in Chapter 7 cases.[14] Such examination will reveal the barrier that many people face in trying to obtain a fresh financial start. Next, it will scrutinize the disparate social impact of current payment practices on debtors' chapter choices and their eventual case outcomes.[15] This part will shed light on the fact that one's ethnicity may play a role in the type of bankruptcy relief they can obtain and their ultimate chance for success.

This Article will then study what has likely been the most successful workaround that debtors' attorneys have employed to mitigate the harshness of requiring their clients to pay them in full upfront before filing for Chapter 7 relief.[16] This workaround is called the two-contract approach, which results in a bifurcation of legal fees for prepetition and postpetition work. The benefits and detriments of this approach will be explored and examined.

In closing, this Article will propose some legislative solutions to remove the obstacles to debtors' access to Chapter 7.[17] The author will propose an original and workable bipartisan solution to this problem that will include a federal exemption for the debtors' firearms. This is a unique and somewhat controversial proposal, but it will hopefully generate enough support from both major political parties. Legislative changes are the most reliable and universal option for increasing access to Chapter 7 relief for those who need it most. Thus, a serious compromise is necessary as a means to an end.

I. A Brief History of the Current Practices Regarding Debtors' Payment of Bankruptcy Attorneys' Fees in Chapter 7 Cases

It is always instructive to examine the history behind any perceived legal problem. The history behind the current practices regarding debtors' payment to their attorneys in Chapter 7 bankruptcy cases is quite interesting, if not a bit awkward.[18] Prior to 1994, attorneys representing Chapter 7 debtors in bankruptcy cases could seek their reasonable compensation from the bankruptcy courts.[19] This practice allowed Chapter 7 bankruptcy debtors to pay their attorneys over time during the pendency of the case.[20] By paying their attorneys over time, many debtors who otherwise could not pay their attorneys in full prior to the bankruptcy filing could afford to proceed in a Chapter 7 bankruptcy case.[21] Since it was affordable, debtors had a meaningful choice between filing a Chapter 7 bankruptcy case or a Chapter 13 bankruptcy case.[22] Both types of bankruptcy

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14. *See infra* Part I.

15. *See infra* Part II.

16. *See infra* Part III.

17. *See infra* Part IV.

18. Lamie v. U.S. Tr., 540 U.S. 526, 534 (2004) (noting the awkwardness of the amended statute at issue).

19. *Id.* at 526.

20. *Id.* at 528.

21. *See* Kiel, *Can't Afford*, *supra* note 1.

22. *See* Warren, *supra* note 6.

cases are quite different, and Chapter choice plays an important role in whether the debtors' bankruptcy cases will ultimately succeed or not.[23]

Congress changed this practice in 1994 when it amended the Bankruptcy Code with the Bankruptcy Reform Act of 1994 (1994 Act).[24] Prior to these changes, Section 330(a) of the Bankruptcy Code provided that:

> (a) After notice to any parties in interest and to the United States trustee and a hearing, and subject to sections 326, 328, and 329 of this title, the court may award to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title, *or to the debtor's attorney*—
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> (1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, *or attorney* . . . and by any paraprofessional persons employed by such trustee, professional person, or attorney . . . ; and
> (2) reimbursement for actual, necessary expenses.[25]

After the 1994 Act, § 330(a) of the Bankruptcy Code now provides that:

> (a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103—
>
> (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, *or attorney* and by any paraprofessional person employed by any such person; and
> (B) reimbursement for actual, necessary expenses.[26]

In the amended version of the statutory section, notice that the words "or to the debtor's attorney" are missing from § 330(a)(1), but the word "attorney" is still present in § 330(a)(1)(A).[27] This seemingly minor but inconsistent change to § 330(a) in the 1994 Act resulted in confusion, litigation, and conflicting results within the various federal circuits.[28]

The issue was whether the deletion of the words "or to the debtor's attorney" in the amended § 330(a)(1) was the result of a legislative drafting error, since the amended statutory provision resulted in both a grammatical error and a lack of

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23. *Id.*
24. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106.
25. 11 U.S.C. § 330(a) (1993) (emphasis added).
26. 11 U.S.C. § 330(a) (1994) (emphasis added).
27. *Compare* 11 U.S.C. § 330(a) (1994), *with* 11 U.S.C. § 330(a) (1993).
28. Lamie v. U.S. Tr., 540 U.S. 526, 531 (2004) (noting that various courts disagreed over the proper interpretation of the revised statute).

parallelism between two parts of the same statutory section—§ 330(a)(1)(A) still included the word "attorney."[29] This issue impacted whether debtors' attorneys in Chapter 7 cases, who were not appointed by the trustee, could continue to receive fees for their services on a postpetition basis.[30] Six United States Courts of Appeals addressed this question, which resulted in an even three-to-three circuit split on the issue.[31]

In the United States Courts of Appeals for the Fifth and Eleventh Circuits, the courts concluded that § 330(a)(1) should be read plainly, and therefore Chapter 7 attorneys could not be compensated from the debtors' estates unless they had been employed by the trustees in those cases.[32] In contrast, the United States Courts of Appeals for the Second, Third, and Ninth Circuits held that the amended statutory provision was ambiguous, and therefore still authorized the payment of fees to Chapter 7 debtors' attorneys whether or not those attorneys were hired by the trustees in those cases.[33] In 2002, a few years after the last of this type of case was decided, the United States Court of Appeals for the Fourth Circuit issued a decision in *In re Equipment Services, Inc.*,[34] consistent with the Fifth and Eleventh Circuits' resolutions of the issue.

In *Equipment Services*, attorney John M. Lamie sought compensation from the debtor's estate for his legal fees for the services he performed after the debtor's case had been converted from a Chapter 11 case to a Chapter 7 case.[35] After the debtor's case had been converted to a Chapter 7 case, Mr. Lamie continued to perform legal work for the debtor without obtaining the trustee's authorization or the bankruptcy court's approval.[36] Mr. Lamie filed an application with the bankruptcy court seeking compensation for the work performed post-conversion.[37] The United States Trustee objected to Mr. Lamie's fee application on the basis that the Bankruptcy Code did not authorize his compensation, as he was neither authorized by the trustee to continue work for the debtor nor approved to do so by the bankruptcy court.[38] The bankruptcy court agreed with

29. *Id.* at 530-31 (noting that the deletion created an apparent legislative drafting error and defeated the neat parallelism of the statute).

30. *See id.* at 529.

31. *See infra* text accompanying notes 32-42.

32. *See In re* Pro-Snax Distribs. Inc., 157 F.3d 414, 425 (5th Cir. 1998), *overruled by In re* Woerner, 783 F.3d 266 (5th Cir. 2015); *In re* Am. Steel Prod., Inc., 197 F.3d 1354, 1357 (11th Cir. 1999).

33. *See In re* Ames Dep't Stores, 76 F.3d 66, 71-72 (2d Cir. 1996), *overruled by Lamie*, 540 U.S. 526 (2004); *In re* Top Grade Sausage, Inc., 227 F.3d 123, 130 (3d Cir. 2000), *overruled by Lamie*, 540 U.S. 526 (2004); *In re* Century Cleaning Servs., 195 F.3d 1053, 1060-61 (9th Cir. 1999), *overruled by Lamie*, 540 U.S. 526 (2004).

34. 290 F.3d 739, 745 (4th Cir. 2002).

35. *Lamie*, 540 U.S. at 529.

36. *Id.* at 532.

