AMERICAN BANKRUPTCY INSTITUTE

2018 Mid-Atlantic Bankruptcy Workshop

Consumer: ABI Commission on Consumer Bankruptcy

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CONCURRENT SESSION

2018

AMERICAN BANKRUPTCY INSTITUTE | www.abi.org

May 21, 2018

Office of Postsecondary Education
U.S. Department of Education
Washington, D.C.

Re: Docket ID ED–2017–OPE–0085, Request for Information on Evaluating Undue Hardship Claims in Adversary Actions Seeking Student Loan Discharge in Bankruptcy Proceedings

On behalf of the American Bankruptcy Institute's Commission on Consumer Bankruptcy, we submit the attached comments in response to the Department of Education's request for information (RFI) on the evaluation of undue hardship claims in bankruptcy.

The American Bankruptcy Institute (ABI) is the world's largest association of insolvency professionals, made up of over 11,000 members in multi-disciplinary roles, including attorneys, bankers, judges, lenders, professors, turnaround specialists, accountants and others. These members represent debtor, creditor and other stakeholder interests. Founded in 1982, ABI is non-profit and non-partisan and organized under Internal Revenue Code section 501(c)(3). ABI also plays a leading role in providing congressional leaders and the general public with unbiased reporting and analysis of bankruptcy regulations, laws and trends. ABI is often called on to testify before Congress, analyze proposed bills, and conduct periodic briefings for congressional committees, legislative staff, other government regulators and the media.

In December 2016, the ABI's board of directors passed a resolution creating the Commission on Consumer Bankruptcy and charging the Commission with "researching and recommending improvements to the consumer bankruptcy system that can be implemented within its existing structure." The Commission and its three advisory committees are composed of fifty-two bankruptcy professionals. The commissioners and committee members represent all stakeholders in the bankruptcy system, including attorneys who primarily represent debtors and attorneys who primarily represent creditors as well as chapter 7 trustees, chapter 13 trustees, retired bankruptcy judges, government officials, and academics. As of the date of this letter, the Commission and its committees have conducted seven public meetings in which we have heard from seventy-eight witnesses. We have received 131 written comments. The Commission and its committees have

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held fifty-seven private meetings to debate possible reforms. More information, including the membership of the Commission and its committees, is available at our web site: https://consumercommission.abi.org/.

Many of the witnesses at our public meetings and the persons who sent us written comments urged the Commission to address the treatment of student loans in bankruptcy. The Commission has placed student loans on its publicly available list of topics to be studied.

We will release the Commission's final report in the coming year. The final report will set out comprehensive recommendations on student loans in bankruptcy, including recommendations for legislative changes about how student loans are treated in both chapter 7 and chapter 13 bankruptcies.

We had not intended to release any of the Commission's recommendations until the final report. However, in light of the Department of Education's request for information and the importance of the student-loan issue, the Commission agreed to release several recommendations that directly respond to the RFI. These recommendations focus on the regulatory reforms that are the subject of the RFI and should not be understood as the Commission's recommendations for possible legislative changes or any other reforms.

The Commission has debated and approved the attached recommendations, which state the conclusions of the Commission as a deliberative law reform group. As such, they do not necessarily reflect the views of any individual associated with the Commission. The Commission also has two non-voting, ex officio members as representatives of the U.S. Trustee Program and Internal Revenue Service. These two ex officio members provided technical assistance and institutional perspectives but took no position on proposals made by the Commission.

We hope that you find these comments helpful as you consider changes to the "Dear Colleague" letter mentioned in the RFI. The Department of Education plays an important role in the administration of the student-loan system. Action at the regulatory level could have a major effect in alleviating the growing burdens of student debt on everyday Americans and the overall economy. If the Commission can provide other helpful information or be of further assistance, please do not hesitate to reach out to us.

Sincerely,

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American Bankruptcy Institute's Commission on Consumer Bankruptcy

Recommendations to the Department of Education: Evaluating Undue Hardship Claims in Adversary Actions Seeking Student Loan Discharge in Bankruptcy Proceedings

I. Promulgation and Interpretation of Regulations

Through regulations or interpretive guidance, the Department of Education should provide the following with respect to governmental student loans:

(a) *Bright-line Rules.* Creditors should not oppose discharge proceedings where the borrower meets any of a set of the criteria below. These criteria should be set out in federal guidelines that indicate household financial distress and therefore undue hardship:

(1) *Disability-based guidelines.* The borrower (i) is receiving disability benefits under the Social Security Act or (ii) has either a 100% disability rating or has a determination of individual unemployability under the disability compensation program of the Department of Veterans Affairs.

(2) *Poverty-based guidelines.*

(A) In the seven years before bankruptcy, the borrower's household income averaged less than 175% of the federal poverty guidelines.

(B) At the time of bankruptcy, the borrower's household income is less than 200% of the federal poverty guidelines and (i) the borrower's only source of income is from Social Security benefits or a retirement fund or (ii) the borrower provides support for an elderly, chronically ill, or disabled household member or member of the borrower's immediate family.

(b) *Avoiding Unnecessary Costs.* Creditors should accept from the borrower proof of undue hardship based on the above criteria without engaging in formal discovery.

(c) *Alternative Payment Plans*. Payment of the loans in bankruptcy should be effective (i) to satisfy any period of forgiveness or cancellation of the loans under an income driven repayment plan, (ii) to rehabilitate a loan in default, and (iii) in chapter 13 cases, to prevent the imposition of collection costs and penalties.

II. Best Interpretation of 11 U.S.C. § 523(a)(8)

(a) *Brunner Test.* The three-factor *Brunner* test should be understood to require the debtor to establish only that

(1) the debtor cannot pay the student loan sought to be discharged according to its standard ten-year contractual schedule while maintaining a reasonable standard of living,

(2) the debtor will not be able to pay the loan in full within its initial contractual payment period (10 years is the standard repayment period) during the balance of the contractual term, while maintaining a reasonable standard of living, and

(3) the debtor has not acted in bad faith in failing to pay the loan prior to the bankruptcy filing.

(b) *Standard of Proof.* Each of these factors should be understood to require proof by a preponderance of the evidence.

(c) *Appellate Review.* The determination of the bankruptcy court as to each of the factors should be recognized as a finding of fact subject to deference in appellate review and in the consideration of appeal by the Department of Education, any guaranty agency, eligible lender, or holder of a federal student loan, and any agent of these parties.

Discussion & Explanation

Student loan debt is one of the most significant economic problems facing the United States. According to Federal Reserve data, outstanding student loan debt has tripled since 2006, from under $500 billion to over $1.5 trillion.[1] In 2003, both credit card and auto loan indebtedness were several times the amount of student loan debt, but now student loan debt greatly exceeds them both.[2] Among all types of household debt, student loans have the highest delinquency rate.[3] As a percentage of the balance, the most recent data show 11.0% of student loans as 90+ days delinquent as compared to 7.6% for credit card debt, 4.1% for auto loans, and 1.3% for home mortgages.[4]

Student loan overindebtedness causes overall economic activity to decline and constrains the post-college options that students have. Academic studies have associated student debt with

[1] These figures are from the Federal Reserve's G.19 release on consumer credit, available at https://www.federalreserve.gov/releases/g19/current/default.htm.

[2] *See* Federal Reserve Bank of New York, Quarterly Report on Household Debt and Credit (2017:Q4), at 3 (Feb. 2018) https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2017Q4.pdf.

[3] *See id.* at 12-14.

[4] *Id*. at 12.

(1) lower earnings of college graduates,[5] (2) lower levels of homeownership,[6] (3) lower automobile purchases,[7] (4) increases in household financial distress,[8] (5) lower probability of students to choose public-service careers,[9] (6) poorer psychological functioning,[10] (7) delayed marriage,[11] and (8) lower probability of continuing education through graduate school.[12] Student loans thus affect not only those who owe the loans but also have consequences that ripple through our communities and our nation. Because of its regulatory and oversight powers, the Department of Education can make substantial inroads in alleviating the student debt problem that will improve the lives of all Americans.

Repayment of federal student loans is in the best financial interest of the federal government. To further this purpose, the Department of Education has sensibly adopted programs that promote the responsible repayment of student loans. At the same time, federal bankruptcy law recognizes that highly distressed student loan borrowers may not be able to repay their loans even with these options. Those bankrupt debtors who can show "undue hardship" can have their student loans discharged in bankruptcy.[13] Our comments seek to balance these competing interests.

Bright-line rules

The current options used by the Department of Education have not always proven to be the most sensible, cost-effective manner of addressing collection processes for student loan borrowers who have filed for bankruptcy. Costly and inefficient litigation both causes the federal

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[5] *See* Justin Weidner, "Does Student Debt Reduce Earnings" (Nov. 11, 2016) (unpublished manuscript) https://scholar.princeton.edu/sites/default/files/jweidner/files/Weidner_JMP.pdf.

[6] *See* Alvaro A. Mezza, Daniel R. Ringo, Shane M. Sherlund & Kamilia Sommer, "Student Loans and Homeownership" (June 2017); Rajashri Chakrabarti, Nicole Gorton & Wilbert van der Klaauw, "Diplomas to Doorsteps: Education, Student Debt, and Homeownership," Liberty Street Economics blog (Apr. 3, 2017) http://libertystreeteconomics.newyorkfed.org/2017/04/diplomas-to-doorsteps-education-student-debt-and-homeownership.html.

[7] *See* Meta Brown & Sydnee Caldwell, "Young Student Loan Borrowers Retreat from Housing and Auto Markets," Liberty Street Economics blog (Apr. 17, 2013) http://libertystreeteconomics.newyorkfed.org/2013/04/young-student-loan-borrowers-retreat-from-housing-and-auto-markets.html.

[8] *See* Jesse Bricker & Jeffrey Thompson, *Does Education Loan Debt Influence Household Financial Distress? An Assessment Using the 2007-2009 Survey of Consumer Finances Panel*, 34 CONTEMP. ECON. POL'Y. 660 (2016).

[9] *See* Erica Field, *Educational Debt Burden and Career Choice: Evidence from a Financial Aid Experiment at NYU Law School*, 1 AM. ECON. J.: APPLIED ECON. 1 (2009); Jesse Rothstein & Cecilia Elena Rouse, *Constrained After College: Student Loans and Early-Career Occupational Choices*, 95 J. PUB. ECON. 149 (2011).

[10] *See* Katrina M. Walsemann, Gilbert C. Gee & Danielle Gentile, *Sick of Our Loans: Student Borrowing and the Mental Health of Young Adults in the United States*, 124 SOCIAL SCI. & MED. 85 (2015).

[11] *See* Dora Gicheva, *Student Loans or Marriage? A Look at the Highly Educated*, 53 ECON. EDUC. REV. 207 (2016).

[12] *See* Vyacheslav Fos, Andres Liberman & Constantine Yannelis, "Debt and Human Capital: Evidence from Student Loans" (Apr. 2017) (unpublished manuscript) https://ssrn.com/abstract=2901631.

[13] 11 U.S.C. § 523(a)(8).

government to incur substantial costs in the bankruptcy collection process with little recovery and leaves bankrupt borrowers without effective relief. It is in the interest of the federal government and borrowers that the government uses a more cost-effective approach for collection from student loan borrowers who have filed bankruptcy cases. Having clear, objective bright-line rules would reduce the costs of undue hardship litigation for the borrowers, the creditors, and the courts, while encouraging the debtors who genuinely need bankruptcy relief (and their attorneys) to seek it.

Our recommendations suggest two sets of bright-line rules,[14] one built around federal Social Security and veterans disability benefits and the other based on the federal poverty guidelines. Both require the borrower to have undergone eligibility screening by a federal administrative agency. More importantly, both indicate borrowers highly likely to be in severe financial distress and therefore highly likely to be incurring undue hardship.

To be eligible for disability benefits under the Social Security Act, an individual must have an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."[15] Veterans disability benefits require either a 100% disability rating or a showing that includes the inability to hold "substantial gainful employment," a threshold interpreted to mean an inability to earn more than the federal poverty guideline.[16]

Our second set of guidelines are built around the federal poverty guidelines. The most recently revised federal poverty guidelines are:[17]

Household Size	Poverty Guideline
1	$12,140
2	$16,460
3	$20,780
4	$25,100

We suggest two thresholds. First, any borrower whose household income averages less than 175% of the national poverty guidelines – currently $21,245 for a household of one – for the seven years before a bankruptcy filing be considered to have undue hardship. We recommend increasing the figure to 200% of the national poverty guidelines at the time of a bankruptcy filing for two

[14] Our recommendations for bright-line rules and cost-savings draw upon a 2014 letter from seven members of Congress. *See* Press Release, "Cohen, 6 Members of Congress Urge Education Secretary to Bring More Fairness to Struggling Students" (May 16, 2014) https://cohen.house.gov/press-release/cohen-6-members-congress-urge-education-secretary-bring-more-fairness-struggling.

[15] 42 U.S.C. § 423(d)(1).

[16] *See, e.g.*, Faust v. West, 13 Vet. App. 342, 356 (Vet. App. 2000).

[17] *See* Annual Update of the HHS Poverty Guidelines, 83 Fed. Reg. 2642 (Jan. 18, 2018) https://www.federalregister.gov/documents/2018/01/18/2018-00814/annual-update-of-the-hhs-poverty-guidelines.

situations to account for personal circumstances: retirees on fixed incomes and persons providing support for an elderly, chronically ill, or disabled household or family member.

The Department of Education's "Dear Colleague" letter, dated July 7, 2015, refers to certain factors, including determinations of disability by the Department of Veterans Affairs and Social Security Administration as "negat[ing] the need for discharge of their student loans in bankruptcy." A borrower may have reasons for filing bankruptcy that include but are not limited to student loan debt. A judicial remedy also sometimes can help solve problems that an administrative remedy might not, such as tax liability from the discharged debt. As the "Dear Colleague" letter notes, the administrative and judicial remedies can be "equally effective." Just as there is no reason for the Department's guidelines to deprive a borrower of an administrative remedy when an equally effective judicial remedy is available, there is no reason to deprive the borrower of the judicial remedy because an administrative remedy is available, especially when the judicial remedy can address other debt and legal issues the borrower might be facing. The "Dear Colleague" letter should respect the choice the borrower makes in addressing debt problems.

Avoiding Unnecessary Costs

Current regulations require a determination of whether "the expected costs of opposing the discharge petition would exceed one-third of the total amount owed."[18] If so, the discharge petition should not be opposed. Despite the direction in the regulation, it is the sense of the Commission that student loan collectors have often vigorously litigated student loan discharge proceedings regardless of the cost/benefit of the litigation.

Student loan creditors should accept and evaluate the borrower's evidence without reference to formal guidelines such as court discovery rules. We are not recommending that the student loan creditor simply accept any evidence on blind faith. Rather, the creditor should exercise good judgment and discretion about the reliability of the borrower's evidence. Using informal processes will lower costs for both creditor and borrower. Formal litigation discovery processes should be the last, not the first resort. If the borrower submits satisfactory evidence of undue hardship outside the litigation process, the student loan creditor should agree that the debtor is entitled to discharge of the student loan debt.

Alternative Repayment Plans

Regulations also should be considered to address how chapter 13 bankruptcy interacts with the student-loan repayment programs. The Department of Education already is authorized to accept alternative minimum payments for borrowers under "exceptional circumstances."[19] The safeguards built into the confirmation of a chapter 13 plan set out statutory requirements more stringent than the Department's income-driven repayment plans, including a liquidation analysis

[18] 34 C.F.R. § 682.402(i)(1)(iii).
[19] *Id.* § 685.208(l)(1).

that is not otherwise considered by the Department. These safeguards should suffice for determining the amount necessary for an alternative repayment.

Also, outside of bankruptcy, borrowers can generally only cure a default on a student loan either through consolidation of their loans or rehabilitation.[20] 11 U.S.C. § 1322(b)(5), however, allows a chapter 13 plan to "provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim on which the last payment is due after the date on which the final payment under the plan is due." Section 1322(b)(5) should be interpreted to apply to the cure and maintenance of student loan payments, and the Department of Education should accept this treatment under chapter 13 plans, both to increase student loan payments and avoid unnecessary collection costs.

These observations lead to the following specific proposals for reform. Pursuant to 20 U.S.C. § 1087e(d)(4), the regulations regarding alternative repayment plans at 34 C.F.R. § 685.208(l) should be amended to provide (1) that the payments under a confirmed chapter 13 plan constitute an "exceptional circumstance" sufficient for the Department of Education to accept any disbursements from a chapter 13 plan as an alternative repayment and (2) that, notwithstanding, the provisions of 34 C.F.R. § 685.219(c)(iv) and 34 C.F.R. § 685.221(f)(1), such payments apply towards any period of forgiveness or cancellation of the student loans under the applicable income driven repayment plan.

The Department of Education also should amend 34 C.F.R. § 685.211(f)(1) to provide that the amount "of a borrower's reasonable and affordable payment based on the borrower's financial circumstances" includes amounts paid through a borrower's chapter 13 plan to "cure and maintain" payments under 11 U.S.C. §1322(b)(5). The Department also should amend 34 C.F.R. § 30.62 to provide that, if student loan payments are made through a chapter 13 plan, the Department of Education will forego administrative costs under 34 C.F.R. § 30.60 and penalties assessed under 34 C.F.R. § 30.61.

Best Interpretation of 11 U.S.C. § 523(a)(8)

As the Request for Information notes, many courts have interpreted the undue hardship standard using a three-factor test known as the *Brunner* test. This test provides that undue hardship exists only if—

> (1) the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans;
>
> (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
>
> (3) the debtor has made good faith efforts to repay the loans.[21]

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[20] *Id.* §§ 685.211(f), 685.220.

[21] Brunner v. New York State Higher Education Services, 831 F.2d 395, 396 (2d Cir. 1987). As the Request for Information also notes, the Eighth Circuit uses a "totality of the circumstances" test. *See* Long

The second of these factors has often been described as requiring the debtor to establish a "certainty of hopelessness" regarding payment of the student loan sought to be discharged.[22] With this strict judicial case law in place, very few debtors have sought to discharge student loans in bankruptcy.[23]

The Commission believes the widely accepted *Brunner* test can be an appropriate standard for determining undue hardship, balancing consideration of the debtor's present ability to pay student loan indebtedness, the debtor's future ability to make the loan payments, and the debtor's good faith in connection with the loan. However, as pointed out by the Seventh Circuit, the "glosses" that some decisions have added to the *Brunner* test do not always track the language of the statute itself.

> The district judge did not doubt that [the debtor] has paid as much as she could during the 11 years since receiving the educational loans. Instead the judge concluded that good faith entails commitment to future efforts to repay. Yet, if this is so, no educational loan ever could be discharged, because it is always possible to pay in the future should prospects improve. Section 523(a)(8) does not forbid discharge, however; an unpaid educational loan is not treated the same as a debt incurred through crime or fraud. The statutory language is that a discharge is possible when payment would cause an "undue hardship". It is important not to allow judicial glosses, such as the language in . . . *Brunner*, to supersede the statute itself.[24]

We believe the best interpretation of the *Brunner* test will hew closely to the statute. In particular, we believe the Department should adopt the following interpretations:

> (a) Courts and the Department should determine the degree of hardship based on the contractual terms of the loan itself, rather than alternatives offered by the creditor, such as federal income-based repayment plans.[25]

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v. Educational Credit Mgmt. Corp., 322 F.3d 549 (8th Cir. 2003). The Commission's recommendations apply to whichever judicial test is used.

[22] *See, e.g.*, Educational Credit Mgmt. Corp. v. Frushour (In re Frushour), 433 F.3d 393, 401 (4th Cir. 2005); Olyer v. Educational Credit Mgmt. (In re Olyer), 397 F.3d 382, 386 (6th Cir. 2005).

[23] *See* Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 499 (2012) ("[B]arely 0.1 percent of student loan debtors in bankruptcy sought to discharge their educational debts.").

[24] Krieger v. Educational Credit Mgmt. Corp., 713 F.3d 882, 884 (7th Cir. 2013)

[25] *See* In re Engen, 561 B.R. 523, 548 (Bankr. D. Kan. 2016) (pointing out difficulties with these repayment plans).

(b) Undue hardship should be found if repayment of the loan according to its terms would prevent the debtor from paying reasonable living expenses, rather than requiring living at a poverty level.[26]

(c) The factual determinations required by *Brunner* should be subject to the ordinary evidentiary burden, preponderance of the evidence. The debtor should not be required to prove that future repayment of the student loan is certain to be hopeless.[27]

(d) The fact-findings of a bankruptcy court on the *Brunner* factors should be recognized as entitled to deference on appeal, and reversible only for clear error.[28]

Our recommendations for regulatory reforms and the best interpretation of the *Brunner* test are presented as complementary parts of a more effective treatment of student loan debt. If the Department were not to adopt those regulatory reforms, we would advocate that those reforms – including the adoption of bright-line rules – be incorporated into decisions applying § 523(a)(8) case law.

[26] *See* Ivory v. United States (In re Ivory), 269 B.R. 890, 899 (Bankr. N.D. Ala. 2001) (listing items necessary to maintain a minimal standard of living).

[27] *See* Price v. DeVos (In re Price), 573 B.R. 579, 601 (Bankr. E.D. Pa. 2017) ("[T]he phrase 'certainty of hopelessness' carries a connotation that vastly overstates the debtor's evidentiary burden under § 523(a)(8). . . . It is time to retire its use."), *rev'd on other grounds* 2018 WL 558464 (E.D. Pa. 2018).

[28] *See* ECMC v. Acosta-Conniff (In re Acosta-Conniff), 686 F. App'x 647, 649 (11th Cir. 2017) ("A bankruptcy court's findings as to each of the three prongs of the Brunner test are factual findings that should be reviewed by the district court for clear error; not under a de novo standard of review.").

Position Statement to ABI Commission on Consumer Bankruptcy
July 15, 2017 Public Meeting
NACTT Annual Seminar, Seattle, Washington

Submitted By:
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21st Mortgage Corporation ("21st Mortgage" or "the Company") respectfully submits the following comments on certain matters of bankruptcy law. The first explores the treatment of loans secured solely by manufactured home in debt restructuring plans. The second examines use of the prevailing prime rate for residential real property in those plans. The third issue examines the valuation method employed for loans secured by a manufactured home. The Commission"s review of these matters is appreciated. Any questions may directed to the Company"s designated personnel:

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Manufactured Home Loans and Cramdown Exemptions

Chapter 13 of the U.S. Bankruptcy Code allows a debtor"s claim restructuring plan to "modify the rights of holders of secured claims". Such modifications, commonly referred to as "cramdowns", may reduce the principal balance or interest rate of secured claims in order to reduce the claim"s periodic payment. Section 1322(b)(2) exempts from cramdown treatment claims "secured only by a security interest in real property that is the debtor"s principal residence". Thus, mortgage lenders generally benefit from that provision by having their loan terms remain intact regardless of the debtor"s current or future repayment ability. However, claims secured solely by a security interest in a manufactured home that is the debtor"s principal residence are not subject to that protection because it is not real property. This unfortunate disparity should be corrected.

In many areas of law, loans secured solely by a manufactured home are regulated the same as loans secured by real property. As such, it should be given similar protections to

preserve uniformity and consistency in the law. Please consider the following examples, all of which treat manufactured home loans and residential real property loans the same:

- The federal Secure and Fair Enforcement of Mortgage Licensing Act (PL 110-289, Title V) ("SAFE Act") requires the same license to originate a loan secured by residential real property as one secured by a manufactured home. All states implementing the federal SAFE Act have followed suit. Each state prescribes certain testing, education, and other qualifications for license applicants.
- The Truth in Lending Act and accompanying Regulation Z define "dwelling" to include both residential real property and a manufactured home, regardless of whether it is attached to real estate; as such, loans secured by either are subject to all of the following.
    - Ability to Repay: certain underwriting requirements apply to manufactured home and residential real property loans. These provisions, found in Section 1026.43, require "the creditor makes a reasonable and good faith determination at or before consummation that the consumer will have a reasonable ability to repay the loan according to its terms". The determination must be based on the consumer‟s current or reasonably expected income or assets, monthly payment amount, other monthly obligations (including alimony or child support), mortgage-related obligations, the consumer‟s monthly debt-to-income ratio, and the consumer‟s credit history. All information may be verified using only reasonably reliable third-party records.
    - High-cost mortgage loans: a loan secured solely by a manufactured home may be a high-cost mortgage under Regulation Z if the APR or points charged on the loan exceed certain thresholds. High-cost mortgage loans have a number of limitations and disclosures.
    - Higher-priced mortgage loans: a loan secured solely by a manufactured home may be a higher-priced mortgage loan under Regulation Z if the APR exceeds a certain threshold. A higher-priced mortgage loan is required to have an escrow account and, unless the loan is a qualified mortgage, the creditor must obtain a valuation or appraisal of the subject property prior to origination.
    - The federal loan originator compensation laws, enacted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act and implemented by Section 1026.36 of Regulation Z, apply to either type of loan. Together, they prohibit compensation of a loan originator based upon a term of the loan or by persons other than the consumer. They also set forth certain requirements for late fees, payoff statements, and prohibit steering a consumer to a loan product from which the originator will receive greater compensation from the creditor than in other transactions, unless the consummated transaction is in the consumer‟s interest.

- The Home Mortgage Disclosure Act and accompanying Regulation C require creditors of residential mortgage loans to annually submit a loan application register that details all application activity and information for the preceding calendar year. Manufactured home loans are subject to the same reporting requirements as a loan secured by residential real property.
- The Nationwide Mortgage Licensing System and Registry ("NMLS"), the use of which is mandatory for residential mortgage lenders by the SAFE Act, requires the filing of a quarterly call report. This report requires information for both manufactured home and residential real property loans.
- Many states require the same disclosures upon receipt of an application for both real estate- and manufactured home-secured loans. For example, Colorado, Illinois, Minnesota, New Mexico, North Carolina, Ohio, and Texas all require certain disclosures be issued either prior to or upon receipt of a credit application.
- The Depository Institution and Deregulation Monetary Control Act ("DIDMCA") and accompanying 12 CFR 590.1, et seq., preempts state usury laws for a loan secured by either residential real estate or a manufactured home provided the creditor abides by the consumer protections listed therein.
- Most states limit late fees to the same amount or percentage of the borrower‟s applicable principal and interest payment for both residential real estate and manufactured home loans.
- The majority of states limit the amount of recoverable post-default attorneys‟ fees to the same amount for both types of property securing the loan.
- A handful of states impose servicing and loss mitigation standards that apply to loans secured by either residential real estate or a manufactured home.

As demonstrated by the above examples, government regulation of manufactured home loans mirrors that of residential real estate loans in many respects. These additional requirements impose on a creditor greater legal and regulatory risk and increased costs, though none of which are offset by protection in a bankruptcy filing. It is inequitable to require many of the same obligations of the two products but allow only one of them to receive protection from a bankruptcy cramdown due to a debtor‟s inability to repay a loan within his/her budget.

21st Mortgage urges the Commission to propose a very minor statutory language change to Section 1322(b)(2). The simple deletion of the word "real" in that subsection will rectify the disparate treatment accorded site built and manufactured homes under Chapter 13 plans.

Till Holding Fails to Account for Rate Variations Among Different Collateral Types

Should the Commission decide to not support the exemption discussed above, another, more minor change may be made in the law to address another existing disparity. Secured loans

subject to cramdown regularly see a reduction in the interest rate as part of the debtor"s plan. The amount and method of reduction appropriate under a Chapter 13 plan was discussed in Till v. SCS Credit Corp., 541 US 465 (2004). The Supreme Court held the "prime-plus" or "formula rate" approach best meets the purposes of the Bankruptcy Code in determining whether a debtor"s proposed interest rate cramdown from 21% to 9.5%, on a loan secured by the debtor"s truck, would ensure the creditor received disbursements whose total present value equaled or exceeded the $4,000 claim. In so deciding, the Court concluded that other methods of rate adjustments (such as coerced loan, presumptive contract rate, and cost of funds approaches) are unwieldy and would impose too many evidentiary burdens on the parties and the bankruptcy court. To be sure, the Court"s conclusion is grounded in its determination that the Bankruptcy Code"s instructions on rate adjustments are unclear to the point that the Court admittedly guessed as to Congress"s intent.[1]

The Court"s interpretation has worked a serious injustice on creditors of manufactured home loans. In determining the appropriate rate for a manufactured home loan in a cramdown (that is, a loan secured wholly by the home without real property), bankruptcy courts most often refer to the prevailing prime rate for residential real property loans—yet another disparity deserving of some form of remedy. However, risk factors between the two properties are not the same. Most manufactured home loans are subject to higher rate pricing due to greater risk of loss in general—whether it be due to borrower characteristics, collateral issues, or even complications relating to the property on which a home is situated. The prime rate for residential real property is a poor fit for manufactured home loans.

21st Mortgage respectfully asks the Commission offer the following change (underlined) to Section 1325(a)(5)(B)(iii)(II):

> The holder of the claim is secured by personal property, the amount of such payment shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan based upon prevailing rates for like collateral …

This language would allow creditors to offer evidence to the bankruptcy court concerning tangible risk of loss when the court is reviewing a debtor"s plan. It also permits debtors" attorneys to offer evidence in support of the debtor"s plan. Submission of such evidence allows the bankruptcy court to consider the totality of circumstances when adjusting rates to meet a debtor"s plan and accords both parties fair treatment. 21st Mortgage is willing to submit further comment and language suggestions to the Commission upon request.

[1] "We think it likely that Congress intended bankruptcy judges and trustees to follow essentially the same approach when choosing an appropriate interest rate under any of these provisions. Moreover, we think Congress would favor an approach that is familiar in the financial community and that minimizes the need for expensive evidentiary proceedings." Till v. SCS Credit Corp., 541 US 465 (2004), 474-475. (Emphasis added.)

