



## Case Law Update for \$0-Down Chapter 7 and Fresh Start Funding

The practice of offering post-petition payment terms is predicated on bifurcating the chapter 7 engagement into pre- and post-petition engagement agreements. Post-petition payments made by debtors are solely for work performed post-petition pursuant to a fee agreement entered into by the debtor post-petition. Bifurcation of chapter 7 engagements is an increasingly common and accepted practice across the country. As I'm sure you know, the recent *Hazlett* decision from Bankruptcy Judge Kevin Anderson in Utah is one of the more comprehensive and thoughtful analyses of the practice. Clifford White, the Director of the US Trustee Program, recently discussed that decision at some length in a speech at the annual conference of the National Association of Bankruptcy Trustees, describing the opinion as "well-reasoned," which led him to "commend" it to the USTP and the bar. Notwithstanding the recent buzz generated by the *Hazlett* decision, the case law history of offering post-petition payment terms to debtors goes back about 25 years. I'm enclosing a few articles that I've written on the subject in the hopes that they are helpful.

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As you may already know, the firm involved in the *Hazlett* case, Capstone Law, was working with a company called BK Billing that is based in Utah and, until September 5<sup>th</sup> of last year, was factoring post-petition fee receivables. While Judge Anderson approved every other aspect of Capstone's bifurcation practice, he expressed reservations about the so-called "BK Billing model."

Although "[i]t is not unlawful for lawyers to sell or encumber their accounts receivable, whether or not the work has been accomplished," Utah State Bar Ethics Advisory Opinion Comm., Opinion No. 17-06 (2017), Fresh Start Funding does not factor receivables. Rather our company extends a line of credit to the attorney that can be drawn against each time the attorney enters into a post-petition engagement agreement with a client. The attorney maintains ownership and control of the receivable, and Fresh Start Funding has a lien against the receivable to secure its loan to the attorney. The line of credit is structured as a recourse loan to the attorney, and thus the attorney has to repay the loan whether or not the client pays. Fresh Start Funding manages the debtor payments as the attorney's agent, and reports the payments to the credit bureaus, thereby providing an attractive opportunity to the debtors to begin rehabilitating their credit immediately after filing their chapter 7 case.

The use of third-party financing is allowed under the ethical rules. "Some clients may be unable to afford lawyers' fees absent some form of accommodation or assistance. For example, a criminal defense or family law client may be unable to afford a lawyer's flat fee at the outset of a representation. The client may be able to afford the lawyer's fee, however, if the client can finance the fee through a loan from a third-party. Or, a client may simply wish to finance a lawyer's fee rather than pay a lump sum." Formal Opinion 484, ABA Standing Committee on Ethics and Professional Responsibility, at 1. The use of



third-party financing does not implicate fee-sharing, and the attorney's cost of financing can be passed on to a client with adequate disclosure and so long as the overall fee remains reasonable. Id. at 10-11.

Fresh Start Funding provides our attorney clients with training, forms and best-practice support based on our review of case law and ethics opinions, and our consultation with well-respected, outside ethics counsel. We also engage in ongoing, periodic audits of our client's cases to verify that the filings comport with engagement agreement terms, and that disclosure to the court is adequate. Where questions nonetheless are raised by trustees or the courts, we provide our clients with a defense guaranty and indemnity through our separate law firm, Protego Law.