37. *Id.*

38. *Id.*

the trustee and denied Mr. Lamie's fees.[39] Mr. Lamie appealed to the district court, which affirmed the bankruptcy court's decision.[40] Mr. Lamie then appealed the decision to the Fourth Circuit, which also affirmed.[41] Both the district court and the Fourth Circuit rested its holding on the plain language of § 330(a)(1).[42]

Mr. Lamie appealed the Fourth Circuit's decision in *Equipment Services* to the Supreme Court of the United States, which granted certiorari to resolve the circuit split on this issue.[43] In *Lamie v. United States Trustee*, the Supreme Court ultimately sided with the Fourth, Fifth, and Eleventh Circuits in holding that § 330 must be read according to its plain meaning.[44] In reading the statute plainly, the Supreme Court held that the Bankruptcy Code does not authorize compensation awards to Chapter 7 debtors' attorneys unless those attorneys were employed by the trustee and approved by the bankruptcy court.[45]

In *Lamie*, the petitioner argued that the existing statutory text was ambiguous and thus required the Court to review the "legislative history to determine whether Congress intended to allow fees for services rendered by a debtor's attorney in a Chapter 7 proceeding, where that attorney is not authorized under § 327."[46] He argued that the statute was "ambiguous because [§ 330(a)(1)(A)]'s 'attorney' [was] 'facially irreconcilable' with the statute's first part since '[e]ither Congress inadvertently omitted the "debtor's attorney" from the "payees" list, on which the court of appeals relied, or it inadvertently retained the reference to the attorney in the latter, "payees" list.'"[47]

The petitioner also argued that there was no apparent reason for the missing conjunction "or" in § 330(a)(1)(A).[48] Notice that in the prior section there was an "or" after "professional person," but in the amended version of the section, there is no surviving conjunction.[49] The petitioner suggested that the missing "or" was the result of a drafting error, otherwise "Congress would have rewritten the statute to produce a grammatically correct provision."[50] His arguments and analysis of the issue of ambiguity were supported by the various Courts of Appeals' conclusions that § 330(a) was indeed ambiguous.[51] The reasoning behind this contention is that "[o]ne determines ambiguity . . . by relying on the

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39. *Id.*

40. *Id.* (citing *In re* Equip. Servs., 260 B.R. 273 (W.D. Va. 2001)).

41. *Id.* (citing *In re Equip. Servs.*, 290 F.3d 739 (4th Cir. 2002)).

42. *Id.*

43. *Id.* at 533.

44. *Id.* at 536 ("The plain meaning that § 330(a)(1) sets forth does not lead to absurd results requiring us to treat the text as if it were ambiguous.").

45. *Id.* at 538-39.

46. *Id.* at 533.

47. *Id.* (citation omitted).

48. *Id.*

49. *Id.* at 530.

50. *Id.* at 533.

51. *Id.*

grammatical soundness of the prior statute."[52]

In *Lamie*, the Court rejected that contention and determined that the starting point in analyzing a statute is the existing statutory text, not prior versions of it.[53] In other words, a statute need not be grammatically sound or even correct to be unambiguous.[54] The Court stated that "[i]t is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'"[55] The Court noted that while the amended statute was awkward and ungrammatical, that did not make it ambiguous.[56] The missing "or" did not change the Court's conclusion because statutes are read for their plain meaning, and "the missing conjunction neither alters the text's substance nor obscures its meaning."[57] The Court contrasted situations where a "not" was missing or when an "or" was inadvertently substituted for an "and" in statutory text but found that the statutory text under consideration did not fall into either one of those categories.[58]

The Court next addressed the effect of the inclusion of "attorney" in the amended § 330(a)(1)(A).[59] It determined that the inclusion of "attorney" in that provision may very well have been surplusage.[60] And even if it was surplusage, the Court stated that it was not controlling because "[s]urplusage does not always produce ambiguity."[61] The Court noted that it "should prefer the plain meaning [of the statute] since that approach respects the words of Congress."[62]

While the Court found it unnecessary to rely on the legislative history of the amended statutory provision, it noted that the legislative history involved here produced more confusion than clarity, as it showed evidence supporting both parties' contentions.[63] Accordingly, the Court held that § 330(a)(1) does not authorize compensation awards to debtors' attorneys from estate funds, unless the attorneys are employed or authorized by § 327 (employed by the trustee and

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52. *Id.* at 534.
53. *Id.*
54. *Id.*
55. *Id.* (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000)).
56. *Id.* at 534.
57. *Id.* at 534-35.
58. *Id.* at 535.
59. *Id.*
60. *Id.* at 536.
61. *Id.*
62. *Id.*
63. *Id.* at 539. In Justice Stevens' concurring opinion, joined by Justices Souter and Breyer, the concurrence would have consulted the legislative history due to the evidence of "scrivener's error" but would have ultimately reached the same result because the National Association of Consumer Bankruptcy Attorneys was aware of the drafting error and decided not to object to it. *Id.* at 542-43 (Stevens, J., concurring).

approved by the bankruptcy court).[64]

The decision in *Lamie* resolved the circuit split on the proper scope of the amended version of § 330(a)(1).[65] It became abundantly clear after *Lamie* that in Chapter 7 cases, debtors' attorneys have two choices to get paid for their work. The most common method would be to get paid upfront for their legal fees. However, in a non-consumer bankruptcy case like *Lamie*, where a Chapter 11 case is converted to a Chapter 7 case, the debtor's attorney must be employed by the trustee and approved by the bankruptcy court post-conversion to get paid for any postpetition work in the Chapter 7 case.[66]

In consumer bankruptcy cases, particularly Chapter 7 cases, the *Lamie* decision had a major impact. If consumer debtors sought bankruptcy relief under Chapter 7, they had to be prepared to pay their attorney in full prior to their cases being filed. Absent a workaround,[67] this was the only way for these debtors to access the type of relief provided under Chapter 7.[68] Not surprisingly, debtors struggled to come up with the one thousand or so dollars needed to pay their attorneys upfront to file their Chapter 7 cases.[69] These debtors would likely "choose" to file for bankruptcy under Chapter 13 because there was no other way to obtain relief.[70] Ultimately, there was no true chapter choice.

II. Understanding the Disparate Social Impact of the Current Payment Practices on Debtors' Bankruptcy Chapter Choices and Eventual Case Outcomes

Before a debtor files for bankruptcy, they will have to decide under which Chapter of the Bankruptcy Code they will seek relief. Unless the debtor is proceeding *pro se*, the debtor will seek out a bankruptcy attorney for instruction and guidance.[71] There are several chapters under which debtors can seek relief, but the two primary chapters that consumer debtors choose are either Chapter 7 or Chapter 13. If a debtor is successful in either chapter, then he or she will obtain

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64. *Id.* at 538-39.

65. *See id.* at 532-33.

66. *See id.* at 538-39.

67. *See infra* Part IV.

68. *See infra* Part III.

69. *See* Kiel, *Can't Afford, supra* note 1.

70. *See id.*

71. Debtors retain attorneys in a vast majority of consumer bankruptcy cases. *See, e.g.*, Paul Kiel, *Bankruptcy: What's the Difference Between Chapter 7 and Chapter 13?*, PROPUBLICA (Sept. 27, 2017, 8:00 AM), https://www.propublica.org/article/bankruptcy-difference-filing-chapter-7-13-success [https://perma.cc/M4MK-RMEK] ("only about 8 percent of debtors who filed under Chapter 7 from 2008-2015 did so without an attorney's help."). A consumer debtor may also seek out a bankruptcy petition preparer, but those are not attorneys. *See In re* Monson, 522 B.R. 340, 345-46 (Bankr. D. Utah 2014). As such, they are not authorized to provide legal advice. *See id.* at 346. Bankruptcy petition preparers may even charge more than attorneys and provide far worse assistance. *In re* Hazlett, 2019 WL 1567751, *5 (Bankr. D. Utah Apr. 10, 2019).

the primary benefit of the bankruptcy system—a fresh financial start.[72]

In order to fully appreciate what is meant by "chapter choice," one must first understand some of the similarities and differences between Chapter 7 and Chapter 13 bankruptcy cases. This discussion will be limited to consumer bankruptcy debtors' choices between Chapter 7 and Chapter 13 bankruptcy cases.[73]

In his recent paper in the American Bankruptcy Law Journal, Judge Terrence Michael provided a very basic overview of Chapter 7 and Chapter 13 bankruptcy cases.[74]

> Chapter 7 cases are often referred to as "straight liquidation" cases. They are designed to be relatively simple and straightforward and comprise the majority of bankruptcy cases filed. A debtor lists all of her assets and liabilities, and a trustee is appointed to investigate her financial affairs. The debtor is entitled to claim certain property as exempt and, in the event there are any unencumbered, nonexempt assets, the trustee sells those assets and distributes the net proceeds to unsecured creditors. The vast majority of chapter 7 cases do not contain any such assets. Those cases are referred to as "no asset" cases. Unless grounds exist to deny the debtor's discharge or determine that a particular debt should not be discharged, the debtor receives a discharge of all secured and unsecured debt.
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> Chapter 13 cases are referred to as "individual wage earner" cases. In a chapter 13 case, a debtor is required to surrender his or her disposable income to a chapter 13 trustee for distribution to secured and unsecured creditors under the terms of a chapter 13 plan that must be approved, or "confirmed," by the bankruptcy judge. Chapter 13 plans commonly focus on saving an asset valued by the debtors, such as a house or an automobile. There are detailed requirements for confirmation of a chapter 13 plan and equally stringent definitions of "disposable income." Upon successful completion of a chapter 13 plan, a chapter 13 debtor receives a discharge.[75]

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72. *See* Warren, *supra* note 6.