Manufactured Home Delivery and Installation as Part of Sales Price

Section 506(a)(2) requires a retail valuation that includes the costs of sale and marketing in determining the replacement value of a claim secured by personal property, such as a manufactured home. The statute further defines "replacement value" for property acquired for personal, family, or household purposes to mean "the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined". Replacement of a manufactured home would necessarily include costs for delivery from a retail center and installation on the subject property in addition to the sales price of a like home. In fact, delivery and installation are required to make a manufactured home suitable for a "personal, family, or household purpose" since it is unfit for occupancy without them. Absent those services, the home sits on the retail center‟s property without gas, water, or electricity. Further, HUD‟s Model Manufactured Home Installation Standards provide the minimum requirements for initial installations. Thus, neither delivery nor installation are optional services for retail sales of manufactured homes, but neither must they be charged by the retail seller.

Unfortunately, courts have held that delivery and installation costs are not allowable in the retail value of a manufactured home. Their interpretation is reasonably based upon a narrow reading of Section 506(a)(2), such that only those costs imposed by a retail seller "for property of that kind". However, as the Supreme Court noted in Assocs. Commercial Corp. v. Rash, 520 US 953 (1997), Section 506(a)(1) states the "value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property". In *Rash*, the Court ultimately held that "under § 506(a), the value of property retained because the debtor has exercised the § 1325(a)(5)(B) „cram down‟ option is the cost the debtor would incur to obtain a like asset for the same „**proposed ... use**.‟" (Emphasis added.) Following the Court‟s logic, a debtor would necessarily incur costs for delivery and installation of a manufactured home if its *proposed use* is a debtor‟s dwelling. It is otherwise unfit for occupancy as it sits uninstalled on a retail center‟s sales lot.

21st Mortgage urges the Commission to propose statutory language to properly address this matter. Specifically, the Company requests the Commission consider adding a qualifying or clarifying remark to Section 506(a)(2) such as the following in italics:

> If the debtor is an individual in a case under chapter 7 or 13, such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined, *including any costs necessary to make the property usable for such personal, family, or household purpose.*

In the absence of any suggested statutory language, the Company appreciates any guidance or other publications issued by the Commission toward addressing this issue.

Conclusion

21st Mortgage appreciates the Commission"s consideration of these issues. Please feel free to contact us using the information provided above should you have further questions.

Respectfully,

Michael Rodgers
Sr. Staff Attorney

STUDENT LOANS AND BANKRUPTCY

By The Consumer Committee of ABI

The Consumer Committee has a diverse membership. It includes practitioners who represent debtors in Chapter 7 and 13 cases; practitioners who represent creditors in consumer bankruptcies, including student loan servicers; Chapter 7 and Chapter 13 trustees and attorneys who represent trustees. We have all seen the effects of burdensome student loans. While we cannot do much about the root causes of skyrocketing education costs and diminishing public support for institutions of higher learning, we can try to suggest ways in which the bankruptcy process can aid the honest, but unfortunate student loan debtor.

I. History of Section 523(a)(8) Legislation

It is important to recall that prior to 1976 student loans were fully dischargeable. The federal student loan program was in its infancy. The National Defense Student Loan Program was established in 1958; the Federal Insured Student Loan Program was enacted in 1965. Congress, however, perceived that a growing number of graduates were filing for bankruptcy relief shortly after graduation for the specific purpose of discharging student loans.[1]

In 1978, 11 U.S.C. §523(a)(8) was born. Exceptions from discharge included:

A governmental unit, or nonprofit institution of higher education, for an education, for an educational loan, unless[2]

A. such loan first became due before five years before the date of the filing of the petition; or
B. excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents;

Section 523(a)(8)(B), allowing discharge of student loans in the case of "undue hardship" was little discussed and was apparently inserted as a compromise. [3]

In 1979, Section 523(a)(8) was expanded to include programs funded in whole or in part by a governmental unit or nonprofit for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution of higher education, unless

A. such loan first became due five years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or

[1] See, generally, Janice E. Kosel, *Running the Gauntlet of 'Undue Hardship' the Discharge of Student Loans in Bankruptcy*, 11 Golden Gate U. L. Rev. 457 (1981).
[2] P.L. 95-598, Nov. 6 1978. Pub. L. No. 95-598 (11/6/1978).
[3] Kosel, "*Running the Gauntlet*" at 465.

B. excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and debtor's dependents.[4]

The Section was further amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984.[5]

> for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, unless
>
> A. such loan first became due before five years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or
> B. excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

In 1990, under the Crime Control Act of 1990, Congress lengthened the time period for discharge from five years to seven years. By simply removing the words "of higher education," Congress opened the door to protection of private loans:

> for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend unless-
>
> A. such loan, benefit, scholarship, or stipend overpayment first became due more than 7 years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or
> B. excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor or the debtor's dependents;[6]

Next, Congress eliminated the possibility of student loan discharge of government loans unless they would impose "undue hardship"'

> for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a government unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such

[4] P.L. 96-56 (8/14/79) Pub.L. No. 96-56 (8/14/1979).
[5] Pub.L. No. 98-353, 98 Stat. 333 (7/10/1994).
[6] Pub.L. No. 101-647, 104 Stat. 4789 (11/29/1990)

> debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.[7]

Finally, BAPCPA, inexplicably, extended the Section 523(a)(8) exception to private and for profit educational loans:

> 523(a) Exceptions to discharge
>
> …
> (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for –
>
> A.
> i. an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or
> ii. an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
> B. any other educational loan that is qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1996, incurred by a debtor who is an individual.[8]

While Congress was enlarging the nondischargeablity provision of the Bankruptcy Code, it was simultaneously expanding loan servicers' ability to collect on debt by allowing garnishment of wages and even social security benefits. The cost of education also skyrocketed. College costs rose by 50 percent, adjusted for inflation between 1990 and 2005.

Meanwhile, courts have differed widely over the meaning of "undue hardship" and the result is that in some jurisdictions it is almost impossible to obtain a discharge of student loan debt.

II. Judicial Interpretation of "Undue Hardship"

Current law makes it very difficult to discharge any amount of student loan debt. With the high default rate on this debt and the need to preserve this important resource for future students, it is time to explore options for dealing successfully with student loan debt in bankruptcy proceedings.

Under Section 523, to discharge student loans a debtor must show that "excepting such debt from discharge…would impose an undue hardship…"[9] Congress failed to provide guidance

[7] Health Professions Education Partnerships Act of 1998, Pub.L. No. 105-392, 112 Stat. 3524 (11/13/1998).
[8] Pub.L. No. 109-8 (10/17/2005).
[9] Boushey, Heather, "Student Debt: Bigger and Bigger," Center for Economic and Policy Research Briefing Paper (September, 2005), http:/www.cerp.net/publications/studentdebt 2005.

to interpret the meaning of "undue hardship." As a result of circuit split, there are two tests utilized by the circuit courts to determine if a debtor is suffering from an undue hardship: the *Brunner* test[10] and the totality of the circumstances test.[11] The *Brunner* test is more widely adopted, with nine circuit courts applying *Brunner,*[12] which requires the debtor to demonstrate:

> (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans. [13]

Each of these are a "prong," meaning that instead of a factor test where failing to meet one factor is not necessarily dispositive, to receive a discharge under *Brunner* a debtor *must* meet each prong.[14]

The second test, created and applied by the Eighth Circuit, is the "totality of the circumstances" test,[15] which requires examination of a list of *non-exhaustive* factors:

> 1) the debtor's past and present financial resources and those the debtor can reasonably rely on in the future, 2) the reasonable necessary living expenses of the debtor and the debtor's dependents, and 3) any other relevant facts and circumstances surrounding each particular bankruptcy case.[16]

Because this test allows courts to consider additional circumstances, does not require debtors to show additional circumstances and does not require debtor to show good faith efforts to repay the loans, the totality of the circumstances test is generally considered a more lenient test.[17] However, with the majority of circuits applying the *Brunner* test, and some of those

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[10] *Brunner v. New York State Higher Educ. Servs. Corp.,* 831 F. 2d 395, 396 (2d Cir. 1987).
[11] *Long v. Educ. Credit Mgmt. (In re Long),* 322 F. 3d 549, 554-55 (8th Cir. 203).
[12] *See Brunner*, 831 F. 2d at 396; *Oyler v. Educ. Credit Mgm't Corp.* (*in re Oyler*), 397 F. 3d 382, 385 (6th Cir. 2005); *Educational Credit Mgmt. Corp. v. Polleys,* 356 F. 3d 1302, 1307 (10th Cir. 2004); *United States Dep't of Educ. v. Gerhardt (In re Gerhardt),* 384 F. 3d 89, 91 (5th Cir. 2003); *Hemar Ins. Corp. v. Cox (In re Cox)*, 338 F. 3d 1238, 1241 (11th Cir. 2003); *Ekenasi v. Education Resources Inst. (In re Ekenasi)*, 325 F. 3d 541, 546 (4th Cir. 2003); *Brightful v. P.H.E.A.A. (In re Brightful)*, 267 F. 3d 324, 327 (3d Cir. 2001); *Rifino v. United States (In re Rifino)*, 245 F. 3d 1083, 1087 (9th Cir. 2001); *Matter of Roberson*, 999 F. 2d 1132, 1135 (7th Cir. 1993).
[13] *Brunner*, 831 F.2d at 396.
[14] *In re Frushour*, 433 F.3d 393, 404 (4th Cir. 2005)(recognizing that a court cannot discharge student loans under *Brunner* without proving all three prongs).
[15] *Long v. Educ. Credit Mgmt. (In re Long)*, 322 F.3d 549, 554-55 (8th Cir. 2003).
[16] *Id.*
[17] *See* Sarah Edstrom Smith, *Should the Eighth Circuit Continue to Be the Loan Ranger? A Look at the Totality of the Circumstances Test for Discharging Student Loans Under the Undue Hardship Exception in Bankruptcy,* 29 HAMLINE L. REV. 601, 633 (2006) (describing the totality of the circumstances test as a more lenient test).

circuits indicating that Debtors must show a "certainty of hopelessness"[18] in order to discharge a debt, student debtors across the country face considerable obstacles in discharging this debt.

III. Discharging Student Loan Debt Through a Chapter 13 Plan

Debtors who propose a repayment plan under Chapter 13 find it very difficult to repay meaningful distributions to student loan creditors during the course of a Chapter 13 plan.

The Bankruptcy Code, in Section 1322(b)(1), provides that a plan "may designate a class or classes of unsecured claims, as provided in Section 1122 of this title." That designation, however, may not lead to unfair discrimination between the classes of claims so designated. 11 U.S.C. §1322(b)(1). Unless the Chapter 13 debtor can show that discriminatory treatment between similarly situated creditors is necessary for the debtor to successfully complete his Chapter 13 plan, separate classification of student loans and other general unsecured claims is seldom permitted. [19]

In many cases, however, a maintenance payment on the student loan debt has very little impact on creditors of the same class. For Debtors with a large student loan balance, adding the balance of the debt to the unsecured pool to be paid may actually have a more negative impact on the amount to be repaid to all unsecured creditors. Often, the calculation favors a small separate maintenance payment on the student loan, rather than inclusion in the class for receipt of pro-rata distributions, thereby driving down the dividend to general, unsecured creditors.

Income Based Repayment for Student Loan Debt

There are several different income based repayment plans, each of which caps the amount that a student loan borrower has to repay to the federal government at a fixed rate based on the borrower's discretionary income.[20] Further, these plans drive up the borrower's standard repayment plan from 10 years to 20 or 25 years.[21] [22] Different, programs include: Income-Based Repayment (IBR), Pay As You Earn (PAYE), Revised Pay As You Earn (REPAYE), and Income-Contingent Repayment.[23]

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[18] *Oyler v. Educ. Credit Mgm't Corp. (in re Oyler)*, 397 F. 3d 382, 386 (6th Cir. 2005) (requiring that there be a "certainty of hopelessness" in showing that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans).

[19] *Groves v. LaBarge (In re Groves*), 39 F. 3d 212, 215 (8th Cir. 1994).

[20] Brianna McGurran & Teddy Nykiel, Find the Best Student Loan Repayment Plan for You, Nerdwallet (Apr. 8, 2016), https://www.nerdwallet.com/blog/loans/student-loan-repayment-plans/.

[21] *Id.*

[22] However, if a borrower qualifies for PSLF, then the loans will be forgiven after the 10 years of payments that are made while working for a public service entity.

[23] *Id.*

Under the IBR Plan and depending on when the borrower first started taking out loans, the loan repayment will either be capped at 10% or 15% of the borrower's discretionary income.[24] However, the qualifying borrower must suffer from a partial financial hardship, meaning that a borrower's monthly payments on the standard ten year plan could not be under the amount of IBR caps their income.[25] Finally, after a 20 or 25 year term of repaying loans, any remaining debt is forgiven – even if the borrower is working for a private for-profit company.[26] Unfortunately, all the additional debt forgiven is taxable income, and forgiveness under this option can create a substantial tax burden.[27]

Debtors should apply for one of the repayment plans before or as they enter bankruptcy. A reasonable monthly repayment amount should be continued while the Debtor completes a Chapter 13 plan. Maintaining a forgiveness repayment program during bankruptcy effectuates a true fresh start and balances the policy objectives of the bankruptcy system and the expressed governmental interest in maintaining a viable student loan program. It is advisable to have the student loan repayment made through the Trustee to insure that the payment is kept current and to insure complete accounting records.

The Bankruptcy Court in the Middle District of North Carolina has signaled that student loan debt should be paid during the course of a Chapter 13 plan, subject to certain parameters to insure fairness to the student loan creditor and other unsecured creditors.[28] For example, the Debtor should apply for and enroll in an income-driven repayment plan. The bankruptcy plan should not provide for discharge for any portion of the student loan debt. The plan should avoid unfair discrimination in favor of the student loan creditor, i.e. a disproportionate advantage to the student loan creditor. The Debtor must also notify the Trustee of any changes in repayment of the student loan or any default under the repayment plan. The court's approval of such Chapter 13 plan insures transparency while allowing a Debtor to participate in a favorable repayment program.

In the Austin Division of the Western District of Texas, a working group will soon propose a program similar to the North Carolina procedure. The working group includes the local Chapter 13 Trustee, attorneys who represent consumer debtors in bankruptcy, and the local U.S. Attorney on behalf of the U.S. Department of Education. The recommendation procedure will include the Chapter 13 plan language previously approved by the Department of Education.

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[24] *See Income-Driven Repayment Plans for Federal Student Loans,* Federal Student Aid Website, 1 (Feb. 2016), https://studentaid.ed.gov/sa/sites/default/files/income-driven-repayment.pdf (indicating that new borrowers after July 2014 would have the amount capped at 10% of their monthly income).
[25] Brianna McGurran, *Income-Based Repayment: How it Works and Whom It's Best For*, Nerdwallet, https://www.nerdwallet.com/blog/loans/student-loans/what-is-income-based-repayment/.
[26] *Id.*
[27] *Taxability of Student Loan Forgiveness,* FinAid, http://www.finaid.org/loans/forgivenesstaxability.phtml.
[28] *In re Buchanan (Order Confirming Chapter 13 Plan),* Case No. B-14-51161 (Bankr. M.D. N.C. June 12, 2015).

IV. Pending Legislation

There is a plethora of legislation introduced in this Congress, as in the last Congress, intended to provide relief to the beleaguered student loan debtor. The bills from attempting to ensure a better understanding of the student loan process,[29]to providing emergency loan refinancing,[30]to allowing employers to help repay student loans.[31]

Two bills directly address the dischargeablity of student loans in bankruptcy. The Discharge of Student Loans in Bankruptcy Act of 2017,[32] simply seeks to strike Section 523(a)(8), altogether. Passage, of course, would allow the discharge of student loan debt in bankruptcy and return the law to its pre-1976 status. The bill currently has 17 cosponsors.

The second bill, Private Student Loan Bankruptcy Fairness Act of 2017[33] seeks to amend Section 523(a)(8) to allow private education loans to be discharged regardless of whether the debtor demonstrates undue hardship. The bill has 22 cosponsors. It would essentially return the state of the law to its pre-1984 status. It leaves the "undue hardship" language unchanged.

There is some bipartisan support for each of these two bills, although most the sponsors are Democrats. In addition to pending legislation, the current administration has announced plans to make changes regarding student loan forgiveness. The U.S. Department of Education has not approved any applications for student loan forgiveness for fraud since the President took office. There are about 8,000 applications pending.[34] The DOE is preparing a new regulation. There are also reports of discussions to change other student loan forgiveness and student loan repayment plans.[35]

V. Observations and Recommendations

A. Student Loan Debtors Need More Access to Legal Advice.

Some consumer attorneys are engaging in very creative litigation to obtain relief for their student loan debtors. Many debtors, however cannot afford or have no access to attorneys who are willing and able to bring dischargeablity actions for student loan debt. In fact, the problem of access to bankruptcy legal advice is not limited to student loan debt. The Consumer Committee is working on a program for the Annual Spring Meeting in partnership with the Ethics Committee to address possible ways to enlarge access of consumer debtors to the bankruptcy process and competent legal advice.

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[29] e.g. College Transparency Act, H.R. 2434, 115th Cong. (2017 – 2018).
[30] e.g. Bank on Students Emergency Loan Refinancing Act, S. 1162, 115th Cong. (2017-2018).
[31] e.g. Employer Participation in Student Loan Assistance Act, H.R. 795, 115th Cong. (2017-2018).
[32] H.R. 2366, 115th Cong. (2017-2018).
[33] H.R. 2527, 115th Cong. (2017-2018).
[34] PBS News Hour July 26, 2017, 7:39 p.m.
[35] Martha Danilova, *Devos May Only Partly Forgive Some Student Loans,* Las Vegas Rev.J., Oct. 29, 2017 at 10A.

B. Payment of Some Student Loan Debt Through Chapter 13 Plans.

The Middle District of North Carolina and now the Austin Division of the Western District of Texas have developed procedures to allow payment of student loan debt through a Chapter 13 plan. While it is limited to loans paid through an income based repayment program, it can provide some relief. Other Districts should be encouraged to do the same. Further, now that some spade work has been done, consumer debtor practitioners should try to adapt these established procedures to their local practice. Of course, it requires that the student loan debtor apply for one of the income based repayment plans before filing for bankruptcy protection.

C. Court Sponsored Student Loan Debt Mediation.

Promising as it is, payment of student loans through Chapter 13 plans would only assist some debtors with some loans. A practitioner who represents a student loan servicer has suggested that mediation appears to be very effective in reducing or discharging student loan debt. In view of the fairly successful mortgage mediation programs, perhaps a similar program aimed at student loan debt would work. Many bankruptcy courts already encourage mediation of adversary proceedings. Possibly a local rule requiring mandatory mediation for student loan dischargeablity actions would serve the same purpose.

D. Amend Section 523(a)(8).

There are two bills pending currently. H.R. 2366 seeks to strike Section 523(a)(8) from the Bankruptcy Code and allow student loan debt to be treated as any other unsecured debt. H.R. 2527 would amend Section 523(a)(8) to allow private education loans to be discharged through bankruptcy.

Striking Section 523(a)(8) goes too far. There is a reason to discriminate in favor of federal student loan programs. Student loan repayment affects future generations of students. The purpose of the student loan programs has always been to ensure a supply of well trained professionals and technical people and to allow educational opportunities to every person who would benefit.

On the other hand, since it is a mystery why BAPCPA expanded Section 523(a)(8) protection to private loans, H.R. 2527 ought to be endorsed. It should go a little further, however, and strike "undue" from the "undue hardship" language. This time Congress should add some guidance for the hardship test. Hardship should be based on the totality of the circumstances including the debtor's past, present and predictable future financial resources and the reasonable, necessary living expenses of the debtor and debtor's dependents.

It seems that an amendment to the statute is necessary. It has become all too clear that DOE policies can be changed at the stroke of a pen and with a change in administrations. Student loan debtors should be able to rely on repayment or discharge policies.

E. Amend Section 1322(b).

The committee recommends a revision to Section 1322(b) to carve out student loan debt similar to the current treatment of co-signed obligations. The revised statutory language would allow separate classification and treatment of student loan debt for a debtor enrolled in an income driven repayment plan, as defined under the Higher Education Act.

Nutter

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November 29, 2017

Robert M. Lawless
Max L. Rowe Professor of Law
Co-director, Program on Law, Behavior & Social Science
University of Illinois College of Law
504 E Pennsylvania Ave
Champaign, IL 61820

Dear Professor Lawless:

I am writing in my capacity as Special Projects Leader of the ABI's Mediation Committee to make the ABI Commission on Consumer Bankruptcy aware of efforts underway by the Mediation Committee to formulate a Position Statement for the Commission prior to the 2018 Annual Spring Meeting. Although the Committee is not positioned to submit a Statement to the Commission in time for the 2017 Winter Leadership Meeting, we thought it appropriate to alert the Commission to our efforts.

In that regard, in the Fall of 2017, the leadership of the Committee circulated a request to members of both the Mediation Committee and the Consumer Bankruptcy Committee for their experiences and recommendations on the topic of mediation in consumer proceedings. The leadership of the Mediation Committee will meet at the WLC to discuss feedback received. In addition, the Committee's first newsletter in early 2018 will be devoted to consumer mediation and will also solicit input to help inform the Committee's proposed Position Statement, which we have begun to outline.

As you know, the "List of Topics" published by the Commission does not explicitly include mediation. I, along with other members of the Committee's leadership team, believe that the Commission's consideration of mediation will help it fulfill its charge of "researching and recommending improvements to the consumer bankruptcy system that can be implemented within its existing structure."

We understand that the Commission is operating under a tight deadline and plan to submit our statement sufficiently in advance of the 2018 ASM to allow for meaningful consideration. I regret that I will not be able to attend the WLC in person this year but look forward to attending ASM. In addition, I know that many members of our Committee will be attending next week (including Committee chairs Jerry Markowitz and Rick Mikels) who are familiar with the Committee's special project of contributing to the Commission.

Thank you and all members of the Commission for your dedication to this important topic

Very truly yours,

John G. Loughnane

cc: Jerry M. Markowitz, Esq.
Richard E. Mikels, Esq.
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Statement of the ABI Mediation Committee

Prepared for the ABI Commission on Consumer Bankruptcy

March 2, 2018

Introduction

The ABI Mediation Committee ("Committee") respectfully submits this statement ("Statement") to the ABI Commission on Consumer Bankruptcy ("Commission") to assist the Commission in fulfilling its charge of "researching and recommending improvements to the consumer bankruptcy system that can be implemented within its existing structure." As set forth below, the Committee believes that opportunities for mediation should be expanded in consumer matters. In that regard, the Committee urges the Commission to adopt the specific recommendations identified below.

This Statement consist of three parts. Part I contains background information regarding the Committee's work analyzing mediation in consumer matters. Part II discusses a sampling of: (A) existing court programs for mediating consumer disputes; (B) empirical evidence regarding the effectiveness of such programs; and (C) perspectives from experienced consumer practitioners and judges regarding such programs. Part III sets forth specific recommendations for the Commission.

As described below, mediation plays an important role in the resolution of disputes in consumer bankruptcy proceedings. Unfortunately, as currently formulated, the nation's bankruptcy system does not uniformly reap the benefits of mediation as not all districts have such programs. The Committee urges the Commission to act to improve the system by addressing this issue.

I. **Background**

In the Fall of 2017, leadership of the Committee discussed the "List of Topics for ABI's Commission on Consumer Bankruptcy" (available here) and noted the absence of mediation from the list. That observation led to the Committee's commitment to undertake a special project assessing the use of mediation in consumer cases and preparing a statement to make specific recommendations to the Commission.

By letter dated November 29, 2017 the Committee informed the Commission of work performed as of that date on this topic. The letter outlined a timetable for the Committee to conclude its work and its intent to submit a final statement to the Commission in advance of the Commission's meeting at the 2018 Annual Spring Meeting.

Under the auspices of its Special Projects Task Force, the Mediation Committee has gathered information from several sources in connection with the preparation of this Statement including:

- In the Fall of 2017, leadership of the Mediation Committee submitted a request to both the Mediation Committee and the Consumer Bankruptcy Committee seeking both feedback on experiences and recommendations on the topic of mediation in consumer proceedings;

- In December, 2017, the leadership of the Mediation Committee met at the WLC to discuss feedback received as of that date;

- The Committee's newsletter circulated in February 2018 provided an update on the preparation of this Statement and again solicited input on the topic of mediation in consumer cases;

- The Committee requested information from various bankruptcy courts known to have empirical information about the use of mediation in consumer proceedings including: the Central District of California, the Southern District of Florida, the Eastern District of Michigan, and the Western District of Pennsylvania.

After gathering information as set forth above, the Committee's Special Projects Task Force prepared drafts of this Statement which were circulated to Committee members for comment early in 2018. The Committee discussed the status of the work at leadership meetings ultimately agreeing to submit this final form for submission to the Commission.

II. Sampling of Existing Mediation Programs for Disputes Arising in Consumer Cases

A. Types of Consumer Disputes Suitable for Mediation

As noted in the 2016 ABI book Bankruptcy Mediation, in a chapter authored by Judy W. Weiker, "by far the largest category of adversarial disputes [in individual debtor cases] sent to mediation by the courts is whether a discharge should be allowed."[1] The book highlighted common disputes that arise regarding dischargability actions under 11 U.S.C. § 523(a) in individual cases and provided a summary in the following chart[2]:

Chart: Dischargeability Exceptions for Individuals	
Exception	**Dispute**
False Pretenses and Fraud (a)(2)	Mortgages and Consumer Loans
Fraud or defalcation while acting in the capacity of a fiduciary (a)(4)	Business Partnerships
Support Agreements and Debts incurred relating to Divorce Proceedings (a)(5) & (15)	Former spouses and child dependents
Willful and malicious injury to property (a)(6)	Single Asset Real Estate, Landlord disputes
Repayment of educational loans and hardship exception (a)(8)	Student Loans

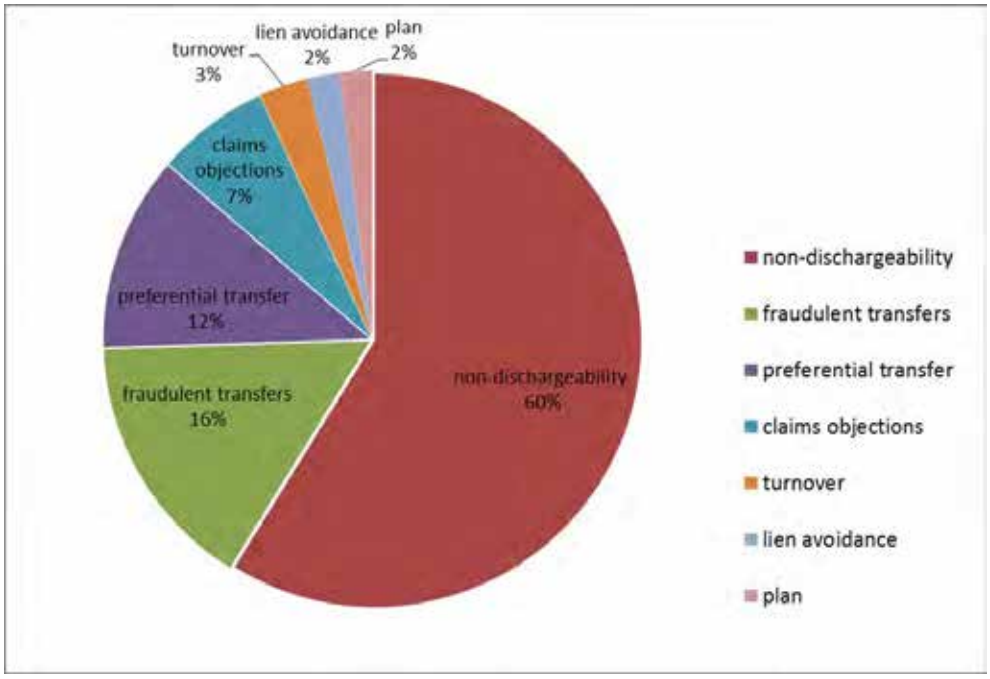
In addition to disputes relating to dischargability issues, another common dispute relating to consumer debtors relates to residential mortgages with certain districts offering loss

[1] Bankruptcy Mediation at 52 n.41 (citing to Steven Hartwell & Gordon Bermant, Alternative Dispute Resolution in a Bankruptcy Court: The Mediation Program in the Southern District of California, FEDERAL JUDICIAL CENTER (1988) ("80 percent [of the adversary proceedings] were brought under 11 U.S.C. § 523(a), Dischargeability, including (a)(2), (a)(4), (a)(5) and (a)(6), which list circumstances and conditions that prevent an individual debtor from receiving a bankruptcy discharge of a particular debt.").

[2] Bankruptcy Mediation at 52.

mitigation or foreclosure mediation programs in Chapter 13 proceedings.[3] In contrast to dischargeability and mortgage modification disputes, which have proven capable of consensual resolution, actions to deny a debtor a discharge under 11 U.S.C. § 727 are often not considered not appropriate for compromise.[4]

The below chart, provided to the Committee from the United States Bankruptcy Court for the Central District of California, shows the percentage breakdown of the types of matters assigned to mediation from the program's inception in 1995 through January 31, 2018.[5] Of the 5,894 matters referred to mediation, 4,784 matters arose in chapter 7 matters and 228 arose in chapter 13 matters.



[3] Bankruptcy Mediation at 56 (listing districts with mortgage modification programs).