73. A consumer debtor can also file a case under Chapter 11 or Chapter 12 of the Bankruptcy Code, but those types of cases are rare in comparison. For example, in 2021, fewer than one percent of individuals with primarily consumer debt filed for bankruptcy relief under Chapter 11. U.S. COURTS, 2021 REPORT OF STATISTICS REQUIRED BY THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 (2021), https://www.uscourts.gov/statistics-reports/bapcpa-report-2021 [https://perma.cc/N3WP-MHTK].

74. Terrence L. Michael, *There's a Storm a Brewin': The Ethics and Realities of Paying Debtors' Counsel in Consumer Chapter 7 Bankruptcy Cases and the Need for Reform*, 94 AM. BANKR. L.J. 387, 389 n.7 (2020) (noting in a footnote that his summary of the two chapters is intentionally oversimplified).

75. *Id.* at 389 (footnotes omitted).

A few critical points are worth adding to Judge Michael's summary. Chapter 7 cases are far less expensive and time consuming than Chapter 13 cases. Attorney's fees for basic Chapter 7 cases averaged about $1,229.[76] They also take much less time than a Chapter 13 case. Uncomplicated "no asset" Chapter 7 cases are completed from start to finish in about four to six months, with the debtor receiving a discharge of most unpaid debts at the conclusion of the case.[77]

On the other hand, Chapter 13 cases are more than twice as expensive and, on average, take up to ten times as long to complete as Chapter 7 cases. Attorney's fees for Chapter 13 cases average about $3,217.[78] Chapter 13 cases also take much more time than Chapter 7 cases. Chapter 13 payment plans range from three to five years, and the debtor only receives a discharge after completing all the plan payments.[79] In other words, a successful debtor in a Chapter 7 case will obtain a discharge within four to six months, while a successful debtor in a Chapter 13 case will obtain a discharge within thirty-six to sixty months.[80] Another important point to consider is the overall success rate of debtors under each type of chapter. The evidence is clear that debtors in Chapter 7 cases have a much higher rate of successful case outcome than their counterparts in Chapter 13 cases. Debtors in Chapter 7 cases have a success rate of over ninety-five percent, while debtors in Chapter 13 cases have a success rate hovering at fifty

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76. Pamela Foohey et al., *"No Money Down" Bankruptcy*, 90 S. CAL. L. REV. 1055, 1058 (2017). Note that this figure reflects 2007 and 2013-2015 data. *Id.* at 1058 n.10. Inflation and time have most likely increased this average. *See* Michael, *supra* note 74, at 411 n.77 (noting that fees for filing Chapter 7 cases in the author's district range from $500 to $1,500).

77. *Discharge in Bankruptcy - Bankruptcy Basics*, U.S. COURTS, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/discharge-bankruptcy-bankruptcy-basics [https://perma.cc/F3PM-FV3Z] (last visited July 13, 2022) (noting that the discharge usually occurs within four months after the date the debtor files the bankruptcy petition); Maureen Milliken, *How Long Does Chapter 7 Bankruptcy Take?*, DEBT.ORG (Feb. 8, 2022), https://www.debt.org/bankruptcy/chapter-7/how-long-does-it-take/ [https://perma.cc/X9LN-S7DL] (noting that a Chapter 7 bankruptcy usually takes about four to six months from the debtor filing to the final discharge). It is also worth noting that student loans comprise a substantial portion of consumer debt and are not dischargeable in bankruptcy absent a showing of undue hardship. *See, e.g.*, Hillary Hoffower, *An Astounding Number of Bankruptcies Are Being Driven by Student Loan Debt*, BUS. INSIDER (June 13, 2019, 3:30 PM), https://www.businessinsider.com/people-filing-for-personal-bankruptcy-carry-student-loan-debt-2019-6 [https://perma.cc/4BWA-HX73] (noting that almost one-third of consumers filing for Chapter 7 bankruptcy carry student loan debt, and of those, the student loan debt comprises almost half of their total debt); *see* 11 U.S.C. § 523(a)(8). Additionally, there are many other categories of debts that are not dischargeable in bankruptcy. *See, e.g.*, *id.* § 523(a).

78. Foohey et al., *supra* note 76, at 1058. Like the figure for Chapter 7 data above, note that this figure reflects 2007 and 2013-2015 data. The average amount is likely much higher now due to inflation and the passage of time. *Id.* at 1058 n.10. *See* Michael, *supra* note 74, at 411 n.77 (noting that the fees for filing Chapter 13 cases in the author's district are $3,500 as a matter of course).

79. 11 U.S.C. § 1322 (d)(1)(C)-(d)(2)(C); *id*. at § 1328(a).

80. *See* Foohey et al., *supra* note 76, at 1062.

percent.[81] This is a significant difference in debtors' eventual case outcomes.

Perhaps the key difference between Chapters 7 and 13 is how the weighty costs of filing for bankruptcy relief are spread out in each type of case. In a Chapter 7 case, debtors must pay both their bankruptcy attorney's fees and filing fees upfront, prior to filing their bankruptcy petitions.[82] On the other hand, debtors in Chapter 13 cases can pay their attorney's fees and filing fees over time through their Chapter 13 plans.[83] This is a key difference between the two chapters because it may substantially constrain the debtor's chapter choice.[84] If debtors cannot afford to pay the costs of a Chapter 7 bankruptcy case upfront, then they may have no choice but to file a Chapter 13 case.[85] It may be their only avenue for any financial relief, even though a Chapter 13 case is far more costly and has a much lower likelihood of overall success.

Ultimately, for the poorest among us, there is no such thing as a true chapter choice. These debtors must "choose" the more expensive Chapter 13 process because it is the only option that they can afford.[86] Debtors are funneled into the wrong chapter simply because they cannot afford the proper relief—they are too broke to file for Chapter 7 bankruptcy. There is a major problem with the lack of proper access to justice for debtors who cannot afford the upfront costs of a Chapter 7 case.[87] The debtor's inability to afford Chapter 7 relief results in

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81. Walter Metzen, *How Much Does It Cost to File Bankruptcy?*, NAT'L BANKR. F. (Oct. 29, 2021), https://www.natlbankruptcy.com/how-much-does-it-cost-to-file-bankruptcy-2/ [https://perma.cc/X9VF-DXYZ] (noting that the success rate for debtors filing Chapter 7 cases who are represented by counsel is over ninety-five percent). *See, e.g.*, *BAPCPA Table 6*, *supra* note 10 (showing that more than fifty percent of Chapter 13 cases were dismissed without the debtor receiving a discharge).

82. *See, e.g.*, Lamie v. U.S. Tr., 540 U.S. 526 (2004). Note also that debtors can seek to pay filing fees in installments or even seek a waiver of the filing fee upon a stringent showing that their income is substantially less than the poverty line. Fed. R. Bankr. P. 1006(b), (c); Fed. R. Bankr. P. Official Form B103B. That said, a very small percentage of filers who apply for a waiver of filing fees actually receive it. *See, e.g.*, Ed Flynn & Gordon Bermant, *Bankruptcy by the Numbers*, EXEC. OFF. FOR U.S. TRS. https://www.justice.gov/archive/ust/articles/docs/abi01julnumbers.pdf [https://perma.cc/WV9A-8DPA] (last visited July 13, 2022).

83. In Chapter 13 cases, the bankruptcy judge can set both the amount and the timing of attorney's fees payments. BANKRUPTCY SERVICE, LAWYERS EDITION § 50:567 Attorneys' Fees (July 2022) (citing 11 U.S.C. § 1326; *In re* Maldonado, 483 B.R. 326 (Bankr. N.D. Ill. 2012)).

84. Foohey et al., *supra* note 76, at 1058 (noting "chapter choice is powerfully shaped by when debtors must pay their attorneys and how attorneys can receive payments.").

85. *See* Hon. Maureen A. Tighe, *Seeking Innovation to Address Low-Income Access to Bankruptcy*, 37 AM. BANKR. INST. J. 38 (Nov. 2018) (explaining that debtors may choose the wrong chapter if they do not have the money to pay the upfront fees).

86. *See supra* INTRODUCTION.

87. *See, e.g.*, Robert J. Landry, III & David W. Read, *Erosion of Access to Consumer Bankruptcy's "Fresh Start" Policy in the United States: Statutory Reforms Needed to Enhance Access to Justice and Promote Social Justice*, 7 WM. & MARY POL'Y REV. 51 (2015); Richard I. Aaron, *Access to Justice: Consumer Bankruptcy*, 2006 UTAH L. REV. 925 (2006).

"serious access-to-justice concerns."[88]

This, however, is just the tipping point. There are more serious access-to-justice issues when one analyzes the eventual bankruptcy case outcomes among different racial groups. There is a growing body of empirical research on bankruptcy and race in America.[89] The data clearly demonstrate that there is a disparate social impact among different racial groups filing for bankruptcy. ProPublica's research paper, which is quite comprehensive, used a national dataset of bankruptcy filings to document the scope of racial disparities in bankruptcy filings and outcomes.[90] The authors noted that "[t]hese disparities are large, pervasive and remain even when considering a host of factors, including income, assets, and the court districts where debtors lived."[91] A brief excerpt from ProPublica's research paper is reproduced below to demonstrate both the comprehensiveness of their study and the shocking findings that followed:

> Specifically, we found that for people residing in majority black zip codes who file for bankruptcy, the odds of having their cases dismissed (and failing to attain lasting relief) were more than twice as high as those of debtors living in mostly white zip codes.
>
> The main driver of this disparity is chapter choice. Black people struggling with debts are choosing to file under Chapter 13, as opposed to Chapter 7, at much higher rates. Unlike Chapter 7, which in almost all cases provides permanent debt relief within a matter of months, Chapter 13 is a particularly risky choice for these debtors, because Chapter 13 usually requires five years of payments before any debt is wiped out, and black Americans are much less likely to have the resources to run this gauntlet. Nationally, for the years 2008 through 2010, only 39 percent of Chapter 13 cases filed by debtors from majority black zip codes ultimately resulted in a discharge of debts. In contrast, 58 percent of the cases filed by debtors from majority white zip codes were discharged. When we examined this disparity, controlling for income and other

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88. Landry & Read, *supra* note 87, at 53 n.10. It is worth noting that bankruptcy clinics exist at some law schools to assist those who cannot afford Chapter 7 relief. While these clinics are extremely helpful, they cannot solve the larger access to justice issues that remain.

89. *See, e.g.*, Paul Kiel & Hannah Fresques, *Data Analysis: Bankruptcy and Race in America*, PROPUBLICA (Sept. 27, 2017), https://projects.propublica.org/graphics/bankruptcy-data-analysis [https://perma.cc/HZ6J-ST5U]; A. Mechele Dickerson, *Race Matters in Bankruptcy Reform*, 71 MO. L. REV. 919 (2006); Nick Thieme & Emily Merwin DiRico, *Georgia Bankruptcy Filings Reveal Economic, Racial Differences*, THE ATL. J.-CONST., https://www.ajc.com/investigations/georgia-bankruptcy-analysis/ [https://perma.cc/GK2L-KN8Y] (last visited July 15, 2022).

90. Kiel & Fresques, *supra* note 89.

91. *Id.* It should be noted that bankruptcy courts do not collect data on race. The authors used geographic locations and zip codes of the debtors to infer their racial makeup for purposes of the study. *Id.*

factors, a large gap remained.[92]

These findings are simply astonishing. Not only are there serious and pervasive access to justice issues in bankruptcy, but those problems are even worse for similarly situated people of color.[93]

In a more recent study, limited to Georgia, the Atlanta Journal-Constitution collected data from several thousand bankruptcies to try and understand the economic impact of the pandemic.[94] The authors in this study analyzed the differences among white and black debtors, and the data revealed some similarities and differences among racial groups.[95] Some of the racial disparities noted in the study were that black filers had significantly more non-dischargeable student loan debt than white filers, black filers owed more on their home mortgages than white filers, and black filers paid more in interest on their various loans.[96] These differences were statistically significant and certainly could impact the type of relief that predominately black debtors are able to obtain (or not obtain) in a bankruptcy case.[97]

These severe access to justice issues, coupled with the increased problems of racial disparity, make it even more critical to examine some of the potential solutions to these problems.[98] The next section will examine a few different workarounds that have been used to increase debtors' access to Chapter 7 relief. As it will be shown, these workarounds are by no means universally allowed by the courts. Thus, a more long-term, intentional solution to these problems must be undertaken to achieve more equality and easier access to bankruptcy relief.

III. EXAMINING THE TWO-CONTRACT APPROACH TO THE PAYMENT OF CHAPTER 7 LEGAL FEES AND ITS DRAWBACKS

It is clear that after *Lamie*, debtors are required to pay their attorneys in full prior to the filing of their bankruptcy cases.[99] Otherwise, in order for them to be

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92. *Id.*

93. *See, e.g.*, *id.*

94. Thieme & DiRico, *supra* note 89; *see also* Leslie A. Pappas, *Bankruptcy Racial Disparities Poised to Add to Pandemic Pain*, BLOOMBERG L. (Aug. 31, 2020, 6:30 AM), https://news.bloomberglaw.com/bankruptcy-law/bankruptcys-racial-disparities-poised-to-add-to-pandemics-pain [https://perma.cc/8GK5-WBDQ] (examining the disproportionate economic impact that the COVID-19 pandemic has had on Black Americans).

95. Thieme & DiRico, *supra* note 89.

96. *Id.*

97. *Id.*

98. *See, e.g.*, Elena Botella, *The Bankruptcy Code Is Stacked Against Black Families. Elizabeth Warren's New Bill Would Change That*, FORBES (Dec. 15, 2020, 4:30 PM), https://www.forbes.com/sites/elenabotella/2020/12/15/the-bankruptcy-code-is-stacked-against-black-families-elizabeth-warrens-new-bill-would-change-that/?sh=58f4c4521b25 [https://perma.cc/WQ3Y-69EA] (noting that the legislation introduced by Senator Elizabeth Warren in 2020 would have had the effect of reducing the disparity between black and white individuals filing for bankruptcy).

99. Lamie v. U.S. Tr., 540 U.S. 526, 538 (2004).

paid from the debtors' estates, the debtors' attorneys must be authorized by the trustee and approved by the court.[100] As Part II of this Article has shown, this requirement creates a substantial barrier for debtors' access to Chapter 7 relief because many debtors simply cannot afford the high upfront costs. The Court in *Lamie* understood that its decision would lead to harsh outcomes.[101] The Court noted that Congress should amend § 330(a) of the Bankruptcy Code if it intended something different than what it says.[102] Unfortunately, to date, Congress has failed to take any action on this issue.