[4] See Louis P. Rochkind, Paul R. Hage and Patrick R. Mohan, Not for Sale: An Approach to the Approval of Chapter 7 Discharge Settlements by Trustees, ABI Journal (November 2014) available at https://s3.amazonaws.com/abi-org-corp/journals/2014/july/straight.pdf; See also Andrew F. Emerson, So You Want to Buy a Discharge? Revisiting the Sticky Wicket of Settling Denial of Discharge Proceedings in the Chapter 7 Bankruptcy 92 American Bankruptcy Law Journal 111 (2018).

[5] The percentages in the chart total slightly over 100% due to the overlap of issues in matters assigned to the program.

B. **Empirical Evidence Existing Regarding the Effectiveness of Mediation Programs for Consumer Disputes.**

The Committee collected empirical evidence from several source as detailed below:

- The United States Bankruptcy Court for the Central District of California provided a report to the Committee with details of the program established in that jurisdiction in 1995. A link to the Third Amended General Order No. 95-01 which governs the program is contained in the Appendix. The program consists of a panel (currently numbering 180 members) consisting of attorneys and non-attorney professionals such as accountants, real estate brokers, physicians, and professional mediators. The report provided to the Committee states:

> *All issues which arise in bankruptcy cases are eligible for referral to the Program and all 21 of the active bankruptcy judges in the Central District's five divisional offices assign matters to the panel. From the Program's inception in 1995 through January 31, 2018, the judges have assigned 5,894 matters to mediation; 5,630 of those maters have concluded and 3,526 of the concluded matters settled. The settlement rate has held steady over the years at a very favorable rate of 63%.*

The program solicits feedback by means of a comprehensive, anonymous questionnaire which is sent to all of the parties and attorneys who attend mediation conferences with results tabulated and analyzed by a customized statistics software program. From 1995 through January 31, 2018 the data consistently indicates that approximately 89**%** of respondents are satisfied with the mediation process, approximately 88**%** would use the program again, and approximately 92**%** would use the same mediator again.

- Information provided to the Committee concerning the mediation program in place at the United States Bankruptcy Court for the Western District of Pennsylvania demonstrate the impact in that jurisdiction. Since the beginning of the period during which statistics have been tracked in the jurisdiction (2000), 238 cases have been sent to mediation with 156 reported as fully resolved and another 6 as partially resolved for a resolution rate of 74.7 percent. Mediation survey data collected in 178 cases since June 30, 2013 reveals that mediation cases included 71 chapter 7 cases and 25 chapter 13 cases. Of those 178 cases, 139 were reported as fully resolved and 5 partially resolved.

- The United States Bankruptcy Court for the Eastern District of Michigan reported that its mediation program has been in existence for over 15 years. A link to information about the program is contained in the Appendix. Settlement through mediation has proven more expedient and less costly than traditional litigation. Chief Deputy Clerk Todd M. Stickle reported that mediation has proven to be a "very efficient process" as evidenced by statistics about the program. Specifically, "Settlement rates have averaged around 70% in each of the last three (3) years. Adversary Proceedings typically settle within 63 days of the mediation order." Not

surprisingly, "dischargeability issues are the most frequently mediated nature of suit" as determined by records kept of the mediation program.

- Statistics regarding mortgage modification mediation in the United States Bankruptcy Court for the Southern District of Florida from April 1, 2013 through December 31,2017 indicates that 4,396 matters have reached resolution through mediation out of a total of 13,275 motions filed (including both pro se and attorney motions) which equates to a success rate of 18.32 percent.[6]

- Data from the mortgage modification program of the United States Bankruptcy Court for the Middle District of Florida through October 2017 also revealed impactful results.[7] For example, for 2017 through October, 425 mediations had been completed with 240 modifications achieved for a success rate of 56.5 percent. A total of 3,869 loans have been modified since 2010 through the program.

C. **Perspectives of Consumer Practitioners and Judges Regarding Mediation of Disputes Arising in Consumer Disputes.**

In the course of preparing this Statement, the Mediation Committee received perspectives from bankruptcy lawyers and judges experienced with mediation programs in their districts. The following is a sampling of responses received:

- Michael T. O'Halloran, a practitioner in the Southern District of California for the past 36 years, pointed out several virtues of mediation in the consumer context including the importance of economics savings of an avoided trial, the preservation of judicial resources, the ability to lend a new perspective into a situation not previously considered by the parties, and the opportunity for the parties to learn and evaluate information not previously understood.

- Stuart Gold echoed similar sentiments in noting that success of the bankruptcy mediation program applicable to both commercial and consumer cases in the Eastern District of Michigan since 1997 and the recent introduction of a similar program by the Western District of Michigan. Attorney Gold shared that in light of its reduced costs and time, the overall efficiency of the program has been well documented over time.

- Another practitioner submitting a comment, Marc. S. Stern of Seattle, observed that while mediation is generally beneficial, mandating its use in consumer cases would be undesirable if doing so resulted in an increase of costs. He cautioned that "mandating another procedure that will require additional fees and costs that

[6] Official website of the United States Bankruptcy Court for the Southern District of Florida at http://www.flsb.uscourts.gov/mortgage-modification-statistics

[7] Date for the mortgage mediation program for the Middle District of Florida obtained on November 20, 2017 from Laurie K. Weatherford, Chapter 13 Trustee for the Middle District of Florida.

no one can afford accomplishes nothing except making the process even more expensive and cumbersome."

- Retired Judge Louis Kornreich, who served for the United States Bankruptcy Court for the District of Maine noted that judges actively encouraged mediation in that jurisdiction with another judge in appropriate cases. Judge Kornreich reported that "Most parties took advantage of the opportunity; and most referred cases settled." He attributed the success to several factors including: (i) the voluntariness of the program; (ii) the skills of the judicial mediators who served; (iii) the cost advantages of settlement before a judicial mediator as opposed to litigation; (iv) the desire of many attorneys to air a troublesome case informally before a neutral; and (v) the inclination of the judicial mediators to educate the parties and counsel at the mediation session. Judge Kornreich highlighted the importance of the educational component: "More often than not, debtors and creditors in consumer cases did not understand the nature of the proceedings and frequently their attorneys lacked broad experience in bankruptcy matters. The judicial mediators were able to fill this gap with instruction on the general nature of the law and its application without rendering legal advice or providing conclusions. This information often diffused the tensions and created an environment conducive to settlement."

III. **Recommendations**

As noted above:

1. Mediation has proven to be important means of enabling the resolution of certain disputes in consumer cases in districts with mediation programs.

2. Local rules in certain jurisdictions providing for mediation in consumer cases have achieved notable success on a number of levels – for the disputants, for the mediators and for the courts. Of course, not all cases mediated result in a consensual resolution but even the process of mediation can be beneficial in narrowing issues, conserving resources and furthering the interests of justice.

3. The existence of an opportunity for mediators to serve in select cases on a pro bono basis has also proven valuable to mediators in gaining experience, to parties lacking resources to pay and to the courts.

For all of those reasons, the Committee recommends to the Commission that any consideration of changes to consumer provisions of the Bankruptcy Code emphasize and take necessary action to ensure counsel and judges consider mediation in every contested matter/adversary proceeding arising in consumer cases for which a compromised result would be acceptable. Towards that end, the Committee believes the Commission should act to encourage the establishment of procedures for the referral of disputes in consumer proceedings to mediation. Such procedures should include the establishment in each judicial district of a registry of qualified mediators. In addition, the procedure should provide for the availability of

pro bono mediation with the Court authorized to make a condition of serving on the registry a mediator's indication of willingness to accept pro bono assignment periodically.

Conclusion

In sum, the ABI Mediation Committee believes that it is imperative that the ABI Commission on Consumer Bankruptcy take action to promote the continued adoption and use of mediation in consumer cases. The successful experiences of the judicial districts that have used such programs should serve as a basis for widespread adoption.

The Committee is grateful to all who contributed information for the preparation of this Statement and to the volunteers on the Commission for the work devoted to the study of these issues. The Committee looks forward to presenting further on this topic at the Commission's meeting on April 20, 2018 to be held in conjunction with the 2018 ABI Annual Spring Meeting in Washington, DC.

Appendix

A. **Summary by Judicial District for United States Bankruptcy Courts with Mediation Rules** -- https://mediatbankry.com/2016/12/06/a-list-of-bankruptcy-districts-that-have-and-have-not-adopted-local-mediation-rules/

B. **Sampling of Local Rules/Orders Establishing Mediation Programs**

1. United States Bankruptcy Court for the Central District of California -- http://www.cacb.uscourts.gov/sites/cacb/files/documents/general-orders/3rd%20Amended%20G.O.%2095-01.pdf

2. United States Bankruptcy Court for the District of Massachusetts -- http://www.mab.uscourts.gov/pdfdocuments/localrules/appendix/2016_Appendix7.pdf

3. United States Bankruptcy Court for the Eastern District of Michigan -- http://www.mieb.uscourts.gov/sites/default/files/courtinfo/LocalRules.pdf (Rule 7016-2)

4. United States Bankruptcy Court for the Western District of Michigan – Administrative Order 2016-1 dated January 5, 2016 entered as an interim rule adopting Alternative Dispute Resolution procedures for the Court -- http://www.miwb.uscourts.gov/sites/miwb/files/general-ordes/ADR.pdf

5. United States Bankruptcy Court for the Middle District of Florida – Third Amended Administrative Order Prescribing Procedures for Mortgage Modification Mediation -- http://pacer.flmb.uscourts.gov/administrativeorders/DataFileOrder.asp?FileID=67

Access to Justice Lab | Center on the Legal Profession
Harvard Law School

Open Letter to the ABI Commission on Consumer Bankruptcy:
Language Access in Bankruptcy Proceedings

November 16, 2017

The Access to Justice Lab at Harvard Law School is engaged in a randomized control trial to investigate the effectiveness of legal assistance and financial counseling on consumes facing financial distress, including bankruptcy.[1] Through the course of our research and development of self-help materials for study participants, we have learned that federal bankruptcy court forms and information are not available in languages other than English. The lack of language access in bankruptcy court constitutes a significant access to justice gap in bankruptcy proceedings.

The federal government has acknowledged that bankruptcy proceedings are complex and that people who participate in them need a minimal level of support. To that end, it established the U.S. Trustee Program, which assists with some aspects of preparing for bankruptcy proceedings, including interpreting and translation.[2] In fact, the U.S. Trustee Program is *required* to do so. Federal agencies, including the Executive Office for United States Trustees—the office that oversees the U.S. Trustee Program—must comply with Executive Order 13166, which requires federal agencies and recipients of federal funding to provide language access to avoid discrimination on the basis of national origin.[3] As required by Executive Order 13166, the

[1] More information about the Financial Distress Research Project is available on the Access to Justice Lab website, at http://a2jlab.org/current-projects/signature-studies/financial-distress/.

[2] "The United States Trustee Program is the component of the Department of Justice responsible for overseeing the administration of bankruptcy cases and private trustees under 28 U.S.C. § 586 and 11 U.S.C. § 101, et seq." https://www.justice.gov/ust

[3] *Improving Access to Services for Persons with Limited English Proficiency*, 65 Fed. Reg. 50,121 (Aug. 16, 2000), *available at* https://www.gpo.gov/fdsys/pkg/FR-2000-08-16/pdf/00-20938.pdf. See also *Lau v. Nichols*, 414 U.S. 563 (1974) (failure to provide language access constitutes national origin discrimination, in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.).

Access to Justice Lab | A2JLab.org
Center on the Legal Profession | Harvard Law School
Austin 009 | 1515 Massachusetts Ave. | Cambridge, MA 02138

Trustee Program has developed a language access plan that lays out its strategic goals for providing written and spoken language access to LEP individuals navigating the trustee process.[4]

Unfortunately, language access stops cold when bankruptcy proceedings begin in court. Paradoxically, limited English proficient (LEP) individuals seeking financial relief can move forward in a language they understand, but only up to the courthouse doors. With the disappearance of translated materials and interpreters, LEP parties must surmount the twin obstacles of dense legal procedure and language barriers.

State courts are required by the federal government to provide exactly this type of language access. After the promulgation of Executive Order 13166, regulations and guidance from the Department of Justice made clear that state trial courts are required to provide interpreters and translated written materials in whatever languages people need in order to understand their interactions with the courts.[5] Indeed, the Department of Justice has engaged in a number of enforcement actions against state court systems that fail to provide adequate language access.[6]

While federal law has been interpreted to require language access in federal executive agencies and state courts alike, that interpretation has not been uniformly extended to federal courts. Title VI does not apply to federal courts, as federal courts are ironically not considered recipients of federal financial assistance nor "federally-conducted programs."[7] The question of

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[4] Executive Office for United States Trustees, *Language Access Plan for Implementation of Executive Order 13166* (2011), *available at* https://www.justice.gov/sites/default/files/ust/legacy/2012/03/26/lang_assistance_plan.pdf. The Bankruptcy Information Sheet, for example, has been translated into over fifteen languages. *See* https://www.justice.gov/ust/bankruptcy-information-sheet-0. No such language access plan or translation of instructions exists in the bankruptcy court system.

[5] *See* 28 CFR 42.104(b)(2); G*uidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons* (2002), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/DOJFinLEPFRJun182002.pdf.

[6] The Department of Justice has conducted investigation and/or enforcement of state court systems in Arizona, California, Colorado, Hawai'i, Kentucky, Maine, Michigan, New Jersey, North Carolina, Pennsylvania, Rhode Island, Tennessee, and Washington State. "State Court Enforcement and Investigation Materials," https://www.lep.gov/resources/resources.html#SCGuidance. *See Language Access Guidance Letter to State Courts from Assistant Attorney General Thomas E. Perez* (Aug. 16, 2010), *available at* http://www.lep.gov/final_courts_ltr_081610.pdf (admonishing state courts for slow implementation of Title VI requirements, noting court policies and practices that "significantly and unreasonably impede, hinder, or restrict participation in court proceedings and access to court operations based upon a person's English language ability."). *See also* Justice Index, mapping states' promulgation of language access requirements in civil proceedings.

[7] "Activities wholly carried out by the United States with Federal funds . . . are not included in the list [of federally assisted programs]. Such activities, being wholly owned by, and operated by or for, the United States, cannot fairly be described as receiving Federal 'assistance.' While they may result in general economic benefit to neighboring communities, such benefit is not considered to be financial assistance to a program or activity within the meaning of title VI." *U.S. Dept. of Transp. v. Paralyzed Veterans of America*, 77 U.S. 597, 612 (1986), quoting legislative history of Title VI, 110 Cong.Rec. 13380 (1964). The scope of Executive Order 13166 is limited to the executive branch.

whether lack of language access is a violation of due process has been argued in federal court, with mixed results.[8]

One federal statute does make plain that language access should be available in bankruptcy courts: the Court Interpreters Act.[9] While this Act does not specifically mention written translations, it does require courts to respond to litigants' requests for interpreters "where possible, [by] mak[ing] such services available to that person on a cost-reimbursable basis."[10] On this narrower interpretation of language access, bankruptcy courts still fail. They do not provide certified interpreters as described in the law.

As the Commission considers recommendations for the future, including changes to court forms and notices, we urge the adoption of translated forms and certified interpreters in bankruptcy proceedings. Translation of vital documents[11] such as court forms is consistent with the spirit of due process, Title VI, and the fair administration of justice, and has the added benefit of improving efficiency and accuracy of court proceedings.

Thank you for your consideration.

Sincerely,

Erika J. Rickard, Esq.
Associate Director of Field Research
Access to Justice Lab
erickard@law.harvard.edu

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[8] E.g., *Loyola v. Potter*, No. C 09-0575 PJH, 2009 WL 1033398, at *2 (N.D. Cal. Apr. 16, 2009); Fessehazion v. Hudson Grp., No. 08 Civ. 10665(BJS)(RLE), 2009 WL 2596619, at *2 (S.D.N.Y. Aug. 21, 2009), abrogated on other grounds by Fessehazion v. Hudson Grp., No. 08 Civ. 10655(BSJ)(RLE), 2009 WL 2777043 (S.D.N.Y. Aug. 31, 2009); *In re Morrison*, 22 B.R. 969, 970 (Bankr. N.D. Ohio 1982) (holding that the Constitution did not require appointment of an interpreter in a bankruptcy case because no fundamental right was at stake). *See generally* Laura K. Abel, *Language Access in the Federal Courts*, 61 DRAKE L. REV. 593 (2013) (examination of due process rights to LEP litigants in criminal and civil proceedings in federal courts, including bankruptcy court), *available at* http://ncforaj.org/wp-content/uploads/2013/12/abel-ncaj-language-access-federal-courts.pdf.

[9] 28 U.S.C. § 1827 (2006).

[10] *Id*. at § 1827 (g)(4). The Act provides greater language access obligations in proceedings initiated by the federal government. In other proceedings, the court can charge the litigant for the cost of the interpreter. In practice, this provision of certified interpreters, even reimbursed by the litigants themselves, is not followed.

[11] In the context of courts, "vital" documents include "court forms, consent or complaint forms, notices of rights, and letters or notices that require a response." Department of Justice, Language Access Planning and Technical Assistance Tool for Courts 2, 13 (2002), https://www.lep.gov/resources/courts/022814_Planning_Tool/February_2014_Language_Access_Planning_and_Technical_Assistance_Tool_for_Courts_508_Version.pdf. *See also Guidance to Federal Financial Assistance Recipients*, *supra* n. 5.

American Payroll Association

Government Relations • Washington, DC

April 27, 2017

Commission on Consumer Bankruptcy
American Bankruptcy Institute
Attn: Honorable William Brown
Honorable Elizabeth Perris
Commissioners
ConsumerCommission@abiworld.org

Re: Commission on Consumer Bankruptcy

Dear Honorable William Brown, Honorable Elizabeth Perris, and Commissioners:

Thank you for taking a lead role in examining the consumer bankruptcy system. The American Payroll Association (APA) is formally requesting to participate in the ABI Commission on Consumer Bankruptcy.

Established in 1982, the APA is a nonprofit professional association serving the interests of more than 20,000 payroll professionals in the United States. The APA's primary mission is to educate members and the payroll industry about the best practices associated with paying America's workers while complying with all applicable federal, state, and local laws. The APA's Government Relations Task Force (GRTF) works with legislative and executive branches at the federal and state levels to help employers understand their legal obligations with significant emphasis on minimizing the administrative burden on government, employers, and individual workers. In addition, APA's GRTF participants willingly share their expertise with other organizations to develop best practices and improve processes and procedures.

APA's GRTF Subcommittee on Child Support and Other Garnishments is very interested in the mission of the Commission to recommend improvements to the consumer bankruptcy system. As payroll professionals who process bankruptcy orders and send payments to trustees for employees under Chapter 13 bankruptcy protection, we are committed to working together with all parties to increase efficiency and make system enhancements. APA supports a repayment process that emphasizes a reasonable approach for employees without unduly increasing the administrative burden on employers.

We are open to recommendations on how to best serve the ABI Commission on Consumer Bankruptcy. Please consider APA for the Chapter 13 Committee and the Committee on Case Administration and the Estate.

1601 18th Street, NW, Suite 1, Washington, DC 20009 ● Phone 202-232-6889 ● www.americanpayroll.org

To discuss APA's request further, please contact Corri Flores at 909-971-5858 (office), 909-895-9565 (mobile), or by email at corrinne.flores@adp.com.

Sincerely,

Corri Flores
Chair, GRTF Child Support and Other Garnishments Subcommittee
American Payroll Association

William Dunn, CPP
Director, Government Relations
American Payroll Association

American Payroll Association

Government Relations • Washington, DC

American Bankruptcy Institute
NACTT 52nd Annual Seminar
July 15, 2017

Commission on Consumer Bankruptcy
Committee on Chapter 13

Written Statement

The American Payroll Association (APA) appreciates the opportunity to participate in the Commission on Consumer Bankruptcy's public meeting. We are committed to sharing our knowledge about the role of payroll professionals in the context of the Commission's mission to recommend improvements to the consumer bankruptcy system. While we have specific recommendations for the Commission to consider, we are open to assisting other stakeholders with their concerns and recommendations.

APA was established in 1982 as a nonprofit professional association serving the interests of payroll professionals in the United States. Today, we have more than 20,000 members. APA's primary mission is to educate members and the payroll industry about the best practices associated with all applicable federal, state, and local laws. Our Government Relations Task Force works with federal and state legislators and regulators to help members understand their legal obligations. In turn, we recommend improvements to minimize the administrative burden on employers, individual workers, and government bodies. We also act with private groups to share expertise and develop best practices for better processes and procedures for all stakeholders.

APA's Subcommittee on Child Support and Other Garnishments is interested in the Commission on Consumer Bankruptcy's Committee on Chapter 13 because our members process bankruptcy deduction orders and send payments to trustees on behalf of employees under Chapter 13 bankruptcy protection.

We offer two primary recommendations for consideration by the Commission: (1) implementation of electronic delivery of bankruptcy deduction orders and electronic transfer of payments to trustees and (2) creating a standardized bankruptcy deduction order form.

1601 18th Street, NW, Suite 1, Washington, DC 20009 ● Phone 202-232-6889 ● www.americanpayroll.org

Develop and implement electronic systems

APA encourages the development and implementation of electronic capabilities for employer receipt of bankruptcy deduction orders and payments to trustees. Given an imperative to keep administrative costs low for employers and to carefully track a debtor's plan, it seems essential that bankruptcy transactions be electronic. Where paper is necessary, i.e., for very small employers or trustees, the bankruptcy system should enable simple electronic fill-in forms or, at a minimum, two-dimensional bar codes for any paper submission process.

A standardized file format would be beneficial to ensure that data elements are consistent among states. Ideally, bankruptcy deduction orders and payments should be processed through a centralized location. This includes electronic funds transfer such as the Third Party Payment file format created by NACHA – The Electronic Payments Association. NACHA's system is already known to employers and financial institutions as a reliable method for paying wages to employees electronically.

Create a standardized Bankruptcy Deduction Order form

APA recommends that the Committee on Chapter 13 develop a standardized bankruptcy deduction order form. Uniformity in forms adds greatly to employers' ability to process bankruptcy deduction orders, which leads to faster, more efficient processing of payments. In turn, a standardized form helps trustees, attorneys, and employees understand what information is needed by employers to effectively process orders.

The standardized bankruptcy deduction order form should include, at minimum, the following information:

- Type of notice, "Bankruptcy Deduction Order."
- Form category, including "Original," "Amended,", or "Termination."
- Type of bankruptcy filing (Chapter 7, Chapter 13).
- Payment remittance identifier, such as the bankruptcy case number.
- Trustee information, including name, business name (if applicable), mailing address, telephone number, facsimile number, and email address.
- Bankruptcy court information, including court name, court clerk's name, mailing address, telephone number, facsimile number, and clerk's email address.

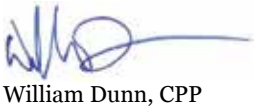
-
- Employee information, including full name, full or last four numbers of Social Security number, and any other identifying information (if known), such as the date of birth and home address.
- Fixed withholding dollar amount per month or specific pay frequency, as applicable.
- Effective beginning date of the wage withholding.
- Specific remittance instructions, including frequency (monthly or by pay period), electronic payment information or mailing address, and contact person's name.
- Contact information to obtain a list of creditors named in the filing.
- Other instructions as determined relevant by the trustee.

Conclusion

APA supports a bankruptcy system that offers standardized, effective, and efficient methods to managing bankruptcy deduction orders, including electronic communication capabilities and forms. We look forward to working with the ABI Commission on Bankruptcy to improve the bankruptcy system. To discuss APA's request further, please contact Corri Flores at 909-971-5858 (office), 909-895-9565 (mobile), or by email at corrinne.flores@adp.com.

Respectfully submitted,

Corrinne Flores
Chair, GRTF Child Support and Other Garnishments Subcommittee
American Payroll Association



William Dunn, CPP
Director, Government Relations
American Payroll Association

From: Kent Anderson
To: ConsumerCommission@abiworld.org
Subject: Discharge of Tax in Bankruptcy
Date: Saturday, April 29, 2017 5:09:14 PM
Attachments: ABA Tax- Proposed Amendment to Bankruptcy Code Section 523(a).pdf
SIL16465.pdf

Thank you for soliciting comments from NACBA members. A both a NACBA and ABI member I would like to comment on the problem that has arisen with discharge of tax due on late filed tax returns. I have attached a copy of the ABA Tax Section recommendation to congress for a fix. I participated in the workgroup that produced the recommendation and I have spoken with both Oregon Senators about this issue. Senator Jeff Merkley has drafted a bill to fix the problem but we are still looking for co-sponsors from the majority party.

I have attached a copy of the ABA recommendation and the proposed legislative fix.

Kent Anderson
Oregon NACBA State Chair
888 West Park Street
Eugene, OR 97401
(541) 683-5100

Section of Taxation

Suite 400
1050 Connecticut Avenue, NW
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202-662-8670
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E-mail: tax@americanbar.org

July 29, 2014

The Honorable Ron Wyden
Chairman
Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, DC 20510-6200

The Honorable Dave Camp
Chairman
House Committee on Ways & Means
1102 Longworth House Office Building
Washington, DC 20515

The Honorable Orrin G. Hatch
Ranking Member
Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, DC 20510-6200

The Honorable Sander Levin
Ranking Member
House Committee on Ways & Means
1102 Longworth House Office Building
Washington, DC 20515

Re: Proposed Amendment to Section 523(a) of the Bankruptcy Code

Dear Chairmen and Ranking Members:

Enclosed please find a proposal for a statutory amendment to section 523(a) of Title 11 of the United States Code (the Bankruptcy Code). This proposal is submitted on behalf of the American Bar Association Section of Taxation and has not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, this proposal should not be construed as representing the position of the American Bar Association.

The Section would be pleased to discuss the proposal with you or your staff if that would be helpful.

Sincerely yours,

Michael Hirschfeld
Chair, Section of Taxation

Enclosure

cc: Mr. Joshua Sheinkman, Majority Staff Director, Senate Finance Committee
Mr. Christopher Campbell, Minority Staff Director, Senate Finance Committee
Ms. Jennifer Safavian, Majority Staff Director, House Ways and Means Committee
Ms. Janice A. Mays, Minority Chief Counsel, House Ways and Means Committee
Mr. Thomas A. Barthold, Chief of Staff, Joint Committee on Taxation
Honorable Mark J. Mazur, Assistant Secretary (Tax Policy), Department of the Treasury
Honorable John Koskinen, Commissioner, Internal Revenue Service
Honorable William J. Wilkins, Chief Counsel, Internal Revenue Service

AMERICAN BAR ASSOCIATION
SECTION OF TAXATION
PROPOSED AMENDMENT TO SECTION 523(a)
OF THE BANKRUPTCY CODE

This proposal ("Proposal") for a statutory amendment to section 523(a) of Title 11 of the United States Code (the Bankruptcy Code) is submitted on behalf of the American Bar Association Section of Taxation and has not been approved by the House Delegates or the Board of Governors of the American Bar Association. Accordingly, this Proposal should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing this Proposal was exercised by Kenneth C. Weil for the Bankruptcy and Workouts Committee. Substantive contributions were made by the following members of the Bankruptcy and Workouts Committee and the Pro Bono and Low Income Tax Clinics Committee: Philip Rosenkranz, Thomas Allington, Maria Dooner, and Kent Anderson. The Proposal was reviewed by Lee Zimet, Chairman of the Bankruptcy and Workouts Committee. The Proposal was also reviewed by Bahar Schippel, Council Director for the Bankruptcy and Workouts Committee, and Frances Sheehy of the Section's Committee on Government Submissions.

Although members of the Section of Taxation who participated in preparing this Proposal have clients who may be affected by this amendment addressed or have advised clients on the application of this proposal, no member has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of this amendment.

Contact:

Kenneth C. Weil
Phone: (206)292-0060
Email: weilkc@weilkc.com

Date: July 29, 2014

EXECUTIVE SUMMARY

This legislative recommendation proposes an amendment to the first sentence of the last paragraph of section 523(a) to title 11 of the United States Code (generally referred to as the Bankruptcy Code).[1] That sentence currently reads as follows:

> For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements).

It is recommended that the phrase "other than timeliness" be added to the parenthetical language so that it would read "(including applicable filing requirements other than timeliness)."

Section 523(a)(1)(B) provides exceptions to discharge for a tax liability with respect to which (i) no return was filed or (ii) a return was filed late and the taxpayer filed for bankruptcy within two years thereafter. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)[2] added the Hanging Paragraph at the end of section 523(a) to address what constitutes a return under section 523(a). If a document does not qualify as a return under the Hanging Paragraph, it results in a nonfiled return under section 523(a)(1)(B)(i). This means discharge is denied for any tax reported on the document. Some courts have interpreted the phrase "applicable filing requirements" to include the filing-due-date. As a result, taxes on late returns, even if only one-day late, are denied a discharge in those courts (the "One-Day-Late Rule"). This reasoning has been followed in one circuit court and a number of bankruptcy courts.

The One-Day-Late Rule appears to conflict with section 523(a)(1)(B)(ii), which allows for the discharge of taxes on late-filed returns as long as two years have passed between the tax-return-filing date and the bankruptcy-petition-filing date. If returns under section 523(a)(*) are only timely filed ones, section 523(a)(1)(B)(ii) is reduced to a meaningless provision. We have not found anything in the legislative history that suggests such a dramatic change in section 523(a)(1)(B)(ii) was intended. The One-Day-Late Rule potentially denies a discharge for those taxpayers who are not penalized under the tax law for filing late.

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[1] The entire paragraph is generally cited as 11 U.S.C. § 523(a)(*), and that paragraph is often referred to as the "Hanging Paragraph." The citation is taken from note three in *McCoy v. Miss. State Tax Comm'n*, 666 F.3d 924, 926 n.3 (5th Cir. 2012) ("We use asterisk to cite to this unnumbered hanging paragraph, something we have done in other cases."), *cert. denied*, 133 S.Ct. 192 (2012).