In order to mitigate the harshness of requiring Chapter 7 debtors to pay their attorneys in full upfront, some attorneys have come up with various "workarounds" to try and increase debtors' access to Chapter 7 relief.[103] The wide range of the types of workarounds that debtors' attorneys have attempted accentuate their sheer desperation to try and give their clients access to Chapter 7 relief. Unfortunately, these workarounds have had mixed results. For example, a bankruptcy court denied a debtor's attorney's fees who tried to collect them through an automated clearinghouse that paid counsel a few hundred dollars a month for twenty-four months after the debtor's bankruptcy case had been filed.[104] Some lawyers have tried to use post-dated checks from their debtor clients with little to no success.[105] Other lawyers have attempted, without success, to assign their outstanding fees to third parties who would collect them from the debtors under factoring agreements.[106] These particular workarounds, as well as others, presented serious problems and ethical dilemmas, which have made their use largely ineffective.

There is one workaround, however, that has had much more success than the rest. It is called the two-contract approach, or the bifurcation of legal fees. Unfortunately, this approach is not universally accepted by courts.[107] Under the

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100. *Id.* at 538-39.

101. *Id.* at 538 (discussing the Court's deference to the legislature).

102. *Id.* at 542 (noting that it is not the Court's place "to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result.") (citation omitted).

103. *See In re* Brown, 631 B.R. 77, 85 (Bankr. S.D. Fla. 2021); Michael, *supra* note 74, at 395 (explaining various workarounds and concluding that they have had little or no success). In his article, Judge Michael presents an excellent overview of several different workarounds that have been attempted, *id.* at 395-400.

104. Michael, *supra* note 74, at 395 (citing *In re* Green, 2014 WL 3724986 (Bankr. W.D. La. July 23, 2014)).

105. *Id.* at 395-96 (citing *In re* Lawson, 437 B.R. 609 (Bankr. E.D. Tenn. 2010)).

106. *Id.* at 396-97 (citing *In re* Wright, 591 B.R. 68 (Bankr. N.D. Okla. 2018)).

107. *Id.* at 399; *see, e.g.*, *Brown*, 631 B.R. at 105 (allowing bifurcation of fees under strict guidelines); Walton v. Clark & Washington, P.C., 469 B.R. 383, 387 (Bankr. M.D. Fla. 2012) (upholding a law firm's modified two-contract procedure which allowed debtor to make postpetition installment payments for postpetition services); *In re* Slabbinck, 482 B.R. 576, 597 (Bankr. E.D. Mich. 2012) (allowing the unbundling of legal fees into prepetition and postpetition agreement so long as attorney complies with all professional and ethical obligations). However, not all courts have agreed with the bifurcated fee approach. Some courts have rejected the practice. *See, e.g.*, *In re*

two-contract approach, a bankruptcy attorney will bifurcate the debtor's legal fees for a Chapter 7 case into two contracts—a prepetition contract and a postpetition contract.[108] The prepetition contract covers the fees for prepetition legal services, which the debtor must pay upfront and before the filing of the Chapter 7 case.[109] The postpetition contract covers the fees for postpetition legal services, which the debtor can pay after the Chapter 7 case is commenced.[110] Splitting the fees in this way makes the upfront costs more affordable and thus increases a potential debtor's access to Chapter 7 relief.

Judge Laurel Isicoff, Chief Bankruptcy Judge of the United States Bankruptcy Court for the Southern District of Florida, recently issued a very comprehensive and thoughtful opinion on the issue of fee bifurcation in Chapter 7 cases.[111] In *Brown*, upon objection by the United States Trustee to the Chapter 7 debtors' attorney's fees, the court considered the bifurcated fee arrangements of three different law firms in three separate bankruptcy cases.[112] The court ultimately held that attorneys may bifurcate fees in Chapter 7 cases within the district so long as attorneys follow specific requirements.[113]

The court in *Brown* noted that "the access to justice issues are troubling and compelling."[114] That said, the court in *Brown* noted that it must "rule within the framework of the law" since it is the judiciary's job to enforce the law, not to rewrite it.[115] The court stated in pertinent part:

> Practitioners have tried to develop ways . . . to provide a debtor who cannot pay all or part of the attorney fees up front, an option that would allow a small, or no, payment up front, with the opportunity to pay additional fees over time after the case is filed. Whether and to what extent these arrangements are allowable has been the subject of cases around the country.
>
> These three cases present this Court with the opportunity to provide a framework for when and under what circumstances bifurcation of chapter

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Egwim, 291 B.R. 559, 562 (Bankr. N.D. Ga. 2003) (holding that an attorney representing a Chapter 7 debtor may not limit the scope of the representation); *In re* Baldwin, 640 B.R. 104, 126 (Bankr. W.D. Ky. 2021) (holding that counsel's bifurcated fee arrangements with debtors violated the Bankruptcy Code and rules, local rules, and the Kentucky Rules of Professional Conduct). In *Baldwin*, the bankruptcy court stated that it is not its position "to find clever 'work arounds' of the fee structure determined by Congress." *Baldwin*, 640 B.R. at 131.

108. *Brown*, 631 B.R. at 91.

109. *Id.*

110. *Id.*

111. *Id.* at 77.

112. *Id.* at 86.

113. *Id.* at 105.

114. *Id.* at 85.

115. *Id.* (citing Bethea v. Adams & Assocs., 352 F.3d 1125, 1127-28 (7th Cir. 2003)).

7 fees is allowable.[116]

In *Brown*, the court set forth a detailed analysis and framework for Chapter 7 fee bifurcations.[117] Before providing its framework, the court made clear that fee bifurcation is not acceptable as a method to pay for prepetition services postpetition.[118] In the first part of its framework, the court explained the proper method to measure the reasonableness of the debtors' attorney's fees.[119] In *Brown*, the United States Trustee argued that the reasonableness of an attorney's postpetition fees should be measured by comparing the attorney's prepetition fees.[120] The court rejected the Trustee's argument and held that "it will review the reasonableness of the postpetition flat fee charged by each of the Law Firms by taking into account not only the work that was done but also the services that might have been required in the case for which there would have been no additional charge."[121]

The second part of the framework dealt with the lawyer's duty of providing competent representation to a client.[122] In Florida, where *Brown* was decided, attorneys are permitted to "unbundle" legal services, which means that an attorney can limit the scope of their engagement to prepetition services only.[123] The court in *Brown* agreed with other courts that have held that an attorney need not represent the debtor in all matters in a Chapter 7 case.[124] The court held that any attorney representing a debtor must comply with the Bankruptcy Code, the Bankruptcy Rules, the ethics rules, and the court's local rules.[125] In *Brown*, the court held that these rules require, at a minimum, that an attorney perform the following services:

> These statutes and rules collectively require sufficient inquiry by the attorney, not staff, when initially meeting with a client to ascertain whether filing bankruptcy is the appropriate relief, determining under what chapter a bankruptcy case could or should be filed, and additionally compel the attorney to adequately inform a potential debtor of the consequences of that choice. Further, the attorney must assist the debtor with all of the debtor's obligations under section 521 unless he or she is

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116. *Id.*

117. *Id.* at 91-103.

118. *Id.* at 93 (citing *In re* Hazlett, 2019 WL 1567751, *9 (Bankr. D. Utah 2019). The United States Trustee did not argue that fee bifurcation should be prohibited in Chapter 7 cases, but it did argue that bifurcation can be a disguised way for a debtor to improperly pay for prepetition services postpetition, where the fees are not reasonable. *Id.* at 91-93.

119. *Id.* at 93-94.

120. *Id.* at 93.

121. *Id.* at 94 (noting that in determining reasonableness, the court would not consider services that would not arise in a case).

122. *Id.* at 94-98.

123. *Id.* at 95 (citing Fla. St. Bar R. 4-1.2).

124. *Id.* at 96 (citing *In re* Slabbinck, 482 B.R. 576, 592 (Bankr. E.D. Mich. 2012)).

125. *Id.* at 97.

> permitted to withdraw. The attorney must prepare and file all documents necessary to commence the bankruptcy case, which includes, at a minimum, the petition, the creditor's matrix, any motion to waive or pay the filing fee in installments, the statement of attorney compensation, and the Debtor Credit Counseling Certificate, or, if applicable, a motion to waive the need to file or file late, the certificate . . . . And finally, the attorney must attend the section 341 meeting of creditors unless he or she is permitted to withdraw prior to the meeting.[126]

The third part of the framework explained the attorney's duty to timely and clearly disclose to the potential client the nature of the fee bifurcation agreement.[127] Part of this disclosure requirement includes a fourteen-day rescission period if the postpetition retention agreement is signed immediately after the debtor's bankruptcy petition is filed.[128] However, the prepetition agreement must disclose that, regardless of whether the postpetition agreement is signed, the attorney must continue to represent the debtor unless the attorney is permitted by the court to withdraw.[129]

The next part of disclosure requires that the attorney give the potential debtor a separate disclosure form that makes it clear that the debtor has the option to choose a bifurcated fee agreement and what the different costs will be if that option is taken.[130] This form must make it clear that the debtor has three choices: (1) sign the postpetition agreement and receive the attorney's services at the described cost; (2) do not sign the postpetition agreement and proceed *pro se*; or (3) do not sign it and retain another lawyer.[131] If a debtor chooses a bifurcated fee arrangement, then the debtor must be presented with the separate disclosure at the time the debtor signs the prepetition agreement so that the debtor can make an informed decision.[132] More specifically, the court stated that disclosure to a potential client will be adequate so long as:

> a) The potential debtor receives the separate disclosure form;
> b) The prepetition agreement and postpetition agreement are provided at the same time for the potential debtor's review;
> c) The prepetition agreement clearly describes the services that must be performed prepetition as well as other services that may be provided; and
> d) The postpetition agreement clearly describes the included services (delineated, where appropriate as "if necessary"); and specifically

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126. *Id*. at 97-98.

127. *Id*. at 98.

128. *Id*. at 99. The court noted that it was important to give debtors a "cooling off" period to consider their options. *Id*. at 101.

129. *Id*. at 99.

130. *Id*. at 100.

131. *Id*. The court made clear that the postpetition retention agreement cannot be signed prepetition. *Id*. at 101.

132. *Id*. at 100.

> describes the excluded services, and any additional flat fee or hourly charge associated with those excluded services.[133]

The last part of the disclosure requirement describes the attorney's duty to fully inform the court of the nature of the bifurcated fee agreement pursuant to Bankruptcy Code § 329 and Bankruptcy Rule 2016.[134]

The final part of the *Brown* framework explains that the attorney is not permitted to finance the debtor's bankruptcy filing fee.[135] The court held that "a law firm's payment of the filing fee with postpetition repayment by the debtor violates the Bankruptcy Code as well as the Florida Bar Rules."[136] While filing fees are substantial, a debtor can always seek a waiver of the fee or seek to pay the filing fee in installments.[137]

In *Brown*, the court provided a very useful framework that could be used in other bankruptcy courts across the country to allow debtors to use bifurcated fee arrangements. This framework would serve to increase a potential debtor's access to Chapter 7 relief. However, there are some major drawbacks to this approach. First, as we have already seen, not all courts allow debtors to utilize a two-contract approach to the payment of attorney's fees.[138] Unlike Florida, some courts do not permit attorneys to limit the scope of their legal services or to bifurcate their services in a Chapter 7 case.[139] These courts will require attorneys to represent debtors in all aspects of the Chapter 7 case, regardless of the parties' agreement.[140] Remember, after *Brown*, the court in *Baldwin* made it clear that it would not try to utilize "clever work arounds" to bypass the intent of Congress.[141]

The next major drawback of the two-contract approach is the cost itself. It is much more affordable for a potential debtor to pay only a portion of the fees upfront and the remaining balance over time. That said, a debtor must still be prepared to pay something upfront to satisfy the attorney's prepetition contract requirements. This amount must at least cover the filing fee, unless the debtor's

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133. *Id.*

134. *Id.* at 100. *See* 11 U.S.C. § 329; FED. R. BANKR. P. 2016.

135. *Brown*, 631 B.R. at 102-03.

136. *Id.*

137. Filing fees are $338 for a Chapter 7 case. 28 U.S.C. § 1930. While full waivers of filing fees are rare, many courts will allow debtors to pay their fees in installments. *See* Fed. R. Bankr. P. 1006(b)-(c).

138. *See supra* note 107 and accompanying text.

139. *In re* Egwim, 291 B.R. 559, 562 (Bankr. N.D. Ga. 2003) (holding that "an attorney representing a chapter 7 debtor may not limit the scope of the representation."); *In re* Baldwin, 640 B.R. 104, 126 (Bankr. W.D. Ky. 2021) (holding that counsel's bifurcated fee arrangements with debtors violated the Bankruptcy Code and rules, local rules, and the Kentucky Rules of Professional Conduct); *In re* Suazo, 2022 WL 2197567, *1 (Bankr. D. Colo. July 17, 2022) (voiding a bifurcated fee agreement in a Chapter 7 case because it was misleading).

140. *Egwim*, 291 B.R. at 562.

141. *Baldwin*, 640 B.R. at 131.

filing fee has been waived, which rarely occurs.[142] Most likely, the debtor will need to be able to pay the filing fee plus a certain portion of legal fees prior to their bankruptcy case being filed.[143] This can be a difficult pill to swallow for a potential debtor who is financially struggling to the point of needing Chapter 7 relief. The potential debtor may instead be tempted to make the call to the many attorneys advertising zero money down for Chapter 13 bankruptcy services.[144] Alternatively, the debtor may be properly advised by their lawyer to file a Chapter 13 case in order to get relief since the debtor cannot afford the Chapter 7 option. Of course, while a debtor may get some initial relief in a Chapter 13 bankruptcy case, the overall chance of the debtor receiving a discharge will be a coinflip at best.[145] Thus, the debtor will be funneled into the wrong chapter and will likely be worse off in the end.

The two-contract approach is simply an undersized bandage on a large wound. It does help some people in some situations, but it is not an ideal solution. The serious lack of access to justice issues that many debtors face cannot be cured with it. Even worse, this bifurcation bandage cannot be used universally around the country. The next section of this Article will explore a potential legislative solution which, if adopted, would substantially increase access to Chapter 7 relief for all debtors.

IV. ADVOCATING FOR A BIPARTISAN SOLUTION TO INCREASE DEBTORS' ACCESS TO CHAPTER 7 RELIEF WHILE EXEMPTING FIREARMS IN A BANKRUPTCY CASE

As shown in Part III, the two-contract approach has major limitations. It does not apply universally, and there is still a significant cost component to it that prevents many debtors from filing for Chapter 7 relief. Thus, we are left with a bankruptcy system that fails to adequately serve the poorest people within our communities. This broken system has failed people of color demonstrably and disproportionately more than their white counterparts. The best way to equalize

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142. *In re* Brown, 631 B.R. 77, 91, 103 (Bankr. S.D. Fla. 2021).

143. *Id.*

144. There are far too many zero money down for Chapter 13 advertisements. *See, e.g.*, *Zero Down Bankruptcy Filing*, SAEDI L. GRP., https://georgiabankruptcylawgroup.com/zero-down-bankruptcy/ [https://perma.cc/9FFT-22JE] (last visited Sept. 30, 2022) (advertising a zero down bankruptcy filing); *How to File Bankruptcy for No Money Down and Still Wipe Away Your Unsecured Debt*, CALLAHAN L. FIRM, https://www.callahanlawkc.com/services/chapter-13/how-to-file-bankruptcy-for-no-money-down-and-still-wipe-away-your-unsecured-debt/ [https://perma.cc/8X9W-P2MY] (last visited Sept. 30, 2022) (explaining that "[c]hapter 13 cases can be filed for no money down because the attorney fees and court costs can be rolled into a 3-5 year repayment plan."). There are also YouTube videos explaining how a debtor can file a bankruptcy case for zero money down. *See, e.g.*, OrcuttBankruptcy, *$0 Money-Down Bankruptcy*, YOUTUBE (Sept. 16, 2014), https://www.youtube.com/watch?v=o0PO-5QCZaY ("home of the $0 Money-Down Bankruptcy").

145. *See BAPCPA Table 6, supra* note 10.

access to Chapter 7 relief for all individuals is for Congress to amend the Bankruptcy Code to allow Chapter 7 debtors to pay their bankruptcy attorney's fees in postpetition installments.