[2] P.L. 109-8, 119 Stat. 23.

DISCUSSION

Background

Section 523(a)(1) of the Bankruptcy Code[3] sets forth exceptions to the discharge of tax liabilities. Section 523(a)(1)(A) provides restrictions on discharge based on the type of tax, date of assessment, and the age of the tax debt. Section 523(a)(1)(B)(i) and (ii) address non-filed and late-filed returns. Section 523(a)(1)(C) deals with fraudulent returns and willful attempts to evade or defeat the tax. The Hanging Paragraph in section 523(a)(*) states that a "return" for purposes of this subsection is "a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements)." The Hanging Paragraph also provides that the term "return" includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code (IRC) (return prepared by the Service with information disclosed by the taxpayer and signed by the taxpayer) but does not include a return made pursuant to IRC section 6020(b) (a return made by the Service after the taxpayer fails to file a return).[4]

Present Law

Courts have interpreted the "applicable filing requirements" language in the first sentence of the Hanging Paragraph in two different ways.[5] Under the One-Day-Late Rule, courts read applicable filing requirements to include the due date for filing a tax return. This means a late-filed return, even one-day late, is not a return under section 523(a)(1) and taxes on those returns are nondischargeable.[6]

Other courts do not include timeliness as part of applicable filing requirements, *i.e.*, timely filing is not a precondition for the discharge of taxes. Applicable filing requirements looks to "what" is filed not "when" it is filed.[7]

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[3] 11 U.S.C. § 523(a)(1).

[4] This recommendation deals solely with the One-Day-Late Rule. It takes no position on whether a taxpayer can file a valid income tax return for purposes of § 523(a)(1) after the IRS makes a deficiency assessment against the nonfiling taxpayer. *See, e.g.*, *Martin v. United States (In re Martin)*, 500 B.R. 1 (D. Colo. 2013); and *Martin v. IRS (In re Martin)*, 508 B.R. 717 (Bankr. E.D. Cal. 2014).

[5] The current text of the Hanging Paragraph is found in the Legislative History section of this recommendation.

[6] *See, e.g., McCoy v. Miss. State Tax Comm'n (In re McCoy)*, 666 F.3d 924 (5th Cir .2012), *cert. denied*, 133 S. Ct. 192 (2012); *Creekmore v. IRS (In re Creekmore)*, 401 B.R. 748 (Bankr. N.D. Miss. 2008); and *Pendergast v. Mass. Dep't of Revenue (In re Pendergast)*, 494 B.R. 8 (Bankr. D. Mass. 2013). Currently, *McCoy* is the only circuit court opinion on this issue. *See also*, *In re Payne*, 431 F.3d 1055, 1060 (7th Cir. 2005) (Judge Easterbrook dissenting) (after BAPCPA, tax on late-filed return is nondischargeable).

[7] *See, e.g., Gonzalez v. Mass. Dep't of Rev. (In re Gonzalez)*, 506 B.R. 317, 328 (1st Cir. B.A.P. 2014) (definition of return in Hanging Paragraph appears grounded on what is filed not when it is filed); *Martin v. United States (In re Martin)*, 500 B.R. 1, 7 (D. Colo. 2013) (court declines to follow One-Day-Late Rule but does find tax nondischargeable); *Rhodes, III v. United States (In re Rhodes, III),* 498 B.R. 357 (Bankr. N.D. Ga. 2013); and Office of Chief Counsel Notice 2010-16 (tax debt on late-filed return can be discharged).

Legislative History

The legislative history sheds no light on the meaning of "applicable filing requirements." In 1997 and 1998, the first versions of the legislation that became BAPCPA were introduced in Congress. The House version proposed some changes to section 523(a)(1)(B), and some of that language made its way into BAPCPA. The House version had no "applicable filing requirements" language, and it provided as follows:

> (iii) for purposes of this subsection [§ 523(a)(1)(B)], a return--
>
> > (I) must satisfy the requirements of applicable nonbankruptcy law, and includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or similar State or local law; and
> >
> > (II) must have been filed in a manner permitted by applicable nonbankruptcy law ...[8]

This bill passed both the House and Senate but died in Conference.

In the 106th Congress, the Hanging Paragraph made its first appearance. The "applicable filing requirements" language can be found in the bill that passed the House and Senate and was sent to President Clinton for his signature. That bill provided as follows:

> For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.[9]

Thereafter, all subsequent versions of the bill included this exact language, and it is this

[8] H.R. 3150, 105th Cong. § 515 (1998).

[9] S.3186, 106th Cong. § 714 (2000). This bill became a part of H.R. 2415, 106th Cong. § 1 (2000) ("The provisions of S. 3186 of the 106th Congress, as introduced on October 11, 2000, are hereby enacted into law.") H.R. 2415 is the bill that was pocket vetoed by President Clinton.

version that was enacted in 2005 and is in the Bankruptcy Code today.

The best legislative description of this "new" provision is found in a report inserted into the Congressional Record when the 2000 Bill, as approved in Conference, was under consideration for final approval in the Senate. It provided as follows:

> In general, taxpayers cannot be discharged from taxes unless a return was filed. Courts have struggled with what constitutes filing a return. The tax code authorizes the Secretary of Treasury to file a return on behalf of a taxpayer if either (1) the taxpayer provides information sufficient to complete a return, or (2) the Secretary can obtain sufficient information through testimony or otherwise to complete a return.
>
> The conference agreement modifies section 523(a) of the Bankruptcy Code to provide that a return filed on behalf of a taxpayer who has provided information sufficient to complete a return constitutes filing a return (and the debt can be discharged) but that a return filed on behalf of a taxpayer based on information the Secretary obtains through testimony or otherwise does not constitute filing a return (and the debt cannot be discharged).[10]

The Committee Reports accompanying BAPCPA describe the amendment as follows:

> Section 714 of the Act amends section 523(a) of the Bankruptcy Code to provide that a return prepared pursuant to section 6020(a) of the Internal Revenue Code, or similar State or local law, constitutes filing a return (and the debt can be discharged), but that a return filed on behalf of a taxpayer pursuant to section 6020(b) of the Internal Revenue Code, or similar State or local law, does not constitute filing a return (and the debt cannot be discharged).[11]

The "applicable filing requirements" language is never mentioned in any BAPCPA-related committee reports, whether in committee reports for legislation that was never enacted or in the committee reports for BAPCPA itself.[12]

[10] 146 Cong. Rec. S11716 (daily ed. Dec. 7, 2000).
[11] H.R. Rep. No. 109-031, pt. 1 at 103 (2005).
[12] A House Committee Report in 1999 did mention, without explanation, the applicable nonbankruptcy requirement. H.R. Rep. No. 106-123, at § 814 (1999) (This section "also specifies that a tax return, for purposes of section 523(a)(1)(B) must satisfy the requirements of applicable nonbankruptcy law ....")

Analysis

If correct, the One-Day-Late Rule seems to make other rules in section 523(a) of the Bankruptcy Code unnecessary, which rules help define what qualifies as a return and help determine the dischargeability of the tax reported on those returns. This paragraph of the recommendation examines the impact of the One-Day-Late Rule on section 523(a)(1)(B)(ii), the reference to section 6020(b) in the Hanging Paragraph, and the Hanging Paragraph directive to apply applicable nonbankruptcy law.

Section 523(a)(1)(B)(ii) provides for the dischargeability of tax on late-filed returns after two years passes from the filing date. If the One-Day-Late Rule is correct, the tax on late-filed returns does not become dischargeable after two years, even though the language in section 523(a)(1)(B)(ii) states otherwise. The Bankruptcy Court in the Colorado *Martin* case observed as follows:

> This interpretation says too much, however, essentially rendering section 523(a)(1)(B)(ii) superfluous. Section 523(a)(1)(B)(ii) provides that taxes for which a return was filed "after such return was last due" and less than 2 years prior to the date of bankruptcy are not discharged. This section refers specifically to late-filed tax returns, and is the only place in section 523(a) where late filing is specifically referenced. To read "return" in section 523(a)(1)(B)(i) as meaning "timely-filed return" would make the discharge exception of section 523(a)(1)(B)(ii) entirely coincidental with that of section 523(a)(1)(B)(i), except in the case of tax returns prepared under section 6020(a) of the Tax Code more than two years prior to bankruptcy.[13]

In other words, if the One-Day-Late Rule is correct, there was no need to leave the two-year late-filed rule in the Bankruptcy Code. As set forth in the next paragraph, the section 6020(a) exception has never had any meaning as returns are almost never filed under that provision.

Martin references returns prepared under section 6020(a), which appears on its face to be a very broad exception to the One-Day-Late Rule. The Hanging Paragraph allows late-filed returns prepared by the Service with the consent of the taxpayer under the rules of section 6020(a) to qualify as returns. This rule makes sense as discharge is for the honest and cooperative taxpayer, and the taxpayer described in section 6020(a) is clearly that. The problem is that the section 6020(a) exception is illusory. Returns are almost never prepared pursuant to section 6020(a).[14] This means, other than the rare Tax

[13] *Martin v. United States (In re Martin)*, 482 B.R. 635, 639 (Bankr. D. Colo. 2012), *rev'd*, 500 B.R. 1 (D. Colo. 2013) (both the bankruptcy court and district court rejected the One-Day-Late Rule; they disagreed on whether the taxpayer had made a reasonable attempt to comply with the tax law.)

[14] Chief Counsel Notice 2010-16 at p.2 ("the supposed 'safe harbor' of section 6020(a) is illusory'); and *see*

Court stipulation involving a late-filed return, there are no exceptions to the One-Day-Late Rule in the Hanging Paragraph.

Section 6020(b) returns are prepared by the Service without the taxpayer's consent. Such returns are always late-filed. The Hanging Paragraph states that returns prepared under section 6020(b) are not returns for purposes of section 523(a). This rule makes sense as discharge is for the honest and cooperative taxpayer, and the taxpayer described in section 6020(b) is clearly not that. If the One-Day-Late Rule is correct, there is no need to add a reference to section 6020(b) in the Hanging Paragraph that such returns are not returns.[15] In other words, the One-Day-Late Rule makes this language superfluous.

The Hanging Paragraph mandates that a return must satisfy the requirements of applicable nonbankruptcy law, *i.e.*, tax law. Tax law has never had a *per se* timeliness requirement in its definition of a return. The test that is used in tax cases (and in bankruptcy cases when the One-Day-Late Rule is not followed) is found in *Beard v. Comm'r*.[16] Under the *Beard* test, a document qualifies as a return as follows:

(1) It contains sufficient data to allow calculation of tax;
(2) It purports to be a return;
(3) It represents an honest and reasonable attempt to satisfy the requirements of the tax law; and
(4) It is signed under penalty of perjury.

The only place a *per se* timeliness requirement could be interjected into the *Beard* test is in the third element. Courts have split over how to determine what "represents an honest and reasonable attempt to satisfy the requirements of the law." Some courts have used an objective approach focusing on the document itself, and others have applied a more subjective approach that considers the intent of the taxpayer in creating and executing the document.[17]

Regardless of the approach used by courts, objective or subjective, timeliness is not the controlling factor under applicable nonbankruptcy law. Timeliness plays no part in the *Beard* objective approach, and timeliness is not the only determinative factor in the

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Wogoman v. IRS (In re Wogoman), 475 B.R. 239, 249 (10th Cir. B.A.P. 2012) (citing Notice 2010-16 with approval and acknowledging the Service's statement that relief under section 6020(a) is illusory because it prepares returns under section 6020(a) "in only a minute number of cases.")

[15] *Gonzalez v. Mass. Dep't of Rev. (In re Gonzalez)*, 506 B.R. 317, 328 (1st Cir. B.A.P. 2014); and *Martin v. IRS (In re Martin)*, 508 B.R. 717, 727 (Bankr. E.D. Cal. 2014).

[16] 82 T.C. 766, 777 (T.C. 1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986).

[17] *See, e.g.*, *Martin v. United States (In re Martin)*, 482 B.R. 635, 639 (Bankr. D. Colo. 2012) (objective approach), *rev'd*, 500 B.R. 1 (D. Colo. 2013) (subjective approach finding that taxpayer had not made a reasonable attempt to comply with the tax law); and *Martin v. IRS (In re Martin)*, 508 B.R. 717 at 723-724 and 731 (Bankr. E.D. Cal. 2014) (court adopted objective approach and looked only to face of the document).

Beard subjective approach. There is no support for the One-Day-Late Rule in applicable nonbankruptcy law.[18] This means the One-Day-Late Rule is in direct conflict with the language of the Hanging Paragraph that mandates the application of nonbankruptcy law.

The parenthetical "applicable filing requirements" refers to "what" is filed not "when."[19] Applicable filing requirements would include (i) filed under penalty of perjury, (ii) in the correct place, (iii) on the proper form, and (iv) substantially complete. The "what not when" interpretation is consistent with the Hanging Paragraph references to sections 6020(a) and 6020(b). The inclusion of those references show that dischargeability hinges on the taxpayer's cooperation with the taxing authority not timeliness.[20]

This analysis is consistent with the Service's view of the issue. The Office of Chief Counsel rejected the One-Day-Late Rule, concluding instead that "[r]ead as a whole, section 523(a) does not provide that every tax for which a return was filed late is nondischargeable."[21] When presented with the opportunity to use the One-Day-Late Rule, the United States has declined to do so in multiple cases.[22]

Under the One-Day-Late Rule, events beyond the taxpayer's control may result in tax being nondischargeable. While the Tax Code provides many grounds for abating penalties arising from filing a return late,[23] no leeway appears to be provided under the One-Day-Late Rule. For example, if the Service's electronic filing system goes down late on April 15 from system overload, while there may not be a late-filing penalty, that return may be late under the One-Day-Late Rule.[24] Since the One-Day-Late Rule reads the two-year rule of section 523(a)(1)(B)(ii) out of the Bankruptcy Code, if held nondischargeable under the One-Day-Late Rule, the tax on the one-day-late return would remain nondischargeable forever.

The One-Day-Late Rule may negatively impact disaster victims and members of the military serving in designated combat zones. Such taxpayers are allowed to file their returns late, without penalty. But, these are late-filed returns, which means the tax on

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[18] *Martin v. IRS (In re Martin)*, 508 B.R. 717, 729 (Bankr. E.D. Cal. 2014) (in discussing the addition of timeliness to the *Beard* test, Court stated it is a "judicially constructed fiction that lacks any support in the 'applicable nonbankruptcy law.' ")

[19] *Gonzalez v. United States (In re Gonzalez)*, 506 B.R. 317, 328 (1st Cir. B.A.P. 2014).

[20] *Id*; and *see*, 146 Cong. Rec. S11716 (daily ed. Dec. 7, 2000) (distinguishing between the cooperating and noncooperating taxpayer).

[21] Office of Chief Counsel Notice 2010-16 at 2; and *see*, SBSE 05-0613-0054 (June 28, 2013) (citing Notice 2010-16 with approval).

[22] *See*, *e.g.*, *Martin v. IRS (In re Martin)*, 508 B.R. 717 (Bankr. E.D. Cal. 2014); *Martin v. United States (In re Martin)*, 500 B.R. 1 (D. Colo. 2013); *Smythe v. United States (In re Smythe)*, 2012 W.L. 843435 (Bankr. D. Wash. 2012); and *Casano v. United States (In re Casano)*, 473 B.R. 504 (Bankr. E.D.N.Y. 2012).

[23] *See* I.R.M. 20.1 (Penalty Handbook).

[24] *See*, *Martin v. United States (In re Martin)*, 2014 W.L. 508 B.R. 717, 726-727 (Bankr. E.D. Cal. 2014) (courts following *McCoy* would hold debtors who file their own return on April 16 would have nondischargeable tax debt).

those returns may not be eligible for discharge.[25]

The One-Day-Late Rule marks a significant change in the discharge of taxes in bankruptcy. Prior to *McCoy*, there had never been any question that the honest and cooperative taxpayer, after giving the taxing authority a reasonable time to collect, qualified for a discharge of taxes.[26] The Hanging Paragraph advanced this goal by providing clarity regarding issues that were litigated prior to its enactment.[27] The use of the phrase "applicable nonbankruptcy requirements" was certainly meant to do the same, but its interpretation needs clarification.

Absent legislative guidance, some courts will continue to include timeliness as part of the applicable filing requirements. This recommendation simply asks that section 523(a)(*) be amended to exclude timeliness from the applicable filing requirements.

LEGISLATIVE RECOMMENDATION

It is recommended that the first sentence of 11 U.S.C. § 523(a)(*), which is also known as the Hanging Paragraph, be amended to read as follows:

> For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements other than timeliness).

[25] I.R.C. §§ 7508, 7508(a); Rev. Rul. 2007-59, 2007-2 C.B. 582 (special-late-filing rules for military in combat zones and disaster victims do not change return due date; they only waive penalties).
[26] *See Waugh v. IRS (In re Waugh)*, 109 F.3d 489, 492 (8th Cir. 1997), *cert. denied*, 522 U.S. 823 (1997) (discussing three-way tension among general creditors, the debtor, and the tax collector).
[27] *See, e.g.*, *Gushue v. United States (In re Gushue)*, 126 B.R. 202 (Bankr. E.D. Pa. 1991) (Tax Court settlement not equivalent of filed return); and, *Carapella v. United States (In re Carapella)*, 84 B.R. 779 (Bankr. M.D. Fla 1988 (filing of Form 870 waiver of assessment considered a valid return).

STATEMENT TO THE ABI COMMISSION
ON CONSUMER BANKRUPTCY
Committee on Chapter 7

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September 14, 2017

My name is James B. Angell. I am a licensed attorney in the state of North Carolina and I practice with the law firm of Howard Stallings From Atkins Angell & Davis, PA. I have been a panel chapter 7 trustee in the Eastern District of North Carolina since 2002 and I have been a panel trustee in the Middle District of North Carolina since January of this year. My law firm has 13 lawyers with offices in Raleigh, North Carolina and New Bern, North Carolina. I operate my trustee practice from our Raleigh office with two paralegals and my partner, Nick Brown, who assists me in litigation in my cases.

I would like to address the Committee regarding the practice of a trustee employing his or her own law firm as attorney for the trustee. This practice is permitted in both the Eastern and Middle Districts. Our state is one of two states that have Bankruptcy Administrators rather than using the U.S. Trustee system. You will hear the opinions of three parties today – Marjorie Lynch, the Bankruptcy Administrator in the Eastern District, William Miller, the Bankruptcy Administrator in the Middle District, and my own opinion.

As a preliminary matter, it is important to note that 11 U.S.C. §327(d) permits the Bankruptcy Court to authorize the trustee to act as attorney or accountant for the estate if such authorization is "in the best interests of the estate."

In each district, our Bankruptcy Administrator is responsible for supervising trustees and for reviewing applications for attorneys' fees for attorneys for the trustee.

Eastern District. In the Eastern District, trustees must file an application with the court seeking to employ his or her law firm as attorney for the estate. The application is served on the debtor, the debtor's attorney, and the Bankruptcy Administrator and is filed on the docket as a matter of public record. We must file an affidavit with the application stating any potential conflicts of interest. Absent any issues, the Court enters an order approving the trustee's employment of himself or herself upon approval by the Bankruptcy Administrator without a hearing.

Any fees of the trustee also serving as attorney (or other attorneys for the estate for that matter) must be approved by the Bankruptcy Court, after review and opportunity for objection by parties in interest, including the Bankruptcy Administrator. Our fee applications are actively

reviewed by the Bankruptcy Administrator and adjustments are not infrequently requested. Although the general standard is whether a law license is required to perform a certain task, there are gray areas as to what qualifies as attorney time, such as a distinction between an initial analysis of whether there are preferential transfers (which is trustee time), and reviewing the books and records in order to file preference actions (which is attorney time). In addition, attorneys for trustees are subject to rate caps ($325 per hour for the trustee-attorney, $265 per hour for associate attorneys and $150 per hour for paralegals). Inter-attorney conferences are scrutinized and the amount of compensation allowed is reviewed for reasonableness in accordance with the factors set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

Ms. Lynch points out that, while a trustee employing himself or herself as attorney may be said to raise the issue of whether the trustee is sufficiently independent to supervise his or her law firm in light of the potential for fee income, the structures in place in the application process and fee application process provide sufficient structures to prevent abuse. If the trustee hires his firm as general bankruptcy counsel and another firm is retained for a limited purpose, the applications of both will be reviewed to determine that the trustee's firm does not duplicate efforts of outside counsel and the outside counsel's application will be reviewed to ensure that the activities are within the scope of counsel's employment.

Ms. Lynch notes that, in districts in which the practice is prohibited, law firms may enter into reciprocal relationships in which Trustee A employs Trustee B's law firm and Trustee B employs Trustee A's law firm. In such a case, the issue of whether oversight is truly independent may arise in any event, because the promise of future employment may be said to taint a trustee's judgment in limiting compensable activities of the reciprocating firm.

Ms. Lynch emphasizes the economy of the trustee employing himself or herself as attorney, in that there is no duplication of the learning curve required to get counsel "up to speed" in a case. In addition, by virtue of attending the 341 meeting, the trustee is in a unique position to judge the debtor's credibility and to tactically ask questions that might be useful in later litigation.

Middle District. In the Middle District, there is a standing order that approves the trustee's employment of himself or herself as attorney for the estate (the "trustee-attorney"), a copy of which is attached to this Statement.

Any fees of the trustee-attorney (or other counsel for the estate for that matter) must be approved by the Bankruptcy Court, after review and opportunity for objection by parties in interest, including the Bankruptcy Administrator. Our fee applications are actively reviewed by the Bankruptcy Administrator. Attorneys for trustees are subject to rate caps ($300 per hour for the attorneys and $110.00 for paralegals). Inter-attorney conferences are particularly scrutinized and the amount of compensation allowed is reviewed for reasonableness in accordance with the factors set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

As to the policy implication, Mr. Miller states the following:

"I expect trustees to be qualified to handle most legal matters relating to a typical C-7 case. There is an efficiency and avoidance of duplicative time in not having to consult with another attorney, appearing in court yourself, drafting and filing pleadings without having to run them by the "client", not having strategy conferences with outside attorneys, etc. If a specialized legal matter requires expertise or experience outside of the scope of the trustee's background, the trustee is expected to retain special counsel. We endeavor to have a representative portion of the panel be members of firms with substantial resources that can be utilized by the trustee.

"I also think it elevates the level of the panel. If a panel member had to rely solely on trustee commissions, it would be difficult to make that business model work. Having been a panel member and regularly representing myself, it is a huge incentive to pursue litigation claims, avoidance actions, and create asset cases from what appeared to be no asset filings. I could perform title searches, investigate avoidance actions, etc. prior to the 341 meeting and if I identified a potential action, I could proceed at the risk of no compensation. An outside attorney would only accept employment if a colorable claim existed. I feel there is much greater investigation encouraged when a trustee is his or her own counsel. The employment is also on an hourly basis which will only be paid if funds are created. The fees are subject to later approval based upon the case facts. Outside counsel would typically be hired on contingency fee agreements for most matters which may not yield as large a return to claims. On routine matters that might be billed hourly, the trustee is in the best position to efficiently handle such matters. In many jurisdictions, there may be few bankruptcy practitioners and to require a trustee to locate and retain counsel in every case requiring legal assistance would be a significant burden and again add more cost and delay.

"I'm sure I am missing other important considerations, but I feel we have a long and successful track record in our District allowing (and deeming by Standing Order) trustees to represent themselves as attorney in each case. I have seen it from both sides as a trustee and a BA and strongly support the practice of authorizing a trustee serve as his or her attorney."

My opinions. I begin by suggesting that the practice should not be evaluated based on those would abuse it. Although there are certainly trustees who might employ themselves as trustee-attorney for the purpose of over-billing the estate, there is the same possibility that an outside firm might do the same thing. The issue then becomes not so much a question of over-billing by the attorney but a question of inadequate supervision by the trustee. And, again, although there will always be trustees who fail to adequately supervise counsel, whether in their own firm or an outside firm, there are checks and balances in the system that serve to prevent this, as described above. In other words, prohibiting a trustee from employing himself or herself as trustee-attorney will not avoid the problems of overbilling by attorneys or failure to supervise by the trustee.

A trustee and counsel fulfill different roles. The trustee's role is generally (1) to enhance the estate and review claims to make the greatest possible distribution to creditors and (2) to oversee the procedural aspects of the case to ensure that debtors are compliant, are properly entitled to a discharge, and sometimes to assist in referring the case for criminal prosecution. As you are aware, a trustee is compensated on a commission basis based on funds he or she has distributed under 11 U.S.C. §326. A trustee is charged with oversight of officers of the estate.

An attorney's role is to prosecute adversary proceedings and contested matters as directed by the trustee. An attorney deals with formulating claims, drafting pleadings, formulating discovery, motion and trial procedures, and sometimes with legal matters pertaining to transactions by the estate. While most of the matters in which an attorney might be involved will pertain to efforts to enhance the estate, some matters, such as discharge litigation, will not. An attorney is generally compensated on an hourly basis, although the Bankruptcy Code permits compensation on a contingent fee basis in an appropriate case.

There are several policy concerns that support a trustee employing himself or herself as counsel:

a. **Case efficiency** – A trustee who serves as trustee-attorney has greater information about the case than an outside attorney. Although a particular attorney matter may involve a discrete case, the trustee may have general knowledge of the debtor's personality and background, manner of doing business, and the credibility of a debtor or other parties which enhance the trustee-attorney's ability to be successful in a litigation matter.

   Often a litigation matter will begin with the trustee's review of the schedules, testimony at the 341 meeting or from non-debtor sources. In an appropriate case, the trustee will review the debtor's books and records, and, at some point, identify the matter as a litigation matter to be turned over to an attorney. The attorney will evaluate claims and defenses under applicable law and to prepare demand letters or file a complaint. During the course of the litigation, there are opportunities for settlement, which invokes the trustee role, as the trustee evaluates the case and makes settlement offers.

   Requiring the trustee to employ outside counsel requires educating counsel as to the debtor's business, manner of operation, business documents, relationships, principals, etc., which requires time from both the trustee and from outside counsel. In addition, as the case progresses, hiring outside counsel deprives counsel of direct and immediate contact with the trustee's paralegals who are often a fountain of information regarding the case.

   The trustee-attorney will be more sensitive to junctures in a litigation matter which might induce a party to settle due to other factors in the case. In addition, a trustee will

have a greater feel for the probable results in a bankruptcy case and may be able to propose inducements to settle that may not occur to counsel. For example, if there are substantial claims in a case that would reduce a distribution to a particular creditor in claims litigation, the trustee-attorney would be more likely to be aware of this and more likely to propose settlement at an earlier time.

Aside from the additional time necessary to educate counsel as to matters known to a trustee, there is less risk that facts relevant to the counsel's role are not communicated by the trustee to counsel, possibly resulting in savings to the estate.

b. **Roles "informing" each other; integrated case strategy.** Over a long term, the trustee's service as trustee-attorney yields tangible benefits. A 341 meeting is generally an informational session; however, it is also an opportunity to question the debtor under oath. Lawsuits may be won before they are filed if the trustee is familiar with the requirements of trial and the elements of causes of action by asking the debtor specific and detailed questions, as a lawyer would do at trial. The more experience the trustee has as lawyer, the greater knowledge base the trustee has in questioning the debtor at the 341 meeting, seeking documents, or preserving records. Although the 341 meeting is not an attorney activity, the trustee may begin implementing legal strategy in the case at an early stage to obtain legal advantages.

   Similarly, the practice of the trustee serving as attorney will inform the attorney of the fiduciary obligations of the trustee so that the attorney does not lose sight of the "big picture" (i.e., distributions to creditors) while pursuing specific litigation goals of the trustee. A trustee-attorney is more likely to be aware of other potential assets or claims in a case may use that information to induce an opponent to settle.

c. **Greater supervision by trustee.** A trustee is better able to supervise the attorneys in his own office, where he or she can see what they are working on and assist in developing theories or strategies. Supervising an attorney in another office is a different matter as the trustee must then "micro manage" the litigation in order to have the same ability to supervise.

   A trustee-attorney is self- supervising. Although opponents of the practice may contend that the attorney's profit motives may cloud the trustee's judgment, the fact is that all attorneys are self-supervising in making choices as to how to devote time or resources in a case. Not all attorneys exercise self-supervision in a judicious way, but this heralds my plea not to judge the trustee-attorney practice by the worst case – as discussed above, the system has duplicative safeguards in place: the oversight by the Bankruptcy

Administrator/U.S Trustee, caps on rates, opportunities for parties in interest to object, and judicial review.

d. **Greater supervision of trustee.** Section 327(d) is permissive to the Bankruptcy Court. It may authorize a trustee to serve as counsel for the estate – the Bankruptcy Judge has discretion as to whether or not a particular trustee is properly serving the estate as counsel, whether due to overbilling, incompetence, or other factors. Thus, the Bankruptcy Court may discontinue the practice as to all trustees in its district or as to particular trustees as it sees fit. The Courts should retain this discretion as it affects the efficiency and effectiveness of the cases before them, just as they retain discretion as to the amount of attorneys' fees applied for.

   Further, the disincentive to overbill as attorney for the estate is two-fold for the trustee-attorney. If the trustee-attorney is seen to be over-billing the estate, then not only may attorneys' fees be denied in the instant case, but the Bankruptcy Court may deny the trustee to employ himself or herself in future cases. In particularly egregious cases, the Bankruptcy Court or Bankruptcy Administrator/U.S. Trustee may remove the trustee from the panel.

e. **Availability of attorneys.** In certain instances, a trustee may have duties that require counsel that are not compensable or that may arise in "no asset" cases. Examples include terminating pension plans under Section 704 (a) (11) or pursuing voidable transfers or objecting to a discharge in a no asset case. Prohibiting the trustee from serving as attorney may result in a complete lack of representation for the estate.