There is really no discernible reason that the Bankruptcy Code should prohibit Chapter 7 debtors from paying their attorney's fees on a postpetition basis.[146] In his article, Judge Michael stated that "[a]llowing debtors in chapter 7 cases to pay counsel a reasonable fee after the petition for services performed before and after the case is filed can only enhance debtors' fresh start opportunities."[147] He further noted that, "[i]t is long past time for Congress to address this issue."[148] Several other experts, including Judge Michael, have proposed such legislative changes in the past to address this issue.[149]

In their 2015 article, Professors Robert J. Landry, III and David W. Read proposed several statutory changes to eliminate the hurdles associated with paying for Chapter 7 relief.[150] They proposed the following changes: (1) excepting Chapter 7 attorney's fees from discharge; (2) permitting payment of Chapter 7 attorney's fees from the debtors' estates; and (3) amending §§ 503 and 330 to permit debtors to pay their Chapter 7 attorneys on a postpetition basis.[151]

In 2019, the American Bankruptcy Institute on Consumer Bankruptcy issued its Final Report where the authors also recommended excepting Chapter 7 attorney fees from discharge.[152] It further recommended that the Bankruptcy Code be amended "to render attorney's fees in chapter 7 cases non-dischargeable while requiring the bankruptcy court to review the fee agreement between debtor and her counsel at the beginning of the case."[153]

In her 2020 United States Presidential run, bankruptcy scholar and United States Senator Elizabeth Warren proposed the following solutions: (1) a waiver of the filing fee for debtors below the poverty level and a phased filing fee for debtors above the poverty level; and (2) allowing debtors to pay their Chapter 7 attorney's fees at any time during or after the bankruptcy, instead of upfront.[154] Senator Warren explained that her plan would make it easier for people to obtain the bankruptcy relief they actually need, rather than forcing them into a Chapter 13 case because it is all they can afford.[155]

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146. Michael, *supra* note 74, at 410 (noting that the author could not find any discussion of policy reasons for this prohibition).

147. *Id.* at 417.

148. *Id.*

149. *See id.*

150. Landry & Read, *supra* note 87, at 90.

151. *Id.* at 90-93. The authors further explain the benefits and drawbacks of their proposed legislative solutions. *Id.*

152. AM. BANKR. INST., FINAL REPORT OF THE ABI COMMISSION ON CONSUMER BANKRUPTCY 94-95 (2019), https://www.nclc.org/images/pdf/bankruptcy/rpt-abi-commission-on-consumer-bankruptcy.pdf [https://perma.cc/Z7LH-6VYL].

153. Michael, *supra* note 74, at 414 n.84 (citing AM. BANKR. INST., *supra* note 152, at 94-95).

154. Warren, *supra* note 6.

155. *Id.*

In his article, Judge Michael also recommended a one-sentence change to § 523(a) of the Bankruptcy Code to except from discharge Chapter 7 attorney's fees.[156] He also recommended a few simple amendments to § 329 of the Bankruptcy Code that would give bankruptcy judges the authority they need to review and adjust any agreement by Chapter 7 debtors to pay their attorney's fees during the postpetition period.[157] In his proposal, Judge Michael recommends first that § 329 require debtor's counsel to disclose to the court the nature of the agreement, the amount of fees still owed postpetition, and all terms between counsel and debtor relating to the payment of those outstanding fees.[158] Next, he recommends that the bankruptcy court have the power to adjust those fees if the amount exceeds the reasonable value of services.[159] Part of the power to adjust those fees is the power to cancel the fees or order disgorgement of those fees to the extent they are found to be excessive.[160]

One thing is crystal clear among the various experts who have commented on proposed legislative changes—all of them recommend excepting from discharge Chapter 7 attorney's fees. This author fully agrees with that approach. It would require a very simple amendment to § 523(a) of the Bankruptcy Code to include a new numbered subsection (a)(20) that addresses attorney's fees for services rendered to a debtor in a Chapter 7 case. Here is an example of how the author would draft this simple amendment, with the addition italicized:

> § 523. Exception to discharge
> (a) A discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt– . . .
>
> *(20) in a chapter 7 case, for reasonable attorney's fees incurred from services provided to the debtor.*[161]

Adding the reasonableness limitation here would provide the bankruptcy court with the necessary authority to adjust or deny unreasonable attorney's fees. Further, with reasonableness of attorney's fees addressed here, there would be no need to amend § 329. This should appease Judge Michael's concern with ensuring that the bankruptcy courts have the proper authority to review and adjust attorney's fees as it deems appropriate.[162]

However, this one addition to § 523(a) would not be enough to encourage bankruptcy lawyers to take on the risk that their clients will pay their fees sometime after the case has been filed. Many Chapter 7 cases are "no asset"

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156. Michael, *supra* note 74, at 415.
157. *Id.* at 415-16.
158. *Id.*
159. *Id.*
160. *Id.*
161. *See* 11 U.S.C. § 523 (emphasis added).
162. *See* Michael, *supra* note 74, at 415.

cases.[163] This means that attorneys who take on Chapter 7 debtor clients on a low upfront fee or no upfront fee would likely have no source of non-exempt assets from which to collect their postpetition fees. They would likely have to sue their clients post-bankruptcy and seek to garnish their wages (in states that permit it for this purpose) or recover from any non-exempt assets their clients obtained post-bankruptcy. This is not an ideal solution since many attorneys will simply not take the risk. Thus, the access-to-justice problem will remain because many attorneys representing debtors in a Chapter 7 case will still, rightfully so, demand a substantial portion of their fees be paid upfront.

Another amendment to the Bankruptcy Code is necessary to fully address this problem. Section 330(a) should be amended to include the missing words following the 1994 Act's revision. The current version of § 330(a)(1) provides as follows:

> (a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103 . . . .[164]

Here is an example of how the author would draft the amendment to this section:

> (a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103 *of this title, or to the debtor's attorney* . . . .[165]

The author would simply add back in the language that the 1994 Act took out. Section 330(a)(1)(A) need not be changed since it still includes the word "attorney" in its list of professionals who can be reasonably compensated for their services.[166] After notice and a hearing, bankruptcy courts would then be able to approve the Chapter 7 debtor's attorney's fees so long as they are reasonable for work that was actual and necessary.[167]

As shown in Part I of this Article, there is evidence that the language in

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163. *Chapter 7 - Bankruptcy Basics,* U.S. COURTS, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics [https://perma.cc/464Q-LX3Q] (last visited July 20, 2022) (noting that "[m]ost chapter 7 cases involving individual debtors are no asset cases").

164. 11 U.S.C. § 330(a)(1).

165. *See id.* (emphasis added).

166. 11 U.S.C. § 330(a)(1)(A).

167. *Id.*

§ 330(a)(1) was taken out mistakenly through a scrivener's error.[168] And it has likely not yet been legislatively addressed due to the highly partisan and polarized state of our current political system. This simple fix returns the statutory provision to what it was before the 1994 Act, and to what it likely should have been after the 1994 Act but for the drafting error.

There is one more amendment that is necessary to ensure that the proper statutory framework is in place. Section 330(a)(4)(B) currently states in pertinent part:

> In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.[169]

The author would make a small but impactful addition to this statutory provision, as follows:

> In a *chapter 7,* chapter 12, or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.[170]

The simple inclusion of Chapter 7 in this subsection would make § 330, as a whole, consistent. The message would be heard loudly and clearly—attorneys representing Chapter 7 debtors do not have to be paid upfront anymore. These three amendments, if passed, would substantially increase one's ability to access much needed Chapter 7 relief. Attorneys would be much more willing to take on Chapter 7 cases for little or no money due upfront without the fear that a bankruptcy court would later strike down their fees. This would be a game-changer in the consumer bankruptcy world. For the first time in many years, debtors would truly have a meaningful choice as to their bankruptcy chapter. Their choice would not be based on what they can or cannot afford at the time of filing, but instead, it would be based on which chapter is actually best for the type of relief they are seeking.