   Alternatively, the trustee may need to resort to contingency fees due to the risk of nonpayment, which may prove to be more expensive to the estate than hourly representation.

f. **Attracting qualified trustees.** It is impossible to discuss this issue without addressing the economics of the trustee practice. Trustees are paid a $60 fee for a "no asset" case, although they are expected to investigate a debtor for hidden or undervalued assets, as well as avoidable liens and transfers. The internet provides ample means to conduct detailed investigations; however, the $60 fee does not cover the time taken to undertake these investigations, which are generally performed by paralegals, let alone the trustee's time to conduct the 341 meeting and follow through with case reports.

   Attorneys' fees, on the other hand, are billed on an hourly basis, and absent billing judgment, fee reductions from the Court, or a lack of available assets to pay the fees, an attorney is paid for his or her time, albeit at a reduced rate.

All in all, my experience is that there are less write-offs for attorney time than trustee time.

Based on numbers provided to me by the Bankruptcy Administrator, in the Eastern District, for asset cases closed in 2016, total commissions for trustees totaled $505,842.59 and total attorneys' fees totaled $1,055,670.05. In addition, there were 2,224 chapter 7 cases filed in the Eastern District in 2016, resulting in total base fees of approximately $133,440. While the report does not distinguish between attorney-trustees and outside attorneys, it is clear that there is approximately twice the amount of attorney compensation awarded in asset cases compared to trustee compensation. There were 9 active trustees, resulting in an average trustee commission of $71,031.10 ([$505,842.59 + $133,440] / 9). It is simply not feasible to expect qualified bankruptcy attorneys to devote their time to a time consuming trustee practice without the ability to share in the opportunities to earn fees by also serving as attorney for the estate.

g. **Deference to Bankruptcy Judges.** As noted above, Section 327(d) is permissive and provides the Bankruptcy Judges with discretion as to whether to allow trustee-attorneys in their cases. Bankruptcy Judges are charged with judicial oversight of their cases, and are judged on their efficiency in managing their caseloads.

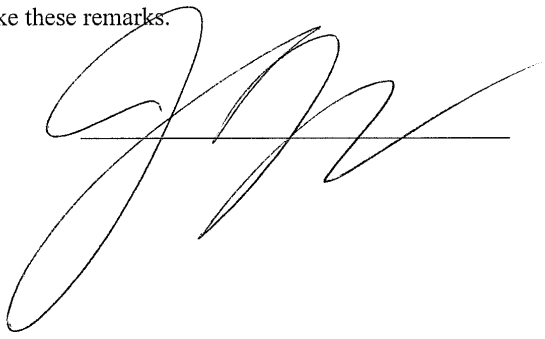
   Changing Section 327(d) to eliminate that discretion in favor of a rigid prohibition of the practice is to tie the hands of judges in controlling their own cases. Just as attorneys will disagree regarding the propriety or wisdom of the practice, judges may disagree as well. The standing order in the Middle District is evidence that at least some judges see the wisdom of allowing trustee-attorneys. Judges should have the discretion to make this call, not Congress.

A skilled and devoted chapter 7 trustee is what makes the system work. Trustees administer chapter 7 cases for the Courts and for the benefit of creditors. It is not generally lucrative work compared to other practices. Most of us perform hourly work at significantly increased rates – some in debtor practices, some in creditor practices. It is a position of trust and we are honored to hold the position.

Although chapter 7 trustees would like to be fairly compensated for their work, as one of my colleagues stated, "Trustees are not in it for the money. If it doesn't piss you off when somebody hides an asset from you or lies to you at the 341 meeting enough to pursue it, you have no business being a chapter 7 trustee."

We should not be judged by the worst among us and the present rule, giving discretion to the Bankruptcy Courts, should not be overturned in favor of a steadfast prohibition.

Thank you for the opportunity to make these remarks.



UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA

In Re	/	
	/	
Authorization of Panel	/	
Trustee to Serve as Own	/	**ORDER**
Counsel in Chapter 7 Cases	/	

IT APPEARING to the Court that Federal Bankruptcy Rule 2014(a) requires that employment of professional persons in a bankruptcy case be requested by a trustee or creditors committee; and

IT FURTHER APPEARING that the members of the Panel of Trustees in this federal judicial district frequently request that they be authorized to serve as their own counsels in Chapter 7 cases in which they serve as Trustee; and

IT FURTHER APPEARING that the Panel Trustees in this federal judicial district continually demonstrate competence to serve as their own counsels in Chapter 7 cases; and

IT FURTHER APPEARING that for each Chapter 7 case in which a Panel Trustee desires to serve as his/her own counsel, that Trustee presently prepares a separate pleading and order for authorization to so serve; and

IT FURTHER APPEARING that the amount of time expended in preparing and processing the paperwork associated with this procedure is substantial and constitutes an unnecessary hardship on the Trustees and this Court's Clerks Office personnel; and

IT FURTHER APPEARING that this Court routinely authorizes Panel Trustee requests to serve as their own counsels in Chapter 7 cases, and for other good cause shown; now, therefore, IT IS

ORDERED, as a standing order of this court, that henceforth any member of the Panel of Trustees serving this Court, who is an attorney admitted to practice before this Court, shall be deemed, upon appointment as Trustee in a Chapter 7 case, to have requested authorization to serve as his/her own counsel in such case; and IT IS

FURTHER ORDERED that all Panel Trustee requests henceforth to serve as their own counsels, within the circumstances described in the immediately preceding paragraph, are, by this Standing Order, deemed authorized and allowed as orders of this Court.

FOR THE COURT:

Dated November 6, 1992

James B. Wolfe, Jr.
Honorable James B. Wolfe, Jr.
Chief Judge

STATEMENT OF LEGAL SERVICES AND PRO BONO ATTORNEYS
ABI COMMISSION ON CONSUMER BANKRUPTCY
SEPTEMBER 26, 2017

Dear Commission Members,

We are legal services and pro bono attorneys who represent low-income debtors in cases under chapters 7 and 13. While our clients share the concerns of median-income consumer debtors addressed by several of the NACBA commenters, many of the issues our clients face are unique and often bear on accessing justice. The most important difference our clients have from median-income debtors is that our clients cannot afford attorneys. Because of this, many of our clients have resorted to filing pro se in the past. From working with these clients, we have gained insight into these pro se filers, a growing body of bankruptcy consumers whose voices may not be adequately reflected among other commenters. We hope that our statement assists the Commission by providing an insight into the obstacles faced by low-income debtors, both represented and pro se, in accessing justice through the bankruptcy system.

FILING FEES

Filing fees are perhaps the most persistent barrier to justice faced by low-income individuals. Justice Stewart, dissenting in *United States v. Kras*,[1] noted that an unwaivable filing fee denies the promise of a fresh start "to those who need it most, to those who every day must live face-to-face with abject poverty," creating a situation where "some of the poor are too poor even to go bankrupt."

Congress has created a system where chapter 7 debtors below a percentage of the relevant poverty guideline may seek waivers of the filing fee. However, the reality is that even today many debtors are still "too poor even to go bankrupt."

Chapter 7

Under 28 U.S.C. § 1930(f)(1), the bankruptcy court may waive the filing fee for an individual chapter 7 debtor with income less than 150% of the relevant poverty guideline and who is "unable to pay that fee in installments." It is this second factor, ability to pay in installments, which creates the greatest obstacle to bankruptcy relief.

Under its statutory authority, the Judicial Conference has issued a policy to assist courts in implementing the bankruptcy fee waiver statute (the "Policy").[2] The Policy states that a court considering ability to pay in installments should consider the "totality of the circumstances." In effect, this leads to nearly unchecked discretion on which low-income debtors may file bankruptcy.

[1] 409 U.S. 434, 457 (1973) (Stewart, J., dissenting).
[2] 4 JUDICIAL CONFERENCE OF THE U.S., GUIDE TO JUDICIARY POLICY § 820 (2015).

As we have experienced in practice, denials of chapter 7 fee waivers for "ability to pay in installments" are often for subjective reasons. While Official Form B 103B, Application to Have the Chapter 7 Filing Fee Waived, asks questions related to ability to pay in installments, courts are not constrained to look only to contents of Official Form B 103B. Courts can impart judgment on the causes and purpose of debtor's bankruptcy filing and scrutinize the reasonableness of the debtor's expenses, including fees paid to help file the bankruptcy case.

Despite the fact that the Judicial Conference Policy provides that "[a] debtor may qualify for a waiver of the filing fee even if the debtor has paid or promised to pay a bankruptcy attorney, bankruptcy petition preparer, or debt relief agency in connection with the filing," we have experienced courts routinely denying fee waiver applications to debtors who have paid for bankruptcy assistance, even at reduced fee or "low bono" rates. As bankruptcy courts have the authority to disgorge unreasonable fees paid for bankruptcy assistance,[3] it makes no sense to punish debtors who have made these payments and who presumably cannot themselves get them back to pay the filing fee in installments.

Courts may also speculate about hypothetical sources of future earnings such as upcoming tax refunds. Conditioning relief on speculations about post-petition income diminishes the fresh start to which chapter 7 debtors are entitled. Further, as noted in the following section regarding the earned income tax credit, many low-income families rely on tax refunds to pay for year-round expenses.

Orders denying fee waivers are seldom published and appealing a denial of a fee waiver is likely to be fruitless: Even if a debtor who could not pay or waive the filing fee can somehow pay or waive the appeal fee, denials are reviewed under a deferential abuse of discretion standard. In pro se cases, a denial of a fee waiver is effectively a dismissal of the case.

The Commission should investigate practices involving filing fee waivers and should recommend a change in the bankruptcy rules or Judicial Conference Policy to curb this discretion or provide clearer standards for what a court may consider in determining ability to pay in installments. One possibility is adopting a bright line test for determining ability to pay in installments. Such a test could impose limits on surplus income and/or liquid assets (adjusted under Section 104) determined as of the petition date. Such a test should be a "safe harbor," meaning that a debtor who fails to meet the test could still offer special circumstances why the filing fee is not affordable.

[3] 11 U.S.C. §§ 110(h)(3)(A), 329(b).

Chapter 13

The filing fee in chapter 13 can create a huge burden in low-income cases where the assumption is that debtors are using all of their disposable income for a plan payment. For many low-income debtors, a filing fee installment is higher than their plan payment. In 1998, the Federal Judicial Center issued a report about six districts which implemented pilot fee waiver programs (the "Report").[4] In the Report, The FJC considered whether the filing fee waiver should be extended to chapter 13 debtors. While conceding that few debtors who could not afford the filing fee could propose a confirmable chapter 13 plan, the FJC noted that a fee waiver in a chapter 13 "might be the only road to filing for a low-income Chapter 13 debtor with a home of modest value who is struggling to pay mortgage arrearages in order to avoid foreclosure."

The FJC also surveyed districts which allowed payment of the filing fee through the plan. At the time, most districts did not allow this form of payment. In the Spring of 1994, the Advisory Committee on Bankruptcy Rules took no action on a proposed amendment to Federal Rule of Bankruptcy Procedure 1006 which would have allowed the practice. The problem of filing fees burdening low-income debtors has not gone away since then. The Commission should recommend that the Rules Committee reassess this issue. The Commission should also consider whether a sliding scale filing fee based upon income may increase accessibility to chapter 13 for low-income filers.

Other Fees

Once a debtor who is not entitled to a fee waiver overcomes the hurdle of paying the filing fee, he or she may be tripped up by various "miscellaneous fees." For example, while the fee for amending Schedules D or E/F is small ($31), for our clients, it can make a big difference. Fees such as the schedule amendment fee discourage pro se debtors from disclosing all of their creditors and in some cases can be case dispositive if a schedule amendment is necessary for confirmation. The Commission should propose abolishing the schedule amendment fee.

While Judicial Conference Policy and 28 U.S.C. 1930(f)(2) permits waivers of "other fees" such as the schedule amendment fee or motion filing fees, there is no clear procedure for seeking such waivers, and the Policy leaves that matter to local rule. For debtors otherwise unable to seek a waiver of the case fee, the Policy incorporates the chapter 7 fee waiver test "defined in Guide, Vol 4, § 820.30(a)(1),"[5] namely income below 150% of the relevant poverty guideline and inability to pay in installments. As it is unusual for a miscellaneous fee to be paid in installments,

[4] FED. JUDICIAL CTR., REPORT TO THE COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON IMPLEMENTING AND EVALUATING THE CHAPTER 7 FILING FEE WAIVER PROGRAM (1998)

[5] So in original. Likely should be a reference to 820.20(a)(1).

presumably this incorporates the problematic "totality of the circumstances" guideline. The Commission should recommend clarification of what standards apply to these waivers and what procedures are necessary to seek them, possibly with an amendment to Fed. R. Bankr. P. 1006 or by proposing a new form.

Finally, with regard to the $298 appeal fee, it is not clear which court is responsible for determining whether to waive the fee. The fee is collected by the bankruptcy clerk, but fee waivers are routinely decided by appellate district courts under the general district court *in forma pauperis* statute, 28 U.S.C. § 1915(a). The Ninth Circuit has determined that its Bankruptcy Appellate Panel lacks authority to grant fee waivers,[6] leading to time consuming transfers of such applications to the district court. The process should be streamlined with a single form which clarifies which court should consider the application and under what statute.

EARNED INCOME TAX CREDIT

The Earned Income Tax Credit ("EITC") is a crucial public benefit to many of our working clients who struggle to provide for their family. Though the EITC is paid once a year, clients rely on the EITC to cover year-round expenses. Unfortunately, a bankruptcy filing can be triggered by something unexpected, like a garnishment or foreclosure. A family's ability to use the EITC to cover vital family expenses should not be hindered by when they happen to file.

While we are not proposing the Commission pursue an amendment to the bankruptcy code itself, we wish to draw the Commission's attention to several provisions of the code which treat the EITC differently than other public benefits, placing a burden on our clients:

- Sections 522(b)(3) and 522(d) provide exemptions for social security, unemployment compensation, public assistance benefits, veteran's benefits, disability benefits, illness benefits, or unemployment benefits, but not the EITC.
- 11 U.S.C. 101(10A), which determines current monthly income for the means test and for the projected disposable income test, excludes social security from current monthly income, but does not exclude other public benefits such as the EITC.
- 11 U.S.C. 1325(b)(2), which determines disposable income, excludes from current monthly income child support payments, foster care payments, or disability payments for a dependent child, but does not exclude the EITC. The test does, however, exclude from disposable income amounts necessary for the maintenance or support of the debtor or a dependent of the debtor. Despite the fact that the EITC exists for just such a purpose, in practice this is not taken into account when determining how much of the EITC must be paid to creditors as part of the bankruptcy case.

[6] *Perroton v. Gray (In re Perroton),* 958 F.2d 889 (9th Cir. 1992); *Determan v. Sandoval (In re Sandoval)*, 186 B.R. 490, 496 (9th Cir. BAP 1995).

- 28 U.S.C. 1930(f) and the implementing fee waiver Policy (as noted above), exclude amounts received as non-cash government assistance from the income prong of the fee waiver standard. They do not, however, exclude the EITC from the income prong or from consideration as a source of funds for the ability to pay in installments prong.

The Commission should investigate these discrepancies and consider whether proposals which protect the EITC to the extent reasonably necessary for the support of the debtor and any dependent of the debtor would increase access to bankruptcy for low-income debtors.

MEETING OF CREDITORS

The new meeting of creditors notices introduced in 2015 (Form B 309A–I) contained many changes designed to ease use by national creditors. However, some of these changes were made at the expense of pro se debtors. The notice, which is full of important information, is difficult to navigate for pro se debtors. One oversight is the fact that the date, time, and location of the meeting of creditors are tucked away on the second page. The notice should place this information front and center.

One of the biggest obstacles to low-income and rural debtors is having to travel a significant distance to the bankruptcy court for a Meeting of Creditors. In "No-Asset" chapter 7 cases, creditors rarely appear. The Commission should research the costs and benefits of handling 341 meetings in such cases by telephone or sworn affidavit. Such a change would streamline the process, reduce the amount of time spent on simple cases, cut costs, and reduce obstacles for the debtors.

CONDUIT PAYMENTS

As attorneys who represent low-income homeowners, we regularly experience confusion and frustration from our clients who have to start writing two separate checks after filing bankruptcy. Frequently, this leads to unexpected stay relief motions and end-of-case payment disputes. Conduit plans (where the trustee collects and pays ongoing mortgage payments) have the potential to cut down on these risks, but if trustees can charge their standard rate on the payments, it could effectively block many of our clients from using chapter 13. While the overall effect of more money coming into the trustee's office would presumably result in a decrease in the trustee's fee percentage, the result would still be that homeowners would bear a disproportionate share of the fees. The Commission should explore the possibility of adopting a national rule on conduit payments, while also considering protections for low-income debtors from excessive trustee fees. Such protections might include a lower trustee commission (such as 1%) on mortgage conduit payments.

OTHER ISSUES

The following are other issues we have encountered as part of our practice we think the Commission should consider in drafting its report. While we are not proposing the Commission pursue an amendment to the bankruptcy code, we believe studying these issues will help the Commission get a better understanding of how consumer bankruptcies work in practice and potential barriers to accessing justice.

Means Test

- The means test already excludes social security from current monthly income, but does not exclude veteran's benefits.
- Debtors who have lost their jobs have to wait 6 months for that income to stop being held against them.

Student Loans

- The rules on unfair discrimination in chapter 13 classification has led to a situation where many borrowers are required to default on current student loans to file chapter 13. As a result, they may experience administrative wage or social security garnishment and intercepts of their tax refunds after discharge.
- Low-income communities have been hit particularly hard by student loan debt, especially for predatory, private schools which target our clients. The current system of requiring proof of undue hardship to discharge all student loans has allowed these predatory institutions to flourish while our clients are burdened with their student debt indefinitely.

Mortgage Mediation

- Mortgage mediation programs have worked out well in the districts that implement them. The Commission should propose best practices for districts interested in starting a program.

We appreciate the Commission's consideration of our statement.

Signed,

Nathan Juster, Atlanta Legal Aid Society, Inc.
Rachel M. Lazarus, Gwinnett Legal Aid
Wilson Webb, Legal Services Alabama, Inc.
Amy P. Hennen, Maryland Volunteer Lawyers Service
Anna Deknatel, Brooklyn Legal Services Corp. A
Leigh Ferrin, Public Law Center

Peter Barker-Huelster, Mobilization for Justice, Inc.
Susan C. Proctor, Blue Ridge Legal Services
Grace B. Pazdan, Vermont Legal Aid, Inc.
Karen Fisher Moskowitz, Charlotte Center for Legal Advocacy
William Ritter, Texas Legal Services Center
Todd S. Kaplan, Greater Boston Legal Services
James L. Baillie, Fredrikson & Byron, Minneapolis, MN
Robert Sable, Greater Boston Legal Services

Lawless, Robert M

From: Babin, Joyce <JBabin@13ark.com>
Sent: Friday, July 07, 2017 6:09 PM
To: 'ConsumerCommission@abiworld.org'
Subject: Request for Public Comments - NACTT Conference - Seattle - July 15, 2017

To the Commission:

The following topics and comments for consideration and study by the ABI Consumer Bankruptcy Commission. These comments are compiled from other attorneys' concerns expressed to me, as well as my concerns.

Debt limits – An increase in Chapter 13 debt limits under 11 U.S.C. § 109(d) should be considered. An increase would make Chapter 13 accessible to more debtors. As part of the study, the amount of the debt increase could be investigated. Some jurisdictions may encounter more debtors that exceed the jurisdictional limits than other jurisdictions around the country. Should the limits be doubled or something less?

Student loans – As student loan debt continues to increase and the related credit problems escalate, it would be beneficial if Chapter 13 could be part of a solution to a borrower's issues rather than a hindrance. Debtors file Chapter 13 cases and cannot propose to pay student loan payments without the treatment being considered discriminatory against other unsecured or including interest. Debtors often depart Chapter 13 cases with larger student loan debts than they had at the time of filing.

Tax liabilities – More debtors are departing bankruptcy cases with tax debts remaining. Debtors will pay IRS priority claims during a case and then learn after completion their plan and case that additional amounts are owed for the tax claims that the debtors thought they had satisfied. This issue appears to be attributable to the IRS's interpretation of "return." Alternatives to allowing debtors to satisfy tax debts during their cases should be investigated.

Forms – The bankruptcy schedules are too lengthy – as in too many pages. The same information could be stated in less space. There is no place to name a joint owner on Schedule A . To determine exemption values, more than one schedule must be consulted; information could be included on Schedule C regarding the claim/debt amount. A debtor's marital status should be included on Schedule I, not the Statement of Financial Affairs. A debtor's dependents should be included on Schedule because the number of dependents is relevant to Schedule I as well as Schedule J.

Mortgage Payments – Consideration should be given to conduit mortgage payments for debtors in all jurisdictions. The success of conduit payments versus debtor-direct payments should be studied.

Success of Chapter 13 Cases – There recently has been more dialogue by academic scholars and practitioners regarding the success of Chapter 13 cases and how to measure a successful case. Further study should be considered. Chapter 13 continues to be a viable option for many debtors and can result in a different "success" for each debtor. Debtors may complete plans, gain more time to address issues, cure defaults and provide distributions to creditors over time that they could not accomplish in a Chapter 7 case or have outside of a bankruptcy situation. Chapter 13 remains a vital part of a successful bankruptcy practice.

Thank you for your important work and consideration of consumer bankruptcy.

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UNITED STATES BANKRUPTCY COURT
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

CHAMBERS OF
JANET S. BAER

(312) 435-6054

November 2, 2017

Re: Statement to the ABI Commission on Consumer Bankruptcy for Public Hearing during the Eugene R. Wedoff Seventh Circuit Consumer Bankruptcy Conference, November 10, 2017

The United States Bankruptcy Court for the Northern District of Illinois has been the busiest jurisdiction in the county for almost two years. This distinction is primarily due to the incredible volume of our consumer docket, both chapter 7 and chapter 13. Prior to taking the bench five years ago, I practiced "big law" bankruptcy. I had never even broken open the chapter 13 portion of the Code. All of that changed when I became a judge. What I found was an often impenetrable statute that frequently focuses on form over substance and requires debtors, some of whom are struggling to afford food or shelter, to navigate a complex array of elaborate provisions and jump through hoops that sometimes appear to serve no useful purpose.

I would like to focus my remarks on just a few of the more troubling aspects of the consumer laws that beg for change. The first is **the chapter 13 debt limits**. A recent review of the legislative history of the debt limits in chapter 13 cases reveal two primary but somewhat conflicting reasons for these caps. The first is that the drafters wanted to provide mom-and-pop businesses and debtors with limited business holdings with an alternative to chapter 11. In other words, the debt limits were allegedly created to make it clear that these small business debtors have an alternative to filing chapter 11 cases. The second reason is similar, but essentially in reverse. That is, the debt limits were created to address concerns that certain debtors, like real estate developers with multiple properties, would use chapter 13 to avoid filing chapter 11, a far more complex and expensive system.

As some of my colleagues have stated in previous hearings before this Commission, the debt limits are provisions that have outlived their usefulness. Given today's marketplace, the secured debt limits with respect to real estate are obsolete and do not take into account, among other things, regional variations in real estate values. Additionally, there is no reason to set an artificial limit in determining who may file for chapter 13 bankruptcy relief. Chapter 13 exists for regular-income earners who need to reorganize their finances and get back on track. The procedures established by and the limitations set on what debtors can do in chapter 13 cases

clearly would not work for commercial businesses of any consequence, and no competent commercial attorney would even attempt to reorganize such businesses under chapter 13. Through bankruptcy counsel's legal knowledge and the Court's supervision, it is easy to decide which debtors should be in chapter 13 and which debtors should be in chapter 11. Artificial debt limits are not needed to make that determination.

Although the issue of **student loans** may not, at first blush, seem connected to the problems associated with debt limits, it is, in fact, very related to debt limit concerns. Due to the cost of higher education, the availability of both government-sponsored and private loans, the challenging job market that our recent college graduates are facing, and the difficulty that debtors encounter in trying to discharge their student loans, it should not be surprising to anyone that we are seeing an increasing number of debtors who are exceeding the debt limit because of their student loans alone or those loans in combination with debts related to homes.

Here is real situation that emphasizes my point. A young man in his late twenties recently filed a chapter 13 case. He is employed on a full-time basis in a tech-related job and makes about $40,000 a year. He is single, lives in an apartment in the suburbs for which he pays rent of $825 per month, and owns a 2005 car with over 150,000 miles. The debtor has approximately $22,000 in credit card debt. He earned an undergraduate degree in liberal arts from a reputable university and a graduate degree in television and film from one of the best schools in the country for that specialty. In connection with his education, the debtor has almost $569,000 in student loan debt outstanding. Of that debt, about $374,000 is owed for Federal Student Aid and $195,000 for private loans. The debtor's father is a co-signor on the private loans. Among his assets, the debtor lists "scripts" that he has apparently written, but, thus far, he is not the next Steven Spielberg or Aaron Sorkin.

This debtor is currently paying his federal loans under an income-based repayment plan. Specifically, he is paying 10% of his discretionary income for a term of 25 years. He filed for bankruptcy under chapter 13 to get some respite from both these payments and the private loan obligations and to protect his father as co-maker on the private loans. Given the amount of student loans that he has, this debtor will never in his lifetime be able to pay all of the debt unless he hits it big in Hollywood with one of his scripts. His father may also have to file a bankruptcy case of his own.

I suppose some could argue that the debtor and his father should have known better than to take out those enormous student loans in order for the debtor to get a degree in a creative endeavor. In today's market, though, there is simply no longer a guaranty that anyone, even those with professional degrees, will fare any better in securing employment or earning a living.

In the meantime, at a minimum, this young man should be allowed to pursue a chapter 13 case in order to give himself some relief from both the student loan obligations and the credit card debt and also to protect his father. If there was ever a debtor who belongs in chapter 13 rather than chapter 11, this is the one.

Further, it is simply crazy that (1) post-high school education is so expensive and (2) we have a system that permits and in fact encourages people to take on this kind of student debt. At

the same time, though, we do not allow the discharge of that debt under any but the most extreme circumstances.

The Bankruptcy Code provides various forms of relief for consumers who have made poor financial decisions and have a vast array of financial issues such as gambling debts, excessive credit card obligations, unpaid income taxes, and over-extensions of home mortgage loans, just to name a few. Remarkably, however, the Code continues to provide no reasonable relief for consumers who are saddled with student loan debt. This simply makes no sense, and the situation is getting worse as the cost of education continues to increase.

Prior to 1978, student loan debt was dischargeable. Subsequently, Congress toughened the law by adding a waiting period of five years, and then seven years, before such debt could be discharged. In 1998, the waiting period was eliminated altogether. In 2005, Congress added private student loans to the mix of debt that cannot be discharged except under the now almost impossible "undue hardship" standard. Ironically, as the cost of higher education has exploded, the ability to discharge this often suffocating debt has effectively been eliminated. And now this crisis in student loan debt is spanning the generations. Last I read, senior citizens have amassed over $18.2 billion of student loan debt, by taking out loans for their own schooling, acting as guarantors on their children's loans, or both. Meeting these obligations comes at a time when these seniors are struggling to pay for living expenses in their retirement and often, at the same time, facing long-term care and medical issues.

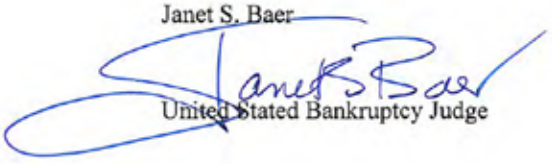
Simply put, Congress needs to address the student loan debt crisis, and the Bankruptcy Code is a logical place to start. The bankruptcy solution might be accomplished in several ways. The definition of "undue hardship" can be amended to be less harsh and rigid than it has become under *Brunner* and its progeny, reasonable waiting periods can be reinstated, and private loans can once again be dischargeable.

Finally, let me address one more of the troubling hoops that an individual consumer debtor must jump through to get into and out of bankruptcy: **credit counseling**. This requirement is another creature of BAPCPA. While it may serve a purpose under some circumstances, by the time debtors need to file a bankruptcy case, any credit education that they should have had is well too late. Typically, these debtors have already incurred far too much debt to recover, their wages are being garnished, their home is being foreclosed, their cars have been towed. In addition, no credit counseling course can prevent the sometimes stifling medical bills they may have incurred, the layoffs from employment that many might be facing, or the funeral expenses that some must pay for the deaths of family members. The last thing that these individuals need under these circumstances is another hoop to jump through before they can file a bankruptcy case.

Instead of expending the time and effort on policing and enforcing the requirements for credit counseling, those resources would be far more valuable channeled to such programs as CARE, which provides education about credit and its abuses to people *before* they get into trouble. The resources would also go a long way to fund the Court's various help desks so that pro se debtors can get real legal help to address their financial problems.

Thank you for your time and attention.

Janet S. Baer



United States Bankruptcy Judge

TO: ABI Commission on Consumer Bankruptcy
FROM: Pam Bassel, Chapter 13 Trustee for the Northern District of Texas, Fort Worth Division
DATE: July 9, 2017

I appreciate the opportunity to share some thoughts with the Commission. I have also requested the opportunity to speak at the hearing at the NACTT conference in Seattle. These are my thoughts:

1. Sale of Collateral

One of the difficult issues families face is the inability to transfer title to property when the automatic stay is terminated or when the debtor elects to surrender collateral in situations where the collateral is not worth as much as the amount of the debt secured by that collateral. Frequently, the lender will not consent to the sale, making a sale pursuant to §363(f) impossible. Allowing the debtor more flexibility to sell such collateral, consistent with protecting the interests of the lender, would increase the likelihood of a successful outcome in Chapter 13 cases.