To date, no one else has suggested amending these three statutory provisions together as a package to increase debtors' access to Chapter 7 relief. However, to think our current legislators can and will make these three changes suggests a very optimistic and unrealistic view of the state of our current political system. Bankruptcy should be a non-partisan area of law since everyone, regardless of their political affiliation, can find themselves in financial distress at some point

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168. *See supra* Part I.
169. 11 U.S.C. § 330(a)(4)(B).
170. *See id*. (emphasis added).

in their lives.[171] However, history has shown time and time again that bankruptcy law is partisan.[172] The author strongly believes that most Democrats would likely support these amendments, while some, or many, Republicans would oppose them.

The author would suggest one more provocative change to garner bipartisan support of these amendments. The author would suggest the use of a rider. The United States Senate's glossary defines a rider as "[a] nongermane amendment to a bill or an amendment to an appropriation bill that changes the permanent law governing a program funded by the bill."[173] A rider is essentially an unrelated "string" attached to the bill that will appeal to the other side, likely garnering their support to pass the bill at issue. What can be used as a "string" to entice the other side on the issue of access to Chapter 7? After we decide that, the next question becomes this: which one is the rider, and which one is the bill?

In one word—guns. Gun rights appeal quite favorably to Republicans. Currently, the Bankruptcy Code does not provide a federal exemption for the debtor's firearms. The "string" would be to create a federal bankruptcy exemption for the debtor's firearms in a bankruptcy case so that they are not taken and sold by a bankruptcy trustee to satisfy the debtor's debts. This "string" would be attached to the three proposed amendments that serve to increase a potential debtor's access to Chapter 7 relief. And either one could be the bill or the rider, so long as both sets of amendments are passed.

Exempting firearms has been attempted before as a standalone measure. In 2011, a bill seeking to amend the Bankruptcy Code to exempt a debtor's firearms was introduced, but it did not receive a vote.[174] This bill was cosponsored by two

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171. The author could not locate any research showing the political affiliations of debtors who have filed for bankruptcy relief. This information is not collected. That said, it is well known that the reasons that drive people into bankruptcy can happen to anyone regardless of their political affiliation (for instance, health issues and related expenses, job loss, divorce, etc.). *See, e.g.*, *The 3 Most Common Reasons Why People File Bankruptcy*, AM. BANKR. INST., https://www.abi.org/feed-item/the-3-most-common-reasons-why-people-file-bankruptcy [https://perma.cc/J2B4-U28K] [hereinafter *Most Common Reasons*] (last visited July 20, 2022) (stating that job loss, medical problems, and divorce are the three most common reasons people seek bankruptcy relief).

172. For example, examine the voting history on the 2005 Bankruptcy Abuse and Prevention Act (BAPCPA), passed by Congress on April 14, 2005, and signed into law by President George W. Bush on April 20, 2005. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23. The voting history in favor of passing this bill was 302-126 in the House and 74-25 in the Senate. *S.256—Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, CONGRESS.GOV, https://www.congress.gov/bill/109th-congress/senate-bill/256/actions (last visited July 20, 2022).

173. *Rider*, Glossary, U.S. SENATE, https://www.senate.gov/about/glossary.htm#R [https://perma.cc/SS9L-J3NA] (last visited July 20, 2022).

174. The Protecting Gun Owners in Bankruptcy Act of 2011 was introduced on March 17, 2011, in the 112th Congress. H.R. 1181, 112th Cong. (2011). However, it never received a vote. *H.R. 1181 (112th): Protecting Gun Owners in Bankruptcy Act of 2011*, GOVTRACK, https://www.govtrack.us/congress/bills/112/hr1181 [https://perma.cc/HSD2-ZWZ4] [hereinafter *H.R. 1181*, GOVTRACK] (last

Democrats, which could signal the potential for bipartisan support.[175] Both parties can likely agree on one thing—Democrats would prefer debtors to keep more of their property in a bankruptcy case, and Republicans would prefer that at least a portion of that property be the debtor's firearms.

Recently, in April of 2022, seventeen Republicans cosponsored the Protecting Gun Owners in Bankruptcy Act of 2022.[176] In summary, this particular bill seeks to modify federal bankruptcy law to allow an individual debtor to exempt from their bankruptcy estate one or more firearms, up to a total maximum value of $3,000.[177] The bill also specifies that such firearms are considered household goods that are not subject to liens in bankruptcy.[178] This recently introduced bill presents a unique opportunity for legislators to attach a rider. The rider would be the three proposed amendments to increase access to Chapter 7 relief. The logic is clear—if Republicans want to ensure that debtors can keep their firearms exempted in a Chapter 7 bankruptcy case, then they would likely also support changes to ensure that those same debtors are actually able to access Chapter 7 relief.

While the author would love to live in an idealistic world where an individual's basic rights are favored over divisive politics, he is keenly aware of the environment in which he resides. Compromise is the key to getting these proposed amendments passed, and these proposed amendments must be passed in order to increase access to Chapter 7 relief for all people. Perhaps it is time to bite the bullet in favor of positive change.

CONCLUSION

As this Article has shown, many debtors currently do not have the ability to choose to file a Chapter 7 bankruptcy case. This lack of chapter choice stems mainly from the high initial costs of filing under Chapter 7. Many debtors simply do not have the funds available to pay their attorneys in full upfront, which is the only universal ticket to Chapter 7 relief after *Lamie*.[179]

The alternatives to obtaining Chapter 7 relief are quite poor in comparison. For example, debtors who cannot afford to file a Chapter 7 case will often seek relief under Chapter 13. Chapter 13 cases, while providing debtors with a modicum of relief at the beginning, are not the best or most effective option for many low-income debtors. Debtors experience a very low success rate in Chapter 13 cases due to missed plan payments over the three to five year repayment period. This means that many debtors who attempt a Chapter 13 bankruptcy case

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visited July 20, 2022).

175. *H.R. 1181*, GOVTRACK, *supra* note 174.

176. *H.R. 7493—Protecting Gun Owners in Bankruptcy Act of 2022*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/7493 [https://perma.cc/822D-Q5A3] (last visited July 26, 2022).

177. *Id.*

178. *Id.*

179. Lamie v. U.S. Tr., 450 U.S. 526 (2004).

will be left worse off after their Chapter 13 cases are dismissed. They will still owe their attorney's fees, which are significantly higher than attorney's fees in a Chapter 7 case, and they will not have the benefit of the bankruptcy discharge. Their hopes of a financial fresh start will be crushed by a worse-off reality.

Further, this Article has evaluated some of the workarounds that have been employed to mitigate the harshness of requiring debtors to pay their attorneys in full prior to commencing a Chapter 7 case. The two-contract approach appears to be the most promising one. However, the two-contract approach has some major drawbacks. It is not universally approved by the bankruptcy courts, and there is still an initial cost hurdle that will prevent some debtors from utilizing this workaround.

Unless something changes, many debtors will continue to lack access-to-justice to obtain a financial fresh start under Chapter 7. Further, there is ample evidence to show that this lack of access has a disproportionately negative impact on people of color. This is not just an access-to-justice issue; it is a serious social justice concern.

The only effective solution to this problem is to amend the Bankruptcy Code to correct the problems created by the 1994 Act. The three proposed changes described in this Article are an effective way to immediately increase access for all to Chapter 7 relief.[180] Anyone, regardless of their political affiliation, can succumb to the three most common bankruptcy triggers (job loss, medical issues, and divorce).[181] In an ideal political climate, these three proposed amendments should pass as a standalone measure. However, we are not currently in such a climate. History has taught us that bankruptcy politics are quite partisan, in spite of the fact that the current lack of access to Chapter 7 relief impacts constituents of both major parties.

This Article proposes a fair, bipartisan solution to increase access to Chapter 7 for all. Of course, it should be used as a last resort. But increasing access to Chapter 7 relief should be the primary end goal, even if that means reaching a compromise by allowing a federal exemption for firearms. Hopefully, our lawmakers can come together to craft a solution to this problem. All people should have the benefit of a financial fresh start, and all people should experience true chapter choice. The solution is technically simple, long overdue, and finally within reach. Now is the time to demand that our legislators do what is right for the American people.

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180. *See supra* Part IV.

181. *See Most Common Reasons*, *supra* note 171.