The issue arises when the automatic stay has lifted or the debtor has elected to surrender collateral and the lender will not foreclose or delays foreclosure for an extended period of time. Often, the debtor elects to surrender collateral because of a change in circumstances, like a reduction in income or a job transfer to a new location, or because the automatic stay terminates when the debtor has been unsuccessful in "saving" a piece of collateral, most often the home. The lender's failure to foreclose leaves the debtor with continued financial responsibilities and liabilities after the debtor no longer needs/wants/is able to retain the collateral. For example, the debtor continues to be responsible for *ad valorem* taxes (if the collateral is real property) or personal property taxes (if the collateral is personalty, like a vehicle), insurance costs, maintenance, HOA dues, etc. The debtor also has continued liability for personal injuries occurring on real property or for damages to or involving the collateral. Sometimes, the debtor is left with collateral they cannot store properly, like a vehicle, because they lack the space to do so.

In these situations, the debtor needs to transfer title to and possession of the collateral, either through foreclosure of the collateral by the lender or, if the lender will not foreclose, through some other means of title transfer. When the lender will not foreclose and the collateral is worth less than the amount that is owed to the lender, the debtor cannot transfer title unless the lender is paid in full or the lender consents. Most debtor counsel in our area report that obtaining lender consent is next to impossible, especially when the collateral is the principal place of residence.

Of primary concern are the provisions of §363(f) which, in pertinent part, provide that:

> The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if –

> . . . (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is great than the aggregate amount of all liens on such property; . . .

The effect of this statutory provision is that when the transfer of property will not produce enough consideration to pay the lender in full, all the lender has to do is say "no" to a saler, creating the situation described above of continued financial responsibilities and liabilities. A reasonable amendment to this statutory provision or a limited exception to it would alleviate this problem. For example, one option might be to give the lender a set period of time to foreclose on collateral from the date the stay terminates or the date a surrender is effective, say 120 days, unless a longer/shorter period of time is ordered by the court on cause shown. If the lender forecloses the collateral within that period of time, it can exercise its right to credit bid. If the lender does not foreclose within that period of time, it would lose its right to credit bid (for the reasons set out below) and the debtor could then file a motion to authorize the sale of property. For example, in the case of a principal place of residence, the debtor could put the house on the market and file a motion to sell the property when a buyer is found. The lender would be noticed, just like any other motion, and have the opportunity to object and be heard. If an objection is filed, the court would make a determination whether the proposed sale is/is not a sale for fair market value. If it is a sale for fair market value, the sale would be allowed. Another example might be a vehicle that has only salvage value. The same procedure could be followed - the debtor could file a motion to sell the vehicle for the salvage value. The lender is protected by the right to object and be heard.

As to the importance of the lender no longer having the right to credit bid after a specified period of time, if the debtor is going to contract with professionals, like a real estate broker, to find buyers for collateral, that professional is going to want some assurance that if they bring an acceptable buyer to the table, they will get their commission. In this scenario, if the lender can credit bid a little bit more than the prospective buyer is offering and derail the potential sale, professionals will not be willing to undertake such a risk. This would hamstring debtors by making it difficult for them to get the professional help they need to obtain a fair market value for the collateral.

In conjunction with an amendment to §363(f), there also should be an amendment to §1322(b)(2) to allow for this type of property transfer regarding a principal residence of the debtor and allowing the lender to assert an unsecured claim for any deficiency.

2. Home Mortgages

There are two issues in this category. The first is the debtor's ability to modify a home loan and the second is the issue of mortgage modifications, also referred to as loss mitigation.

A. Modification of a home loan

Pursuant to §1322(b)(2), the debtor cannot modify the rights of a secured lender when the

collateral for the loan is solely the principal place of residence, except to the limited extent permitted by §1322(b)(5). Along with student loan debt, the mortgage loan and the ability to service it is the largest issue facing most of the debtors who file a Chapter 13 proceeding. Is there a logical reason to treat mortgage lenders secured by the home so differently than lenders secured by other types of property? Some ability to modify the interest rate and extend the term of repayment of the principal, including that portion of a pre-petition arrearage attributable to unpaid principal (and interest perhaps), should be permitted.

There are several possible variations on this basic idea. Perhaps there could be a requirement that any pre-petition escrow shortage must be repaid over the term of the Chapter 13 plan in order for the debtor to qualify for a discharge. Perhaps the debtor could be required to repay all pre-petition escrow shortages and pre-petition interest over the term of the Chapter 13 plan, allowing the debtor to re-amortize the principal owed as of the date of filing at the same type of interest rate other secured lenders receive in a Chapter 13 proceeding and pay that part of the debt (plus required escrow payments) over a longer period of time than the term of the plan. Perhaps the debtor could be permitted to re-pay the loan at a ***Rash*** type of interest rate over the term of the plan (in addition to repaying pre-petition escrow shortages or pre-petition escrow shortages plus accrued pre-petition interest), but then must resume making payments at the contractual rate of interest once the discharge is granted. Perhaps there should be a limit on the amount of time the debtor can extend the term for repayment without lender consent. Perhaps these loans should be subject to cram down where appropriate. There are a number of possibilities that give the debtors some relief, while still protecting the rights of the lender.

B. Home Loan Modification

This is just to mention that the NACTT Mortgage Loan Committee has a subcommittee tasked with creating a streamlined, standardized approval process for home loan modifications. The subcommitee will report its preliminary recommendations to the Committee at large at the NACTT meeting in Seattle. Adoption of the recommendations of the Committee, either as a recommendation by the ABI Commission or, potentially, as a change to the Federal Rules of Bankruptcy Procedure at some point in the future, would be a huge help in standardizing the process and making it easier for the administration of trial period payments in conduit jurisdictions. Such standardization would also, hopefully, help debtors successfully obtain a modification of their home loans. The best end result possible would be if lenders had one set of procedures to follow, rather than having to deal with variations in procedures from district to district, division to division and, sometimes, judge to judge. Standardization of the implementation and approval of home loan modifications would also support and improve the loss mitigation programs that are already implemented or being considered in several jurisdictions.

3. Use of the IRS Standards in Determining Disposable Income in Above-Median Cases

In determining disposable income in cases involving above median debtors, Chapter 13 Trustees utilize Official Form 122C-2 entitled "Chapter 13 Calculation of Your Disposable Income." As you doubtless know, the debtor completes the form using, at least in part, standards

established by the IRS regarding certain basic necessities like housing, vehicle expenses, etc., and can also provide for the deduction of other expenses. Many courts have made the determination, based on the provisions of §1325(b)(3), that an above median debtor is entitled to deduct the full amount of the IRS standard, even if the debtor's actual expense is less than the standard. For example, in our region, the standard for vehicle ownership is $485.00 monthly and, under the logic of these cases, even if the actual monthly car payment is $315.00, the debtor is allowed to deduct the full $485.00.

The above median debtor should not be allowed to deduct an expense he/she does not actually have. First, allowing them to do so artificially reduces the disposable income available to pay unsecured creditors. Second, it unfairly discriminates against below median debtors because they are allowed to deduct only the actual monthly payment, in this example, $315.00.

4. Exclusion of certain types of income from the Means Test and in Calculating Disposable Income.

An example of this is §1325(b)(2), as well as other provisions of the Code, which exclude certain types of income when calculating the debtor's total income as well as the debtor's disposable income. This creates an imbalance and a double-dip.

With regard to §1325(b)(2), for example, it provides that we exclude child support payments, foster care payments and disability payments for a dependent child. We do not count these payments as income, but we do allow the debtor to deduct the living expenses of the child, including the child's special needs, in determining disposable income. If the debtor is entitled to deduct the living expenses, the debtor should also be required to count the income in their total monthly income and that income should be included in the Means Test and in the disposable income calculation. The same analysis holds true for other types of income currently excluded from these calculations.

5. Student Loan Debt

Along with the home mortgage issue, student loan debt is a huge problem for many struggling families. I defer to the expertise of others to offer suggestions on how the Code could be amended to help correct this concern. Student loan debt was formerly dischargeable, at least in part. It should be subject to discharge now under certain parameters. We made a societal decision that enabling people to get higher education was a good choice. We knew when these loans were made that we were lending money to some people who would never be able to pay it back based on the income they were likely to enjoy based on the degree or training they wanted to receive. We are now punishing these very people by not allowing them to discharge debt we knew they could not repay when the loans were made. The future implications caused by these same people not being able to afford houses and other consumer goods boggles the mind. And there are many other implications as well. Some relief should be available in the bankruptcy context for this group of people.

6. Debt Limits

The debt limits set out in §109(e) should be re-visited and raised. One question is whether we are forcing individuals who need to file bankruptcy into Chapter 11 proceedings which are more complicated and costly. For example, a potential debtor may have guaranteed the debt of a failed business and have unsecured debt which exceeds the current limitation. Should this person be forced to file a Chapter 11? Opening Chapter 13 up to this type of debtor may actually enhance recovery to the unsecured creditors because the administrative costs in Chapter 13 are generally far less than in Chapter 11.

Increasing the debt limits may also increase the cash flow to many Chapter 13 trusteeship in the form of the Trustee's percentage fee. Since the Trustee's compensation is capped and all operating expenses are reviewed by the United States Trustee, there is a limit on the type and amount of operating expenses the Trustee can collect. As these operating costs are met, the Trustee's percentage fee goes down which reduces the costs of every Chapter 13 case administered by that trusteeship. This benefits every party in interest, particularly the debtor and unsecured creditors..

7. Vesting

§1327(b) provides that "Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." In the Chapter 13 context, "property of the estate" includes after acquired property described in §1306. Please consider clarifying that §1327(b) includes only property of the estate that the debtor has disclosed to the Chapter 13 Trustee in any Schedules filed prior to confirmation and does not include undisclosed property or property of the estate acquired after confirmation. Additionally, as discussed below, property recovered through the use of the Trustee's avoiding powers should not vest in the debtor.

Additionally, please consider recommending that the value of non-exempt property that exceeds the value stated in the Chapter 13 Plan or any modification of the Plan does not vest in the debtor and should be available to satisfy priority and unsecured claims.

8. Duty to Disclose

The Code, as written, does not contain a provision requiring the debtor to disclose after-acquired property such as income increases, bonuses, insurance settlements, inheritances, lottery winnings, etc. Although in the Fifth Circuit we have some case authority that there is a duty to disclose, this should be part of the debtor's ongoing responsibilities if the debtor is receiving the benefits of the Chapter 13 proceeding. This responsibility should be clearly stated in the Code.

9. Power to Use, Sell or Lease

Section 1303 provides that ". . . The debtor shall have, exclusive of the trustee, the rights and powers of a trustee under sections 363(b), 363(d), 363(e), 363(f), and 363(l), of this title." This means that the Chapter 13 Trustee does not have the power to use, sell or lease assets.

However, the Trustee should have such power, at least to some extent.

First, to the extent the Trustee recovers property through the use of the Trustee's avoiding powers, the Trustee should be able to sell the property free of all interests, including the debtor's interests and the interests of any co-owners, if the court determines that such a sale is in the best interest of the estate. If the Trustee has recovered property that the debtor sought to transfer in order to exclude that property from the estate, the debtor should not have rights with regard to the property when it is recovered. The value of the property should be realized by the Trustee and disbursed for the benefit of unsecured creditors, after appropriate compensation to any co-owners.

Referring back to the topic of vesting, property recovered through the use of the Trustee's avoiding powers should not vest in the debtor, primarily for the reasons discussed above.

Second, the Trustee should have the power to use, sell or lease non-exempt property of the estate, free of all interests, including the debtor's interests and the interests of any co-owners, if the court determines that such use, sale or lease is in the best interest of the estate.

The recommendation is that the statutory language be amended to state that unless the court orders otherwise, the debtor has the exclusive rights under the applicable provisions of §363. Additionally, if the court does so order, the Trustee should have the right to use, sell or lease property free of the interests not only of the debtor, but also of co-owners, subject to the rights of co-owners set out in §363. Additionally, §363(g) should be amended to include the trustee's right to deal with property free and clear of any community property rights attached to the property. This failure to include community property rights in the statute has been a "hole" in §363 overall. The provisions of §363(h) do not solve this problem.

10. Tax Refunds

There are several concerns with regard to tax refunds. First, the I.R.S. at one time was sending the refund directly to the Chapter 13 Trustee. This worked very well. The Trustee reserved the funds until a determination could be made regarding the entitlement to those funds. However, the I.R.S. is no longer doing this. Refunds are sent directly to the debtor. Despite multiple notices to the debtor not to spend the tax refund until it can be determined whether he/she is entitled to retain the money, they spend the refund anyway. Often the refund is spent on items for which the debtor has already been allowed a deduction in determining disposable income, such as home maintenance. Recovery of the tax refund , if the debtor is not entitled to retain it, stretches out over many months because the plan usually has to be modified to give the debtor time to pay that amount to the Trustee. Delay and the attendant increased risk of non-payment often result in the unsecured creditors not receiving what they would have received if the refund was paid to the Trustee in a lump sum (which used to be the case when Trustees received the refunds directly from the I.R.S.). Recovery of the refund over multiple months also complicates the administration of the case and disbursements made by the Trustee. This entire issue could be handled so much more easily if the I.R.S. was directed to send tax refunds directly to the Trustee.

It would also be great if there was some standardization regarding what part of the tax refund the debtor was entitled to retain. This varies tremendously from district to district. It actually is a disposable income issue. If the debtor gets a tax refund because he/she overpaid his/her tax obligation, those overpayments should have been included as income for purposes of calculating disposable income. A calculation of the result of the over-withholding can be made easily. If the amount of the refund had been included in income at the time the disposable income calculation was made, would this have resulted in a higher disposable income? Are there any offsetting allowable expenses? If that analysis results in the conclusion that disposable income would have increased, that part of the refund as to which there are no offsetting expenses should be retained by the Trustee and disbursed to unsecured creditors. If the analysis results in no additional disposable income, the refund could be disbursed to the debtor, the same way any debtor refund is handled.

Finally, it would also be helpful to clarify if that part of the refund which is attributable to earned income credits or to additional child tax credits should be retained by the debtor or the Trustee. If the former, the entire tax refund should be paid over to the Trustee who can then refund the amount of these credits to the debtor, again in the same way any debtor refund is handled.

Standardization of tax refund practices would streamline the administrative process, provide certainty for all concerned and result in higher recovery for the unsecured creditors.

11. Exemptions

Clarification regarding exemptions in Chapter 13 would be welcome. Unlike a Chapter 7 proceeding in which a "snapshot" generally makes sense, Chapter 13 proceedings last for a much longer time. Should exemptions be treated as "once exempt, always exempt", including traceable proceeds from a once exempt asset? Or, if the debtor liquidates an exempt asset and does not use those proceeds to acquire an exempt asset or otherwise changes the form of an exempt asset to a non-exempt asset, should the debtor retain that asset? Put more simply, if the debtor sells an exempt vehicle and does not replace that vehicle, should be debtor be entitled to keep the sales proceeds? Clarification on this issue would be appreciated and would, again, add some certainty to the process for all concerned.

12. Extension or imposition of the automatic stay in case of repeat filers.

The provisions §362(c)(3) and (4) provide creditors with rights to protect themselves against the delays and collateral depreciation caused by repeat filers, but they are expensive rights to assert. And creditors often do not assert those rights for just that reason. There should be a way to streamline these protections such as allowing a individual to file three times within a certain time period (perhaps two years) while preserving a creditor's right to move for dismissal in cases filed within that time period if the case was filed in bad faith.

13. Post-confirmation modifications and revision of §1329(a).

In light of **In re Ramos**, 540 B. R. 580 (Bankr. N. D. Tx. 2015), a revision to §1329(a) would be helpful to clarify that debtors may modify plans post-confirmation to surrender collateral. Courts that allow such post-confirmation modifications have cobbled together a legal analysis for allowing such modifications. The statute should be clear that such modifications are allowed to meet the changing circumstances of the debtor, subject to other protections regarding modification, like good faith. Being subject to good faith prevents a debtor, for example, from destroying or greatly depreciating collateral, such as a vehicle, and then moving to modify to surrender that collateral.

14. Proofs of claim

For cause shown, the court should be able to extend the claims bar date in Chapter 13 proceedings or, on a showing of excusable neglect, allow the claimant to file a late filed claim. The expense of filing and defending such motions will prevent any abuse of such provisions - cost is always a natural regulator. However, as it is now, we have debtor's counsel filing a motion to late file a claim, after the extended bar date has passed, based on excusable neglect. This leads to all kinds of unnecessary complications in a case.

Lawless, Robert M

From: Joseph M. Black, Jr. <jmb@trustee13.com>
Sent: Thursday, May 04, 2017 8:41 AM
To: ConsumerCommission@abiworld.org

I would like the commission to deal with the problem of secured creditors not taking back real estate or foreclosing on the property to relieve the debtor of ongoing obligations of property tax, HOA fees, violations on the property, etc. I believe a fix could be to insert something like 1206 in both 13's and 7's. You could make the sales price subject to Trustee fees to compensate the Trustee to have to sell. If no claim was filed, a provision that at the end of plan funds paid into the clerk registry, and if no claim upon the funds made in five years, turned over to the clerk to supplement their budget.

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Some Random Thoughts About Changes to Consumer Bankruptcy Law

Paul W. Bonapfel
U.S. Bankruptcy Judge, N.D. Georgia
October 2017

One can take a variety of approaches to the question of changes that would improve consumer bankruptcy law and practice. Here, I first set forth some ideas for changes – what I call "tweaks" to the Bankruptcy Code and Bankruptcy Rules. For the truly energetic, I then suggest a framework for a revamping of consumer bankruptcy law.

I. "Tweaks" to the Bankruptcy Code and Bankruptcy Rules

A. Changes to return to the policies of the Bankruptcy Act of 1898 and the Bankruptcy Reform Act of 1978 with regard to bankruptcy relief for individuals

I suggest that, under the Bankruptcy Act of 1898 and the Bankruptcy Reform Act of 1978 (which gave us the original Bankruptcy Code after extensive thought and consideration by bankruptcy practitioners, judges, and academics), the answers to three essential questions determined the extent of relief that a debtor could achieve in a bankruptcy case:

1. Is the debtor entitled to a discharge or has the debtor engaged in some time of wrongful or dishonest conduct on account of which a discharge should be denied?

2. If so, what debts should be excepted from discharge based on the debtor's wrongful conduct (*e.g.,* fraud, breach of fiduciary duty, intentional misconduct) or sound public policy (*e.g.,* alimony and child support, now known as domestic support obligations, and recent taxes).

3. What property is the debtor entitled to keep (*i.e.,* what property is exempt)?

A notably absent factor in determining the scope of an individual's right to bankruptcy relief is whether the debtor has "the ability to pay" debts. From 1898 until 1984 (when the projected disposable income test made its debut in Chapter 13), a fundamental tenet of debtor relief in American bankruptcy law was the notion that creditors are not entitled to encumber the debtor's ability to work; the fresh start meant that a debtor could put past problems behind her (certain debts excepted) and retain all of her education, skills, and experience unencumbered by past difficulties.

A return to this policy requires at least these changes to current law:

1. Elimination of "means testing" in Chapter 7 cases and the projected disposable income test in Chapter 11 and 13 cases.

2. Elimination of the exception to discharge for student loans, at least for those that are not made, insured, or guaranteed by a governmental unit. The 1978 law excepted only government-type loans and those relating to a "nonprofit institution of higher education."

Student loans (of whatever type) are the only debts excepted from discharge that public policy otherwise *encourages* individuals to incur. And to the extent that student loans are federally guaranteed, it is noteworthy that the only other debts to the United States that are excepted from discharge are taxes. No exception exists, for example, for Small Business Administration loans, Veterans Administration loans, or agricultural loans.

3. Elimination of the exception to discharge for tax debts for which a return has not been filed. This is complicated because not all courts interpret amendments in the Bankruptcy Abuse Prevention and Consumer Protection Act to require this result. Generally, the law should be changed to revert to the law as it existed in the 1978 Bankruptcy Reform Act.

4. Elimination of the ability of a Chapter 13 trustee or unsecured creditor to require postconfirmation modification of a Chapter 13 plan on account of increases in the debtor's income or postpetition acquisition of assets (*e.g.,* inheritance, winning the lottery, and possibly postpetition appreciation in assets). The concept of Chapter 13 in the Bankruptcy Reform Act is that it is a liquidation substitute: the debtor can keep property if she "pays" the creditors for it. A Chapter 7 debtor keeps postpetition property; a Chapter 13 debtor should be in the same situation.

5. In individual Chapter 11 cases, removal of postpetition earnings and property acquired postpetition from property of the estate. Inclusion of these items in the estate is inconsistent with the idea that the debtor gets a fresh start.

6. Elimination of the "hanging paragraph" requirement that certain secured claims be treated as fully secured regardless of value. Why should a creditor receive more than what it would get if it repossessed the collateral?

B. Elimination of debt limits in Chapter 13 cases

Provisions that limit Chapter 13 relief based on the amount of the debtor's secured and unsecured debts have outlived their usefulness. Any debtor with regular income should be entitled to use Chapter 13 to propose a repayment plan. The only alternative for such a debtor is Chapter 11, which is cumbersome and was not really designed for such a purpose (although it is available). Moreover, after the BAPCPA changes to (inartfully) insert Chapter 13 concepts into Chapter 11 for individuals, individuals face a variety of difficulties, pitfalls, and burdens that should not exist merely because the debtor has more debt.

It is possible that, in an individual case with debt in excess of current limits, more time might be necessary for a payment plan. In connection with elimination of debt limits for

eligibility, a provision permitting more than five years for a payment plan in cases above specified debt limits might be appropriate.

C. Elimination of absolute priority rule for individuals in Chapter 11 cases

The absolute priority rule as a theoretical matter makes no sense when it is applied to individuals. The absolute priority rule deals with classes of holders of "claims" and "interests." No one holds an "interest" in an individual. If a debtor proposes to pay unsecured creditors the value of the debtor's unencumbered, nonexempt assets (*i.e.,* what creditors would get in a Chapter 7 case), then the plan should meet the "cram-down" requirements.

D. Make it clear that a debtor's prepetition agreement to pay fees of the attorney who filed the case is not excepted from discharge

I doubt that any practitioner under the Bankruptcy Act or in the early days under the Bankruptcy Reform Act would have seriously thought that a debtor who agreed to pay for bankruptcy services after the petition was filed could discharge the obligation to pay for postpetition services. The Seventh Circuit and other courts, applying the broad definition of "claim" that the Bankruptcy Code introduced, held that they are. In my view, the Seventh Circuit is wrong, for several reasons. But if it is correct, the law needs to be changed. The dischargeability of the debt has created confusion and complexity in how an attorney for a debtor can get paid if the debtor does not pay in advance. It is quite likely that the situation results in the filing of Chapter 13 cases so the debtor's attorney can get paid (the "fee-only" plans) that are definitively not in the debtor's best interest for a variety of reasons.

Note that any agreement of a debtor to pay for bankruptcy services is not dischargeable. For example, a debtor could agree to pay attorney A to file a bankruptcy case and then decide to use Attorney B instead. The obligation to pay attorney A would be discharged (as it would be under current law, even under my view.)

E. We really need Chapter 13 plan uniformity.

The laudable and heroic efforts to produce a uniform Chapter 13 plan were derailed by a necessary, but unfortunate, compromise that permitted each district to opt out of it and have a single plan for the district. The result may be that few, if any, districts will use the uniform plan.

Nevertheless, the effort in my view has been successful and worth the time and trouble of working through the process. The requirement of a single plan per district at least eliminated the situation where each judge in a multi-judge court required a different plan. Creditors who do business nationwide now only have to figure out how to deal with 94 plans instead of hundreds. And I suspect that each district adopting its own plan has also given thoughtful consideration to what the form should actually include.

My suggestion at this point is for a study of the local plans that have been adopted and a renewed effort to increase uniformity. Perhaps a uniform plan could permit local variations in some areas (attorney's fees, prepetition adequate protection payments, timing and order of

trustee payments to creditors, for example) while mandating uniformity for the truly substantive provisions that deal with treatment of creditors. It would be interesting to see how much variation there really is in these substantive matters.

If the local plans tend to fall into categories, then perhaps it would be possible to put together alternative forms for districts to choose from, one of which would resemble local practice closely enough to defuse opposition.

F. Permit cram-down of junior mortgages on principal residences

Whatever policies supported protection for residential mortgages when the Bankruptcy Code was enacted should not extend to junior mortgages. The current concept that a lien can be avoided if the property is worth one cent less than the senior liens but not if the property is worth one cent more is difficult to justify as a matter of policy Moreover, if public policy is to limit ill-advised borrowing on residences, the prospect of cram-down in Chapter 13 cases for a junior mortgage should further that policy.

G. Eliminate "good faith" as a tool to prohibit a debtor from doing something that the Bankruptcy Code permits.

Among other things, this would eliminate the dismissal of a case for "bad faith" because the debtor can actually pay her debts. I submit that the concept of good faith under the Bankruptcy Act and as contemplated by the Bankruptcy Reform Act of 1978 did not include the notion that good faith can become a basis for making substantive decisions about what the law does or does not require.

II. Revamp the bankruptcy law for individual debtors

I start with the anecdotal proposition that Chapter 13 generally imposes burdens on lower-income debtors that higher-income debtors either do not face or that they can overcome.

I deal with a debtor who is behind on mortgage payments and car payments and faces foreclosure and repossession. A debtor with higher income – or a debtor with friends or family willing to provide cash – may in many instances be able to file a Chapter 7 case, get rid of unsecured debts, make arrangements to bring the mortgage current, and reaffirm the car debt. She can do so without having to be in bankruptcy for at least three years and pay something to unsecured creditors for the "privilege" of retaining her property.

Doing that may require cash, either immediately or within a relatively short time. Lower-income debtors, especially if they do not have friends of family who can help, cannot come up with that cash. To save their homes and cars, their only hope is Chapter 13. When they seek Chapter 13 relief, they will pay more in attorney's fees, and many Chapter 13 trustees and many courts expect that unsecured creditors get paid something. Indeed, the projected disposable income requirements may mandate such a result (even if the debtor is below-median).

So I have this question: Why should a debtor have to file a Chapter 13 case when, if she had available cash, she could file a Chapter 7 case and keep her house and car?

If the answer to the question is that there is no reason, here is a way to revamp the Bankruptcy Code.

1. Start with having one chapter for individuals.

2. If a debtor has no non-exempt assets, the debtor has two options with regard to secured debts:

A. Elect to cure arrearages on secured debts and reinstate their maturity (with provisions like those in Chapter 13 now). These debts are effectively reaffirmed.

B. Alternatively, a debtor could "cram down" a secured claim over a five-year period in the same fashion that Chapter 13 now permits.

In either situation, the debtor makes payments directly to the creditors, without trustee or judicial supervision. The case is closed after any disputes with regard to value, amounts due, or interest rate are resolved. If the debtor defaults, the creditor may exercise its remedies under nonbankruptcy law. (If the debtor needs bankruptcy help at that point, she could either file a new case or, perhaps, reopen the existing case to propose a way to cure the defaults.)

If a lien is avoidable for some reason, the debtor would have to pay the trustee the value of the asset in payments over time.

Debtors could avoid judicial liens and nonpossessory, non-purchase money security interests as under current.

3. If the debtor has non-exempt assets, creditors are entitled to their value (less the amounts of priority claims). The debtor may elect one of these options:

A. Permit liquidation of the non-exempt assets by the trustee. The debtor gets an immediate discharge.

B. Pay the value of the non-exempt assets to creditors over a period of three to five years through monthly payments to the trustee, who would then make disbursements to creditors. The debtor gets a discharge upon completion of the required payments.

Consideration might be given to permitting a debtor to permit liquidation of some assets while "paying" for others. For example, a debtor might decide not to retain a second home or extra car with equity, so the trustee would sell it.

4. If the debtor has nondischargeable priority claims (usually taxes and domestic support obligations), the debtor may elect to pay them over three to five years through payments to the trustee, who would make disbursements to the creditors. Otherwise, the debtor must deal with them as nondischargeable debt, outside of bankruptcy. If the debtor elects to pay unsecured creditors, the debtor must also elect to pay the priority claims.

5 . I would not include an "ability to pay" component in this new law, but if it's necessary to do so, the current mechanism should be scrapped in favor of a procedure that bases the amount the debtor must pay on actual income, without regard to secured debt. My test would work as follows:

A. The debtor must report adjusted gross income as shown on the debtor's tax returns for the three calendar years preceding the filing of the case. The debtor must report actual income equivalents received during the period, even if not taxable, such as tax-free interest and child support. (Our tax friends will have to help us fine-tune the income concept. The idea is that income is actual *income* (*i.e.,* revenue less expenses in the case of a business) before deductions (home mortgage interest, for example).

B. The debtor must reported projected adjusted gross income and other actual income equivalents for the year of filing.

C. The income for the four years is averaged. That is the debtor's "Average Income." (I can't think of a better term right now.)

D. If the Average Income is below some multiple of the poverty level, the debtor has no ability to pay and she is through.

E. If the Average Income is above that level, the debtor must commit a specified percentage of it to the payment of priority and general unsecured claims over a specified period. The level of her secured debt should not be a factor. Why should a debtor with an expensive home and huge mortgage payments pay less to unsecured creditors than a debtor with modest rent?

I have no current idea about how to work out what the percentages should be or whether they should increase as income increases.

If we return to the policy of the 1978 Bankruptcy Reform Act, the required time period is three years. In the early days under that law, there was considerable debate over whether and to what extent a debtor would be *permitted* to pay for more than three years. One of the purposes of the three-year limit was to protect debtors from the burden of having to be in bankruptcy for an extended period.

The debtor would make these payments to the trustee, who would distribute them to priority and unsecured claimants.

F. It may be that the debtor's historical income is not predictive of future income. She could have a prospective ability to pay that is either less (she had a good-paying job but lost it and can't find work for similar pay, she is now disabled, for example) or more (she just graduated from college and now has a high-income job). To account for this possibility, the debtor must also show her projected annual income, including expected bonuses, on an annual basis, essentially the equivalent of current Schedule I. Schedule J is unnecessary because expenses have nothing to do with the calculation because the percentage of income she must pay must take living expenses into account.)

If there is a material difference in historical versus projected income, the court will determine the debtor's Average Income.

G. A debtor could elect not to pay creditors from income in the bankruptcy case. In such event, the debtor would receive only a partial discharge; the amount that unsecured creditors would receive from future income would not be discharged.

H. If a debtor elects to pay creditors in lieu of liquidation or to satisfy the "ability to pay" requirement, the remedy for default in the debtor's obligations to make payments to unsecured creditors (unless cured) will be entry of an order determining, for each allowed unsecured claim, the amount that the creditor would have received under the plan less the amounts paid. The U.S. Trustee will be responsible for calculating and presenting these amounts to the court, subject to review and objection by creditors and the debtor. The bankruptcy court's determination will have the effect of a judgment against the debtor in the unpaid amount that the creditor should have received. The judgment will be effective as the judgment of a court of general jurisdiction in every state and shall be entitled to enforcement and recordation in the same manner as a judgment in every state. (The judgment would not preclude a creditor from suing for a larger amount on a claim that is excepted from discharge. If the bankruptcy court determines that a debt is excepted from discharge, the creditor may elect to have the determination of the unpaid amount include the amount of the excepted debt.)

I. For purposes of discharge and distribution, a secured creditor will be deemed to have no deficiency claim unless the creditor timely requests a valuation of its collateral and a determination of its deficiency claim. A creditor could make this request in response to a debtor's cram-down proposal; at that time, the value of the collateral, the total amount of the claim, and the resulting unsecured deficiency claim would be determined. In the absence of such a request, the debt is discharged (unless the debtor has elected to retain the property as set forth above, in which the debt is not discharged to the extent of the value of the encumbered property that the debtor will pay.)

III. And here's how to solve the Article III problem

Although not within the scope of consumer bankruptcy law specifically, I note an easy fix to solve the problem that bankruptcy judges are not Article III judges.

Article III of the Constitution requires that judges of the United States serve during good behavior and that their salaries not be diminished. It does not require appointment by the President or confirmation by the Senate.

Article II of the Constitution requires presidential appointment of certain officers, including the judges (they are called judges, not justices) of the Supreme Court, with the advice and consent of the Senate. But it goes on to provide for the appointment of other officers – including judges of the inferior courts – by, among other things, *courts of law.*

The current system of choosing bankruptcy law calls for their appointment by the courts of appeals, clearly a court of law. With rare exceptions, bankruptcy judges are routinely reappointed when they ask to be, so they currently have the practical equivalent of lifetime tenure. Giving them lifetime tenure, in any event, will affect what is currently happens in only a few cases.

Similarly, compensation of bankruptcy judges has never been reduced and (we all hope), it never will be. It is currently fixed by statute as a percentage of the salary of district judges (which cannot be reduced), and it is unlikely that that would be changed.

So, with only occasional actual effect with regard to continuation of bankruptcy judges in office and no other practical effect, bankruptcy judges can become Article III judges simply by changing their term and formalizing the existing practice that they get a percentage of what district judges get. All existing provisions with regard to district court authority can be retained, including the distinction between core and non-core proceedings to satisfy those who are concerned about bankruptcy judges stretching their jurisdiction.

Dear Members of the ABI Consumer Bankruptcy Commission:

INTRODUCTION

My name is Mark Bonney and I have served as a Chapter 13 Trustee[1] for almost 28 years. I also served as a Chapter 7 panel Trustee for five years[2]. I have represented Debtors and Creditors in Chapter 7, 11, 12 and 13 cases. I was formerly certified in Consumer Bankruptcy. I wish to submit the following suggested legislative changes. While some suggestions may be beyond the scope of your mission I believe that these ideas deserve some discussion.

There are many material weaknesses in the code. I will address some of them. The first and most important is the separation of Chapters. Conversions from Chapter 13 to 7 and 7 to 13 are problematic. Section 348 property of the estate issues, termination of Trustee issues, and issues with the Chapter 7 Trustees not having the same concerns as the Chapter 13 Trustees (and vice versa) are the biggest issues in conversion. Allowing Debtors to forum shop between Chapter 7 and Chapter 13 is also problematic[3]. The incentives for Chapter 7 Trustees are different from the incentives for Chapter 13 Trustees and result in disparate choices regarding asset liquidation and distributions to unsecured creditors. As discussed more below I would have one Chapter for consumer bankruptcy. There is, however, a case to be made for a separate chapter for individuals with primarily business income.

Even if no significant change is made to consolidate consumer bankruptcy into a single Chapter there are significant issues facing the Chapter 13 Practice. As we are aware BAPCPA changed the motto of bankruptcy from "Giving honest but unfortunate debtors a fresh start" to "Those that can afford to pay should". I have been fortunate to know a few great judges[4] in my career. I believe that focusing on the "fresh start" and what is in the best interest of the Debtor(s)[5] is better for the long-term health of the economy and of society. Among the barriers to a productive post-bankruptcy life for debtors are student loan debt, home mortgage creditors who do not participate in the process, non-dischargeable debt and financial education.

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[1] I was appointed to serve as Chapter 13 Trustee for the Eastern District of Oklahoma in January 1990. I currently have approximately 500 cases and will disburse approximately $7,000,000 this year. I am a conduit trustee. Less than 10% of the cases filed in the District are Chapter 13 cases. The largest city is about 35.000 and the total population of the district is less than 500,000. It takes over two hours for about half of the debtors to drive to the 341 meetings.

[2] I was appointed to serve as a panel trustee in November 1989 and served for approximately 5 years.

[3] In the E.D. of Oklahoma there are 4 trustees. Myself, the Chapter 12 Trustee and two Chapter 7 panel trustees. The more aggressive action that I take to provide a dividend to the unsecured creditors the fewer debtors want to file a Chapter 13 case. The more aggressive stance I take on proper completion of the bankruptcy schedules the fewer Debtors counsel want to file a Chapter 13 case.

[4] The Honorable David Kline was involved in drafting the Code in the late 70's and The Honorable James E. Ryan worked closely with Rep. Mike Synar from Oklahoma in drafting Chapter 12. The Honorable John TeSelle and The Honorable William Rutledge both influenced my career. All of these Judges believed that leaving debtors with the tools and resources to rebuild their lives at the conclusion of their cases was of utmost importance.

[5] What is in the best interests of Debtors is not always what they think is in their own best interests.

ISSUES ADVERSE TO A SUCCESSFUL CHAPTER 13

The Student loan debt crisis must be addressed. While parts of that crisis cannot be addressed by bankruptcy, bankruptcy should not worsen the crisis[6]. Debtors must be able to propose plans to cure and maintain their debt. The Department of Education must provide bankruptcy debtors with services.[7] Bankruptcy Debtors must have a streamlined process to incorporate any administrative programs into the Chapter 13 Plan. The Department of Education should not be permitted to override the terms set by a Chapter 13 Plan. Some judges have issued opinions that state that there are so many hardship programs available that the Debtors cannot meet the hardship standards. Debtors should be able to repay their student loan debt over a ten-year period (15 or 20 years in certain circumstances). Repayment under a Chapter 13 Plan should result in discharge of the student loan debt[8].

Home Mortgage cure and maintain issues continue to be problematic[9]. Debtors deserve certainty that their mortgage will be reinstated at confirmation and not upon completion of the plan. Servicers still refuse to cooperate and file claims. Servicers continue to take the position that the lien cannot be affected by confirmation or discharge. There must be a clear process for Objecting to Mortgage Claims with clear consequences and monetary certainty when claims are late filed, not filed, or objections to claims are granted for any other reason. Failure to file a claim timely should be treated as a complete waiver of the right to collect the pre-petition arrears and of all continuing mortgage payments due prior to the date of filing a late claim. A late filed mortgage claim should only be allowed for the purpose of setting the amount of the regular monthly payments on a forward-looking basis. If a claim is never filed then the creditor should only be allowed to collect the amounts which would be due according to the amortization schedule as if all payments had actually been made through the date of final payment under the plan[10].

Education for debtors is a must. In addition, Debtors require additional protections post-bankruptcy. For example, placing a limit of 15% of their take home pay as the maximum amount that Debtors can borrow for their first vehicle and 10% as the maximum for a second vehicle would keep many from being repeat debtors. This limitation should continue for at least 36

[6] The overwhelming majority of debtors exit bankruptcy owing at least 15% more on their student loan debt that when they filed.

[7] The Dept. of Education had a policy of suspending the Debtors ability to apply for administrative programs, including IBRs while in Chapter 13. It has even been told to me that the Dept. of Ed will not apply payments from a Trustee to an IBR. About two years that policy appeared to change and Navient would work with bankruptcy debtors to establish an IBR. After Betsy DeVos was sworn in the policy appears to have reverted to one where bankruptcy debtors do not receive the same consideration as non-bankruptcy debtors.

[8] The discharge could be contingent upon repayment or it could, like Chapter 11 create a new contract.

[9] Even after the Rule and Form changes mortgage servicers refuse to devote the resources necessary to comply with filing timely claims. Further, bankruptcy servicers have yet to obtain cooperation from their computer vendors to automate the process and insure that posting is in compliance with 11 U.S.C. Sec. 524(i) and the Chapter 13 Plan

[10] A bankruptcy petition is just that, a petition. If a party fails to respond to a summons they may have a default judgment taken against them. Servicers fail to answer the Complaint when they fail to file a claim. I know of no recent reported cases where the servicer has claimed that lack of notice caused the claim to be late filed.

months post-discharge[11]. Any loan to an individual who has received a discharge or completed a plan within the past 36 months should be limited to 36%. Debtors should be required to take at least 4 hours of instruction on purchasing a home and two hours instruction on purchasing a vehicle prior to being able to enter into those types of transactions.

DEBTOR ABUSES OF THE SYSTEM

Issues that affect the administration of bankruptcy cases that do not harm the debtors' fresh start include *pro se* debtors, multiple case filers, joint obligors filing successive single debtor cases, disclosure of post-petition assets, conversion from Chapter 13 to Chapter 7, the delay in implementing payroll deduction orders, compensation for Chapter 7 Trustees and oversight of business debtors.

Far too many *pro se* Debtors file Chapter 13 cases with no intention of paying any money. These cases are encouraged by unscrupulous mortgage foreclosure scams. In my first 25 years as a Trustee I had about 5 pro se cases filed (total). In the past three years I have had between 20 and 25 *pro se* cases. Only ten percent of those recent *pro se* cases made any payment.

Automatic Stay abuse, which includes *pro se* debtors, is rampant. The changes to Section 362 did not do enough to protect mortgage creditors from unscrupulous debtors. Debtors who file Chapter 13 should not be permitted to dismiss their cases. Trustees should be permitted to file plans where debtors either fail to file a plan timely or fail to confirm a plan within six months of the petition date. A case filed by a joint obligor on a mortgage should be considered as a second case filed under Section 362.

Debtors who receive windfalls post-petition usually fail to schedule such windfalls in a Chapter 13 case. The Bankruptcy Rules fail to provide clear guidance on when and how schedules should be supplemented or amended in Chapter 13 cases. Debtors who have a material change in assets should be required to file a supplemental Schedule A/B within 28 days of receipt. Debtors with no net disposable income who have not filed Supplemental Schedules A/B, D, E, F, I or J should be required to certify that they have not borrowed any money, received a 401(k) or retirement account distribution, had a material change in income or expenses, or have any changes in assets prior to receiving a discharge. Debtors with net disposable income who have not filed supplemental Schedules A/B, I or J should be required to submit such certification annually and again prior to receiving a discharge.

Below median Debtors who receive post-petition assets can convert their cases to Chapter 7 to avoid paying more money to their unsecured creditors. Property of the Chapter 7 estate should always include post-petition property. Chapter 13 Trustees should be permitted to administratively closeout their cases when the cases are dismissed or converted. The Trustee should be permitted to pay the filing fee and any debtors' attorney fees prior to refunding money to the Debtors.

[11] If a single Chapter proposal is adopted then the protection should continue for 36 months after the last plan payment.

Approximately 5% of Debtors in the E.D. of Oklahoma have some business related income. In about 3% of the cases Debtors' income is derived mostly from business sources. Monitoring these few business cases to insure that the Debtors are complying with their post-petition tax obligations takes considerable resources. My staff do not have the skill set to complete this task. Because of the significant differences for monitoring cases where debtors have significant business income, I believe that the Chapter 12 Trustee's are more equipped to deal with the seasonal nature of business income and the monitoring of post-petition operations. I would recommend that Debtors whose income is more than 50% derived from business sources be debtors under Chapter 12.

A REVISED MEANS TEST

Much has been said about the means test. I have long been one of the few that supported the concept. Unfortunately poor draftsmanship led to bad results. Income should be based upon the Debtors' adjusted gross income as reflected on the last three years tax returns[12]. In business cases adjustments could be made for interest expense, depreciation and other non-cash expenses. In wage earner/retired/disabled cases adjustments could be made to income that is received but not included in AGI such as tax credits, disability payments, and non-taxable social security. The Court could have limited discretion, where use of the last three years income would result in a payment to unsecured creditors that debtors could not afford, to confirm a plan with a lesser distribution. All debtors, whether below or above median would receive the IRS standard deductions but would not receive a deduction for secured debt. A single debtor would receive one car ownership allowance and two debtors would receive two allowances regardless of whether the Debtors had any debt on the vehicle.[13] Child Support could be a deduction but retirement deductions should be limited to 6% of gross pay. Charitable contributions would not be deductions but debtors could extend plan terms in order to make charitable contributions.

A SINGLE CHAPTER FOR WAGE EARNERS/RETIREES/DISABLED

The concept behind a revised Chapters 12 and Chapter 13 is that there are only two kinds of cases filed by individuals--those with substantial business related income and those with no or little business related income. Every Debtor (whether they be the traditional Chapter 7 Debtor or Chapter 13 Debtor) would be required to file a plan that paid all priority debts. Priority debts should include the filing fee and the Debtors' attorney fee.[14] In addition to a percent fee, the Court could set a fee per case to be paid to the standing trustee and could waive that fee for

[12] Credit extensions during the three years pre-petition should have been based upon the Debtors' income during that time and therefore repayment based upon that income is the best measurement. Use of tax returns is quick and easy. Debtors would not have an incentive to game the system by waiting to file bankruptcy because one year out of three will not change the average significantly.

[13] This results in Debtors receiving a total expense allowance equal to the total of the IRS standards. Courts would not have to debate whether certain expenses were too high or too low. Debtors would be granted a "basket" to fill as they desired. As discussed below, debtors would be required to pay 36 months of disposable income to the plan for payment of priority and non-priority unsecured debt but could propose to repay such debt over a period of 60 months.

[14] This solves the problem of Chapter 7 Debtors' counsel getting paid post-petition for pre-petition work.

persons at or below the poverty level. Reaffirmation agreements are no longer needed. Debtors with no disposable income under the revised means test would be permitted to provide to pay certain non-modified secured debt direct and would receive a discharge upon payment of all priority debts. This would permit no money down bankruptcy cases to be filed. Wage Orders should be permitted upon filing the case.

ALL debts should be dischargeable and modifiable. The Court could impose a ten-year repayment requirement on certain restitution, fines, and debts that would currently be considered non-dischargeable. The Court could condition the Discharge of these debts upon the full payment of the modified amount as provided for by the plan. If the student loan debt exceeded $100,000 then the court could determine the amount that the Debtor could afford to pay over the lesser of 15 years or one-half the debtor's life expectancy but in no event less than 5 years. If the student loan debt exceeded $200,000 then the court could determent the amount that the Debtor could afford to pay over the lesser of 20 years to 3/4th of the life expectancy but in no event less than 10 years. Alternatively, if there are certain debts that are to be paid beyond five years then the Court could determine that those debts would not be discharged[15].

Similar ten to twenty year repayment provisions could be made for other types of non-dischargeable debt. The point is to give every person, even those who have committed serious crimes or made serious errors in judgment an opportunity to have hope that at some reasonable point in the future they would truly be debt free. Further the Judge should be given wide latitude to fashion the repayment of traditionally non-dischargeable debts so that they become dischargeable.

The Discharge could be granted prior to full payment of all debts and the Trustee could be granted a lien upon all property of the Debtor and after acquired property to secure payments under the plan. Therefore it would be very difficult for the debtor to borrow any further sums without court approval prior to completing all payments under the plan. The lien could even prime new security interests when the new lender knew or should have known that the Debtor had not completed their plan.

After the discharge the Debtor would request the extinguishment of the lien upon completion of all payments provided for by the plan. There would be no maximum plan length but debtors with disposable income would pay the equivalent of 36 months of that disposable income to priority and non-priority unsecured creditors.

There will be debtors who default on their plan payments. If they default prior to receiving a discharge then the plan could be modified to suspend payment and/or reamortize secured debt. If there is a substantial change in circumstances prior to a discharge then the plan could be modified to increase or decrease the amount paid to non-priority unsecured creditors. After discharge the plan could not be modified but the Debtor could file a subsequent bankruptcy case after a set period of time. Any debt from a prior bankruptcy case would have priority in the amounts provided to be paid pursuant to the prior plan over new unsecured debt but would not

[15] But as stated earlier the Court could determine the amount that is non-dischargeable at an amount less than the original claim amount.

otherwise be required to be paid those amounts prior to receiving a discharge in the subsequent case.

I have attached at the bottom some more specific statutory changes to effect the changes that I suggest. Small Business Debtors would file under Chapter 12. Wholly owned corporate entities could be joint debtors in a Chapter 12 case. Chapter 12 Trustees should generally support these changes. I hope that Chapter 13 Trustee's would support these changes. Chapter 7 Trustees might not support these changes but if these changes were implemented many Chapter 7 Trustees would become Chapter 13 Trustees.

ADDITIONAL ITEMS OF NOTE

1. The filing fee could be paid after confirmation if the Trustee has sufficient funds at confirmation to pay the fee and the plan provides for the Trustee to pay the fee to the Clerk.

2. Courts should be permitted to enter wage deduction orders upon filing the case rather than upon confirmation.

3. The first payment under the plan should not be due for at least 45 days after the petition is filed.

4. Adequate protection payments should not be required except upon dismissal or conversion of the case.

5. The CM/ECF filing system should be fully data enabled. Most pleadings should be data enabled forms.

CONCLUSION

This committee has the potential to radically update and modernize the bankruptcy system. My comments are based upon many normative opinions regarding my own experience. Politics must also be factored in to the recommendations of the committee. As we have seen with the National Plan form many Judges see change as diminishing their authority. My recommended changes to how non-dischargeable debts are dealt with would grant judges wide discretion to find the most fair solutions balancing the interests of creditors with the interests of the debtor.

The Committee is comprised of the best minds in the country respecting bankruptcy laws. The Committee members' vast experience provides the Committee the prestige necessary to enact its recommendations. As with all processes there will be negotiation. It is my hope that the Committee will be a force for meaningful change. If I can assist the Committee in any way I stand ready. I want to thank the Committee again for considering my views on these important issues.

Sincerely,

William Mark Bonney

I would recommend the following changes to the code presented in a very, very rough draft format and only for the purposes of providing additional context for the proposal for a single consumer chapter.

Section 1- This Act Shall be known as the Consumer Bankruptcy Modernization Act of 2018

Section 2 – Amend Section 101(10A)(A) to define current monthly income as the average of the adjusted gross incomes as reflected on the Debtors federal income tax returns for the three tax years for which tax returns were first due without regard to any extensions prior to filing of the case, which average shall be divided by twelve. This gives a much better picture of the debtor(s)' true earning potential. The code could be further amended to provide a specific procedure where by the Court could determine that such a method did not represent the debtor(s)' expected future earning potential due to substantially changed circumstances.

Section 3 – Amend Section 101(51C) and (51D) to provide that Small Business Debtors and their cases would be handled by the Chapter 12 Trustee and be Chapter 12 Cases. Amend the definition of a Small Business Debtor to include any person or such person and their spouse and wholly owned corporations or partnerships. Small Business Debtors should be debtors under Chapter 12 and file a consolidated Plan where the wholly owned LLC is a Joint Debtor with the owner and the owner's spouse or where the Partnership is a Joint Debtor with the Spouses who are the two partners. The absolute priority rule would not apply in Chapter 12 cases and these Small Businesses would be able to reorganize. There are many small business debtors who file a Chapter 13. The Chapter 13 Trustee's tend to be less effective than their Chapter 12 counterparts at managing these debtors and their post-petition obligations (especially the post-petition tax obligations).

Section 4 – 109(b). Chapter 7 should be eliminated and Chapter 13 expanded with the discharge coming upon "substantial consummation" provides for a more efficient system.

Section 5 – Section 109(e) should be amended by striking the entirety and replacing with the following: "Only an individual or an individual and such individual's spouse who are not small business debtors may be a debtor under Chapter 13 of this title."

Section 6 – Section 109(f) should be amended by inserting after "income" the following: "or a small business debtor".

Section 7 – Section 302 should be amended so that corporate entities can be co-debtors if they are wholly owned by individuals in the same case.

Section 8 – Section 326 (and 28 USC 586(e) should be amended to provide that Chapter 12 and 13 Trustees shall be standing Trustees and receive $250,000.00 with adjustments annually based upon the CPI.

Section 9 – the sections of 348 dealing with conversion could be repealed for new cases.

Section 10 – Section 1201 could be amended to include affiliates of the Debtor(s) and that the co-debtor stay terminates upon default in the plan payments. The Court could be given latitude to

continue the co-debtor stay even where there is not full payment of the debt according to its original terms.

Section 11 – Appropriate changes could be made to Chapter 12 related to conversions to Chapter 7 and Trustee duties. References to family farmer and fisherman could be changed as appropriate.

Section 12 – Section 1222(a) should be amended to add a subsection (5) which provides that the plan shall provide sufficient compensation to the Chapter 12 Trustee in excess of the percentage fee set by the UST where the plan provides for direct payments by the Debtor to creditors.

Section 13 – Section 1222(c) should be amended to provide that the plan term is not limited.

Section 14 – Section 1229 could be stricken so that post-confirmation there are no plan modifications. If the Debtor can no longer afford the payments under the plan then a new Chapter 12 case could be filed the same way that successive Chapter 11 cases occasionally are filed.

Section 15 – Section 1301 should be amended to provide that upon confirmation of a plan that does not provide for full payment under the terms of the debt the co-debtor stay terminates. It could further provide that upon default of the Debtor in payments under a confirmed plan the stay terminates as to the co-debtor.

Section 16 – Section 1302 should be amended to provide that the Trustee has the power of sale under 363 and can propose a Chapter 13 Plan under certain conditions.

Section 17 – Section 1303 should be amended to provide that the Debtor may request the Court to confer standing in the Debtor to take any action in the case against a creditor that the Debtor has requested that the Trustee take and for which the Trustee has refused. The Debtor should apply any net proceeds from such efforts to the plan but the Court may award the Debtor compensation for the reasonable time and expenses in pursuing such action.

Section 18 – Section 1304 should be repealed as all such debtors should file Chapter 12.

Section 19 – Section 1305 should be amended to provide that only those post-petition claims that arise prior to the entry of the discharge can be allowed.

Section 20 – Section 1306 could be amended to provide that property of the Estate does not include any property acquired more than one year after confirmation. Section 542 should be amended to provide that any entity can be ordered to turnover to the Trustee any property of the estate. Section 1327 should be amended to provide that the Trustee shall have a lien upon all property and all after acquired property of the Debtor to secure the payment by the Debtor to the Trustee of the payments provided for by the plan. Further, unless the Court upon request of a party in interest or the creditor orders otherwise such lien is superior to the purchase money interest of any such post-petition creditor.

Lawless, Robert M

From: Brad Botes <bbotes@bondnbotes.com>
Sent: Monday, May 01, 2017 12:02 PM
To: ConsumerCommission@abiworld.org
Subject: Public Meeting of the ABI Commission on Consumer Bankruptcy

Dear Professor Lawless:

Please accept this email in response to your invitation to speak at the public meeting of the ABI Commission on Consumer Bankruptcy to be held in Orlando this coming weekend. I have practiced consumer bankruptcy law for over 30 years. My firm has had offices in Alabama, Mississippi, Tennessee, Florida, North Carolina and Texas. I was one of NACBA's first 50 members, have served on its board of directors and acted as its first full time executive director.

Based upon my experience, it is my opinion that the BAPCPA requirements requiring credit counseling prior to bankruptcy and financial management post filing and prior to discharge have become exactly what we had predicted they would – a waste of debtor time and resources with little if any benefit to debtors or the bankruptcy system as a whole. On or about October 17, 2005, then serving as NACBA's Executive Director, I made the following statements:

http://www.quotehd.com/quotes/brad-botes-quote-congress-got-bankruptcy-reform-wrong-dead-wrong-the-federal-bankruptcy

An entirely new bureaucratic industry has in fact been created which slows down the administration of cases and created new unnecessary costs. In my opinion, the commission should recommend that these requirements be eliminated post haste. If the commission will give me the opportunity, I will elaborate on my opinion in Orlando.

Thank you and the other members of the commission for your service and consideration of my request to speak.

Sincerely,

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University of Kentucky College of Law

July 14, 2017

ABI Commission on Consumer Bankruptcy
ConsumerCommission@abiworld.org

Re: Statement of Matters for Consideration

Dear Co-Chairs, Commissioners, Committee Members, and Commission Reporter:

It is clear from your agenda that you have an important and substantial task ahead of you. Thankfully, it is also clear, based on your membership, that you will be up to the task.

As a former judicial clerk, former practitioner, and current academic, I care deeply about the fair and efficient functioning of the consumer bankruptcy system. It is an honor to provide this statement concerning matters that might merit the Commission's attention.

For the sake of disclosure, the views expressed below are mine alone and should not be taken to reflect the views of my employer or of any past or current client; I do not have any current clients that would be affected by these matters; and I have not been requested or compensated in any way to express these views.

1. *Clarifying the effect of post-petition changes in nature or value of exempt property*

Courts have struggled to answer this question: What happens when a debtor disposes of, or realizes gain from, exempt property after the petition date but before the case is closed?

In chapter 7 cases, most of us probably assume that, after the exemption objection period has passed, debtors can dispose of property as they wish. This seems consistent with the idea that the petition date is a "snapshot" moment dividing prepetition and postpetition debts and entitlements. But in fact courts divide on this question. Some courts find that as long as the case is still open, the exemption can be lost as to the proceeds of exempt property, even if the exemption was properly claimed without objection. This rule could apply to homesteads, IRAs, health aids, etc.

Such a rule—particularly in the chapter 7 context—seems to me to yield results that are undesirable by virtue of being unjust, overly complicated, and/or simply arbitrary. Chapter 7 cases of course frequently extend for years,[1] for reasons that are essentially random (length of time for an asset to be liquidated, trustee's workload, etc.). Thus the rule leaves the debtor (and all parties in interest) at the mercy of the essentially arbitrary time of when the case is closed.

[1] I haven't found definitive recent statistics. The best I have found is an article from the mid-1980s suggesting an average case length of almost 49 months. Michael J. Herbert & Dominic E. Pacitt, *Down and Out in Richmond, Virginia: The Distribution of Assets in Chapter 7 Bankruptcy Proceedings Closed During 1984-1987*, 22 UNIV. RICHMOND L. REV. 303, 317-18 (1988).

This is particularly pernicious because debtors may have very good reasons to use the petition date as a dividing line after which they will restructure their living situations or other aspects of their daily lives, for instance by taking a job in another state. And the truth is, it's not just debtors who are disadvantaged; the rule complicates the lives of trustees and judges too. Bankruptcy trustees are obligated to maximize the recovery of property of the estate, distribute the assets to creditors, file an accounting with the court, and expeditiously close the case. These obligations are enforced at pain of liability. So, if a conscientious trustee becomes aware that a debtor is taking a job in another state, or is considering a divorce, or is interested in selling exempt assets to "down-size" her living situation, wouldn't the trustee be tempted—or obligated?—to stretch a case out as long as possible, potentially to recover more assets? Could the trustee reopen a closed case when assets change form and become arguably non-exempt?[2] Can there be consistent answers given to this morass of questions in the wide range of cases that will arise throughout the courts?

To take one example, this is a pressing issue in my birth state of Texas, which has an extremely generous homestead exemption, and also has a rule that proceeds of homestead sales are further exempt for six months, to give debtors time to re-invest the assets in a new homestead or other exempt asset. The homestead proceeds rule, which resembles those in a number of other states, is intended to be debtor-friendly—consider that the proceeds of the sale of most other exempt assets aren't protected from creditors at all, much less for six months.

Nonetheless, in a chapter 13 case, the Fifth Circuit has held that if the debtors enter into bankruptcy with their home and sell it at any point that the case is still open, the proceeds lose exempt status and become property of the estate if not re-invested in another homestead within six months. *In re Frost*, 744 F.3d 384 (5th Cir. 2014). Of course, in chapter 13 cases, the question is complicated by section 1306, which provides that post-petition property can become property of the estate. Although there is disagreement, the *Frost* court isn't alone in holding that income received upon the sale or other realization of value from exempt property becomes property of the estate. Perhaps the Commission could consider whether this is an ideal result. I haven't educated myself sufficiently to have a view.

But the issue has now also been presented in a chapter 7 case before the Fifth Circuit. In the *DeBerry* case, the bankruptcy court found that homestead sale proceeds couldn't be brought back into the estate, but the district court held they could. *See Lowe v. Deberry*, No. 5:15-cv-01135 (W.D. Tex. Mar. 10, 2017) (pending on appeal as case no. 17-50315).[3] Unlike the chapter 13 context, this result in a chapter 7 case seems plainly wrong.

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[2] Usually, upon closing, non-administered assets revert to the debtor. But what if a trustee sought the court to "order otherwise" with respect to a currently exempt asset that might later become non-exempt? "The language of section 350(b) gives the court broad discretion in the reopening of a case." 3 COLLIER ON BANKRUPTCY ¶ 350.03 (16th ed. 2017). There is only limited case law on this issue. *See, e.g., In re Hart*, 76 B.R. 774 (Bankr. C.D. Cal. 1987) ("ordering otherwise" in a particular case and outlining a multi-factor test). This is a thicket that courts will continue to have to pick through unless the law is more clearly resolved.

[3] By way of disclosure, I am co-author of an amicus brief on this issue in that case, advocating that the appeals court adopt the view of the bankruptcy court.

The rule could have quite a broad scope, sweeping in the disposition of other exempt assets,[4] conceivably even "current wages," which are otherwise exempt in Texas. If the Fifth Circuit rules, as the district court in *DeBerry* did, that sale proceeds can be recaptured even after the exemption period has passed, there is no obvious reason the ruling wouldn't also apply to certain of the federal exemptions, such as for health aids or unmatured life insurance contracts. 11 U.S.C. § 522(d)(7), (9). In other words, if a debtor sells a prescribed health aid like a wheelchair, those proceeds should immediately become property of the estate—even if they would otherwise be spend on a new wheelchair.[5]

In any case, these questions seem worth resolving at the Code level, because there are courts splitting in various directions.[6] Although there are a lot of potential wrinkles that the Commission is well-positioned to consider, the resolution might be fairly easy: Making clear that dispositions/transformations/realizations of the value of exempt property, after the objection period has run, don't affect the exemption.

The exemption regime, considered on a nationwide basis, is obviously a patchwork at best. One can't really say that any rule will strike the right balance between debtors and their creditors. Congress has chosen to permit tailored state regimes, and so federal rules will have all sorts of different effects on debtors and creditors depending on the vagaries of each state's law. Thus, my concern is most of all a *procedural* one—albeit a procedural one with lots of real-life effects. I strongly believe the current uncertainties in the law, as well as the substantive holdings in many cases, prevent debtors from making good financial decisions, incentivize delay and gamesmanship, and complicate the administration of cases. In other words, my position here isn't as much pro-debtor as pro-bankruptcy-system.

2. *Easing the process of objecting to claims*

There may be room for clarification or alteration in the laws and procedures governing objections to claims.

First, courts are apparently divided on whether compliance with Rule 3007 is sufficient for an objection to claim or whether Rule 9014(a) and 7004 apply, requiring more formal service. It seems to me that the better answer is that the latter rules should not apply. But at a minimum,

[4] In fact, the issue is also pending before the Fifth Circuit in the context of a withdrawal from an exempt retirement account. *See In re Hawk*, 534 B.R. 697 (Bankr. S.D. Tex. 2015) (IRA proceeds lose their exemption), *aff'd sub. nom., Hawk v. Engelhart (In re Hawk)*, 556 B.R. 788 (S.D. Tex. 2015).

[5] To note another question that is important but that I'm not in a position to express a view on, I am aware that similar complications, and arguably similarly arbitrary results, may arise with respect to exemptions that are keyed not to the assets (as per all of those cited above) but rather to some specified dollar-denominated portion of the *value* of certain assets. This is true of the majority of the federal exemptions and many state exemptions as well. This is obviously related to the issue I've discussed above, and could, I believe, be worth the Commission's attention.

[6] Although I don't agree with all of his specific observations, Professor Gary Neustadter made a timely post on Credit Slips about the homestead issue: http://www.creditslips.org/creditslips/2016/11/homestead-proceeds-in-bankruptcy.html.

Rule 3007 should explicitly make clear if it's subject to the other service rules, because it's at best misleading in its current state.

Second, when I clerked for a bankruptcy court, I was struck by how many objections to time-barred claims that our trustees—particularly our very conscientious chapter 13 trustee—were forced to file. And it wasn't easy; they had to go through our whole filing apparatus every time, whereas the system has been greased so that *filing* a claim is pretty easy to do these days in my experience, in most districts.

Of course, as a result of the recent *Midland Funding* decision, objections to time-barred claims are apparently going to continue to be very necessary. Why should objecting to such claims be harder than making them? Are there ways of streamlining the objection to claim process—particularly where claims can be objected to on lack of facial validity? Perhaps, as a first step, something like the easy interface that a lot of courts use for filing claims should be made available for objections to claims?

For all I know courts are already trying this kind of thing out, but I'm not aware of any. Perhaps the Commission could recommend changes that would encourage such experimentation.

3. *Raising compensation for chapter 7 trustees and easing their hiring of their own firms for run-of-the-mill legal work*

There may be a scholarly literature out there to tell me that these premises are wrong, but I will start with two premises:

- Chapter 7 trustee compensation is inadequate. While I am personally familiar with many very talented trustees, my anecdotal evidence is that both trustees and otherwise-might-be trustees say that the job is considerably less desirable than it once was, and many qualified people seem uninterested because of the financial risk of the position.
- Often the most efficient course of action in the main run of small-/medium-asset cases is for trustees to handle the relatively mundane legal matters themselves, or within their firm. But the law as it exists makes this very difficult. Courts apply considerable pressure on trustees trying to retain their own firms to do anything for the estate, and there are cases where trustees have been taken to task for seeking compensation as lawyers for work that the courts found was included within the duties of "trustee" and not "lawyer for the trustee." *See, e.g., In re McCollom Interests, LLC*, 551 B.R. 292 (Bankr. S.D. Tex. 2016) (scrutinizing a fee application); *In re CNC Payroll, Inc.*, 491 B.R. 454 (Bankr. S.D. Tex. 2013) (applying stringent standard for trustee who sought to retain his own firm).

What to do?

Simply raising the default compensation in no-asset cases might well be advisable, but I will not comment on that here. There might be other more "revenue-neutral" ways of easing the burden on trustees financially, including by making it easier for them to retain themselves and take care of legal work for small estates. Perhaps specify some sort of threshold for amount of work up to which trustees can presumptively do it themselves? Or specify certain routine legal matters that can presumptively be handled in-house by trustees and their firms?

4. *Clarifying standing to bring involuntary petitions*

Section 303(b)(1) of the Code requires a petitioning creditor in an involuntary case to have a claim free of "bona fide dispute as to liability or amount." A number of courts have been interpreting this to mean that (as one capable judge I'm familiar with put it) "a bona fide dispute as to the amount of a claim, *whether it is for the full amount of the claim or only part of the claim*, prevents the creditor from having standing to file an involuntary petition under Section 303(b)." *In re CPME*, No. 14-30393, Dkt. 65, Tr. at 15 (Bankr. W.D. Tex. Apr. 10, 2014) (emphasis added) (citing *In re Green Hills Dev. Co.*, 741 F.3d 651 (5th Cir. 2014)).

That is: If the debtor acknowledges that it owes the creditor $149,500, but the creditor thinks it's owed $150,000 (for instance, interest, attorney's fees, etc.), *that creditor is completely ineligible to be a petitioning creditor*.[7]

I see no real defense for this rule aside from discouraging involuntaries, which based on personal experience with clients, it does. Leaving aside the issue of whether discouraging the filing involuntaries is good or bad policy, this seems, in any case, like an irrational basis on which to do so. The law should be clarified that there must be no bona fide dispute that petitioning creditors' claims meet the requisite aggregate amount—even if the *exact* amount owed is subject to bona fide dispute.

As mentioned, I recognize your to-do list is long and these matters may or may not be addressable at this time by the Commission. In any case, please let me express again my sincere gratitude for your service and for the opportunity to make this statement.

I would be very happy to clarify or discuss any of these matters further. I may be reached by phone at (859) 257-6197, or by email at cgbradley@uky.edu.

Thank you again, and I look forward to benefitting from your work.

Sincerely,

Christopher G. Bradley
Assistant Professor of Law
University of Kentucky College of Law
620 S. Limestone
Lexington, KY 40506

[7] This assumes that the creditor intends to file a proof of claim for the full amount owed. One strategy a creditor could use to get around this potentially is to file a POC for less than the full amount they believe they are owed. That seems to me not a decision that a creditor should be forced to make.

Student Loans in Chapter 13

Student loans are considered “non priority unsecured debt” in Chapter 13 bankruptcy matters. But student loans are one of the types of debt that is completely nondischargeable absent filing an adversary petition. Accordingly, student loan debt should be viewed, and treated, differently than other non priority unsecured debt. Doing so would not be unfair to other unsecured creditors, since there is already a different standard that is applied to this debt.

There are several approaches to consider in addressing this issue.

First, changing the classification of student loans to “priority” unsecured claims is justifiable. Other priority claims, such as taxes, alimony, and child support are generally similarly nondischargable. There are public policy considerations to ensuring that those debts are paid. The same is true for student loans, which Congress expressly made nondischargeable except in certain circumstances and only in an adversary proceeding. The big difficulty with this change is that currently, all priority debts must be fully paid within 5 years; a time frame that is frequently impossible for student loan debt. Accordingly, if this change is implemented, the rule requiring full payment in 5 years should be modified to reflect the applicable payment plan for the student loans.

Second, even absent a rule change, debtors’ attorneys should be encouraged to file plans that separately classify student loans pursuant to §1322(b)(1). Judges can and should use their discretion to approve plans with favored treatment of student loan payments. Currently, case law generally holds that generally, the nondischargeable nature of a debt, without more, is insufficient to discriminate in favor of a student loan payment. However, there are a variety of factors that are common in most student loans that will often tip the balance in favor of separate classification.

Third and finally, debtors’ attorneys should make use of the Chapter 13 payment plan to address income-sensitive repayment (ISR) plans for student loan debt. Including an ISR payment plan for the student loan debt in the “Nonstandard Plan Provisions” section is a small but effective way to streamline the payment obligations of the debtor. A court can then approve a plan that actually includes payments toward the student loan debt, permits the debtor to enroll in an income-sensitive payment plan, and administers the student loan payments through the plan payments to the Trustee’s office. While this applies only to ISR-eligible, federally-backed debt, it is still a valuable way to address the chasm between the public policy of prioritizing payment of student loan debt and the “non priority” classification.

John R. Byrnes Remarks
April 20, 2018

Thank you for the opportunity to appear before the Commission. I retired from the U.S. Trustee program after having served in the Department of Justice for almost 35 years, including services as Assistant U.S. Attorney, U.S. Attorney, and 25 years in the UST Program. I mention my service as the U.S. Attorney to show that I had some familiarity with enforcement-type issues before Article 3 Judges before I started with the U.S. Trustee. That experience was invaluable in assessing appropriate enforcement actions and identifying evidentiary and other trial issues.

During my service with the U.S. Trustee, I dealt with a wide variety of enforcement issues—both civil and criminal—involving debtors, creditors, and attorneys representing them. The issues remained relatively constant over the course of my service. Some were resolved informally, usually through warnings and discussions about the potential consequences of continuing certain types of behavior. More serious misconduct involved referrals to the U.S. Attorney in extreme cases, filing disciplinary complaints with the court, or filing complaints with state disciplinary boards. Typically, referrals to state disciplinary authorities were the least effective in securing a lasting remedy.

Remedies available from the bankruptcy courts are typically adequate to address everyday issues involving inadequate performance by attorneys. If the attorney is not a bankruptcy specialist, a mild admonishment and direction on corrective action are sufficient. If the attorney is a bankruptcy specialist, the threat of disbarment, suspension, or modified mandatory filing requirements (for example, specific detailed sworn verification by the attorney) should be effective.

I was never forced to commence a disciplinary action in district court, although there are many cases in which the respondent has disputed the authority of the bankruptcy court to impose monetary or other equitable sanctions. These typically involve large, multi-state practitioners or debt relief agencies with a lot of money at stake.

Unfortunately, in some instances referral to the U.S. Attorney is necessary. These typically include obvious cases of perjury (for example, the case involving John Gellene), or cases involving an attorney filing false documents on behalf of a debtor or creditor. This remedy is often ineffective, however, because some U.S. Attorneys are reluctant to bring such cases, frequently citing the press of other business. The real reason, in my opinion, is a lack of familiarity with bankruptcy laws and procedures and reluctance to rely on the U.S. Trustees to provide expert knowledge. Notwithstanding, the USTP has continued to refer appropriate cases. Between 2006 and 2017, the USTP made over 21,000 criminal referrals.

Although most bankruptcy attorneys are honest and diligent and will not participate in or assist their clients in dishonest acts, there continues to be a substantial number who will. Identifying particular cases is a difficult process. Unfortunately, some judges tolerate a level of inadequate performance on an ongoing basis from barely competent practitioners. Bankruptcy practice has for many years appealed to otherwise unsuccessful lawyers who see an opportunity

for "easy money." As the total volume of cases declines in some areas, more lawyers try and compete on price, and a reduction in the quality of services follows.

As the Commission considers the recommendations, I would urge it to examine any changes in allowable practices with a view toward the potential for abuse, especially from less diligent practitioners. Specific enforcement mechanisms should considered as part of any substantial change. An example of this relates to proposals permitting attorneys to limit the scope of representation, i.e. unbundling.

At present most bankruptcy courts will require an attorney who filed a case to continue to represent the debtor until the case is closed. They cite as a legal basis the general ethical requirement to complete an engagement. As a practical matter, most judges believe the debtor's attorney is in the best position to identify risks of potential litigation before the case is filed and either include that risk in the cost quoted or decline the representation. They also recognize that allowing withdrawal post-petition will simply leave the debtor unrepresented.

An unusual circumstance in my district related to the review of substantial abuse issues under 707 of the code. Upon the commencement of such a motion, many attorneys would immediately consent to dismissal or convert the case to Chapter 13, regardless of whether the debtor had a compelling explanation. We ultimately modified our practice to conduct informal discovery with the debtor and their attorney to inquire about income and expenses. Often the debtor had a story (usually post-petition unemployment or major medical expenses) that was satisfactory to us but unknown to their attorney. I remain proud of the fact that in our office the government actually called people, together with their attorney, to get their side of the story before launching litigation. Attorneys simply dumping such cases on an automatic basis would have been a grave disservice to their clients.

Incidents such as these will proliferate if attorneys have carte blanche to limit the services from the outset. It also seems unlikely that there will be any significant reduction in fees to the debtor over the long haul. Therefore, when considering practice changes, I strongly encourage the Commission to take into account the potential for abuse in relation to the changes and the ability to identify and enforce appropriate actions against bad actors.

November 29, 2017

STATEMENT OF JACK BUTLER
CHIEF EXECUTIVE OFFICER OF BIRCH LAKE HOLDINGS, LP
TO THE AMERICAN BANKRUPTCY INSTITUTE
CONSUMER BANKRUPTCY COMMISSION

My name is Jack Butler. I am grateful for the opportunity to submit this written testimony to the *American Bankruptcy Institute Consumer Bankruptcy Commission* and to appear before the Commission at its December 1, 2017 public hearing convened at the ABI Winter Leadership Conference in Palm Springs.

This statement will focus on steps that the Commission can take to help break down traditional access barriers to the judicial system experienced by unsophisticated consumers, especially those who live outside of large urban centers. My testimony is offered from three vantage points: as a former practicing attorney for whom access to justice is a long-standing personal passion and commitment, as the chief executive officer of a merchant bank that is an investor in the legal tech industry, and as a commissioner on ABI's business bankruptcy commission that completed its work and published its report in December 2014. While I am mindful that the subjects of technology and improving access to the consumer bankruptcy system are not listed explicitly among the Commission's "List of Topics" that are being studied by the Commission's Committees on Case Administration, Chapter 7 and Chapter 13, I am also confident that the Commission itself will not complete its work without thoughtful consideration of these threshold issues.

For the last 35 years, I have focused on creating value in stressed businesses where we concluded there was a viable business enterprise that justified the investment of intellectual and financial capital to preserve, protect and maximize value. For much of my career, I pursued this from my seat as a co-founder and practice leader of the corporate restructuring and distressed M&A practice at Skadden, Arps, Slate, Meagher & Flom LLP. More recently, I have acted as a principal in private business as Chief Executive Officer of the merchant bank Birch Lake Holdings, LP.[1] Throughout my career, one of my core values is the belief that we all have an obligation to "pay forward" and "pay back" by affirmatively making a difference in the broader communities in which we have been fortunate to be participants and beneficiaries. For me, that has included dedicating attention

[1] Chief Executive Officer of merchant bank Birch Lake Holdings, LP, Jack Butler has been credited during his career as one of the principal architects of restructuring solutions for companies across a diverse range of industries, including Delphi Corporation, Kmart Corporation, Masonite International, Inc., Per-Se Technologies, Inc., Rite Aid Corporation, Sprint Corporation, Warnaco Group, Inc., Xerox Corporation and on behalf of creditors in the American Airlines' reorganization and merger with US Airways Group, Inc. The American-US Airways transaction was cited for its innovation, collaboration and creativity by the Financial Times, which separately profiled Jack for developing "creative solutions" during the credit crisis. Jack is a member of the M&A Advisor Hall of Fame and the Turnaround, Restructuring and Distressed Investing Industry Hall of Fame. He is a recipient of the Ellis Island Medal of Honor, which is awarded to Americans who exemplify outstanding qualities in both their personal and professional lives. A founder and past chairman of the Turnaround Management Association, Jack has served in leadership positions for many other industry organizations, including the American Bankruptcy Institute, American Board of Certification, Commercial Finance Association and its Education Foundation, INSOL International and New York Institute of Credit. He is also a Fellow in the American College of Bankruptcy and International Insolvency Institute. Jack received an A.B. from Princeton University and a J.D. from the University of Michigan Law School.

to the consumer bankruptcy system and the barriers to access that frustrate many Americans from the "fresh start" that consumer bankruptcy is supposed to offer.[2]

Today, with my law career in the rear-view mirror, I am completely focused and invested in Birch Lake and its proprietary and synergistic approach towards the investment of both intellectual and financial capital in complex and stressed businesses. Relevant to the Commission's deliberations is our experience in advising and investing in the legal tech business.[3] It is our clear conviction that legal tech (including artificial intelligence) will continue to break down barriers to access for consumers across a broad spectrum of legal needs including in the consumer bankruptcy area.

> *"The venture capitalist Marc Andreessen once said that software is eating the world. You don't have to look very far to see that in action. The ubiquity of smartphones and social networking apps, for example, has transformed how people keep in touch with family and friends. Amazon and other e-commerce sites have revolutionized shopping. Even in health care, digital technology has already started changing how consumers choose service providers."*[4]

The reality facing every business and profession is that technology is transforming how we live our lives. In addition to personal empowerment, convenience and peace of mind that consumers feel from controlling their world from their tablet, smart phone or wearable, the way in which information and services are delivered to consumers has irrevocably changed over the last two decades. According to the Pew Research Center, nearly nine-in-ten Americans today are online, up from about half in the early 2000s. Roughly three-quarters of Americans (77%) now own a

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[2] In 1991, Jack served on the Steering Committee that produced ABI's *National Report on Professional Compensation in Bankruptcy Cases*, which addressed professional compensation in both consumer and business cases. Several years later, the ABI Board of Directors (on which he then served) commissioned the *ABI Bankruptcy Reform Study Project* to examine significant issues affecting the way we approach the resolution of insolvency in this country with a view to furnishing the results to policymakers charged with reviewing and reforming the nation's bankruptcy laws. As a member of the Project Steering Committee, Jack had the privilege of organizing and leading the *ABI National Symposia*, which included a symposium on administrative oversight in the bankruptcy system focusing on administrative oversight of the business and consumer bankruptcy systems. For better or worse, the work of the *ABI Bankruptcy Reform Study Project* has helped inform the consumer system that exists today. Around the same time, a group of ABI leaders discussed the importance of best practices in the consumer and business bankruptcy systems. That led to the creation of the *American Bankruptcy Board of Certification*. Jack served as the initial chair of the Board's Standards Committee for several years as well as its Chairman of the Board of Directors through mid-1998. Later, he advised on the merger of the certification programs sponsored by the ABI and the Commercial Law League of America, which formed today's *American Board of Certification*. All told, ABC has certified nearly 1,000 attorneys in consumer bankruptcy, business bankruptcy and creditors rights.

[3] Earlier this year, Birch Lake invested in Justiva, LLC (d/b/a Bridge Legal), a legal-tech company that provides various business process and marketing services and strategies to consumer law firms. Birch Lake's investment thesis is centered upon its view that technology increasingly is a game changer in the delivery of consumer legal services and will help address the need for affordable and practical access to legal justice by consumers. Bridge Legal currently provides business process, marketing services and sophisticated proprietary technology to one of the preeminent national bricks and mortar law firms, Law Solutions Chicago, LLC d/b/a UpRight Law and its affiliates. UpRight facilitates the delivery of legal services to clients in the comfort of their homes at a time of their choosing. David Leibowitz, UpRight Law's Chief Legal Officer, testified before the Commission last month at its public hearing held in Chicago, Illinois.

[4] See Kelvin Calveria, "4 examples of how technology is changing consumer behavior" at https://www.visioncritical.com/4-examples-how-technology-changing-consumer-behavior-1/ (February 3, 2017).

smartphone, with lower-income Americans and those ages 50 and older exhibiting a sharp uptick in ownership over the past year. Nearly seven-in-ten Americans now use social media. When the Pew Research Center started tracking social media adoption in 2005, just 5% of Americans said they used these platforms. Today, 69% of U.S. adults are social media users. Half the public now owns a tablet computer. Though less widespread than smartphones, tablet computers have also become highly common in a very short period.[5]

Just in the four days prior to the Commission's December 1, 2017 public hearing, Americans participated in two widely adopted online events that illustrate how profoundly technology has changed consumer behavior in the United States: Cyber Monday and #GivingTuesday. On Cyber Monday 2017, Adobe Digital Insights projected the day to rake in as much as $6.6 billion in sales -- a 16.5% increase over last year's record-setter. By comparison, Adobe said shoppers spent about $5 billion online on Black Friday (the traditional "bricks and mortar" post-Thanksgiving holiday retail spending spree).[6] #GivingTuesday is a global day of giving, which begins the traditional year-end charitable season is celebrated on the Tuesday following Thanksgiving. In 2016, the #GivingTuesday Data Project by 92Y estimated a haul of $168 million worldwide, with the majority through online donations to U.S.-based nonprofits. The total number of gifts was estimated at 1.56 million individual contributions, with an average gift size of $107.69.[7]

This fundamental change in consumer behavior is affecting every industry and profession. In the legal profession, there is an evolving value proposition for both clients and lawyers. Business and consumer clients are demanding simpler, faster, more convenient, more accountable, more responsive and less expensive access to lawyers and legal solutions. Lawyers are moving, albeit sometimes remarkably slowly, to respond to these client pressures and are thinking about how their bricks and mortar, leveraged, hourly rate-based, paper driven business model can adapt to become more attractive to clients while both maximizing profits and improving work-life balance for law firm partners and their millennial associates, paralegals and staff.

In their treatise on disruptive innovation and emerging models of new legal practice, Professor Joan Williams and her colleagues, Aaron Platt and Jessica Lee, have attempted to catalogue a wide variety of new business organizations and arrangements that innovators and entrepreneurs have created to respond to client and lawyer dissatisfaction with traditional law firms.[8] They have identified five distinct new business models: (1) secondment firms, which place lawyers inside client organizations, (2) law and business advice companies, which combine business consulting, investment banking and legal advice, (3) law firm accordion companies, which assemble and "lease out" networks of experienced lawyers to meet short-term staffing needs of law firms, (4) virtual law firms and companies, which often base their model on contract lawyers working from

[5] See Aaron Smith, "Record shares of Americans now own smartphones, have home broadband at http://www.pewresearch.org/fact-tank/2017/01/12/evolution-of-technology/ (January 12, 2017).

[6] See Jackie Wattles, "Cyber Monday could set a sales record" at http://money.cnn.com/2017/11/26/news/cyber-monday-sales-record/index.html (November 26, 2017).

[7] See Mark Hrywna, "#GivingTuesday Up 20%" at http://www.thenonprofittimes.com/news-articles/givingtuesday-up-20/ (December 6, 2016).

[8] Joan C. Williams, Aaron Platt, and Jessica Lee, Disruptive Innovation: New Models of Legal Practice, 67 Hastings L.J. 1 (2015). Available at: http://repository.uchastings.edu/faculty_scholarship/1279.

their own home offices and (5) innovative law firms and companies, which range from legal services provided for a monthly subscription fee (think a more expensive "Amazon Prime") to firms that have adopted alternative fee arrangements, team scheduling, and even elimination of traditional distinctions between partners, counsel and associates.

Although technology is driving innovation in the United States' legal system, there continues to be unacceptable systemic limitations on access to justice by those Americans who arguably require access most of all. In their research examining how the legal profession is failing low and middle-income families, Professor Jennifer Baird of the University of Cincinnati Law School and Larry Cunningham, Vice Dean of St. John's University School of Law, concluded that "eighty percent of low-income individuals in the United States cannot afford the legal assistance they need to avoid the loss of their homes, children, jobs, liberty and even lives. The middle class doesn't fare much better: Forty to sixty percent of their legal needs go unmet."[9] Professor Baird and Dean Cunningham suggest that the legal profession adopt a tiered system of legal services delivery that reduces barriers to entry. Their research is confirmed by other scholars. After researching bar association surveys regarding the lack of access to affordable legal services, University of Utah College of Law Professor George Harris observed that "more often than not, 'ordinary' people with a need for legal services go without."[10]

These systemic barriers are accentuated outside of large urban centers. Nearly twenty percent of Americans live in rural areas, but less than two percent of small law practices are in those areas. "A hospital will not last long with no doctors, and a courthouse and judicial system with no lawyers face the same grim future," South Dakota's chief justice, David E. Gilbertson, said. "We face the very real possibility of whole sections of this state being without access to legal services."[11] Those still practicing law in small towns are often nearing retirement age, without anyone to take over their practices. And without an attorney nearby, rural residents may have to drive 100 miles or more to take care of routine matters like child custody, estate planning and taxes. For people of limited means, a long drive is a logistical hardship, requiring gas, a day away from work and sometimes an overnight stay. And census information shows that rural communities are disproportionately poor. All this creates a "justice gap," with legal needs going unmet because potential clients can't find a lawyer, or they can't afford the lawyers they can find.[12]

Against this contextual backdrop, why did Birch Lake invest in Bridge Legal?

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[9] Baird, J. and Cunningham, L., "The legal profession is failing low-income and middle class people. Let's fix that.", Washington Post, https://www.washingtonpost.com/opinions/the-legal-profession-is-failing-low-income-and-middle-class-people-lets-fix-that/2017/06/02/e266200a-246b-11e7-bb9d-8cd6118e1409_story.html?utm_term=.e8a2a42b24d0 (June 5, 2017).

[10] George C. Harris and Derek F. Foran, The Ethics of Middle-Class Access to Legal Services and What We Can Learn from the Medical Profession's Shift to a Corporate Paradigm, 70 Fordham L. Rev. 775 (2001). Available at: http://ir.lawnet.fordham.edu/flr/vol70/iss3/6.

[11] Bronner, Ethan, No Lawyer for Miles, So One State Offers to Pay, The New York Times, available at http://www.nytimes.com/2013/04/09/us/subsidy-seen-as-a-way-to-fill-a-need-for-rural-lawyers.html (Apr. 8, 2013).

[12] Laird, Lorelei, In rural America, there are job opportunities and a need for lawyers, ABA Journal, http://www.abajournal.com/magazine/article/too_many_lawyers_not_here._in_rural_america_lawyers_are_few_and_far_between (Oct. 1, 2014).

We did so because we believe that technology will continue to drive innovation and evolution of the legal system both in the commercial and consumer sectors. We envision consumer bankruptcy activity (from case commencement to court hearings to final disposition) will be executed more efficiently through technology-based solutions including paperless filings and Skype or other video-enabled Section 341 meetings and court hearings. Technology-facilitated innovation will make it possible for a single parent in rural West Virginia or a family in a remote area of Montana to achieve a fresh start in their financial lives without traveling long distances to law firms and courthouses, taking time off their jobs or finding childcare for their children (all or some of which may be impossible for them to do financially). If we are sincere about equal access to justice for all Americans, we must encourage and facilitate innovative ways to harness the personal empowerment, convenience and peace of mind that consumers feel from controlling their world from their tablet, smart phone or wearable.

Legal tech companies like Bridge Legal are developing sophisticated AI-enhanced tools that can be used by state-wide, regional and national "bricks and mortar" consumer bankruptcy firms to eliminate barriers to access faced by rural consumers as well as by consumers (wherever they reside) who either do not know how to access the system or are unwilling to do so without the comfort of using their tablet or smartphone to educate themselves. Ironically, while critics of legal services delivery through technology-enhanced applications and the Internet often characterize the activity as the unethical solicitation of clients, it is the consumer himself or herself that initiates an inquiry and reaches out for help. Without these multi-faceted networks of local, regional and national consumer bankruptcy law firms adopting the latest technology and channels of client communication, existing barriers to access to justice will remain and consumers' needs will remain unmet. I believe that the most important issue for the Commission to consider is access to justice which both transcends and informs almost every topic that the Commission has identified for study and consideration.

Does disruptive innovation and the creation of new models of legal practice cause problems? Clearly, they do. Are these new business models executed flawlessly? They most certainly are not – nor would such an expectation be realistic. At last month's public meeting, the Commission received the testimony of David Leibowitz, the Chief Legal Officer of UpRight Law. That national bricks and mortar law firm, headquartered in my hometown of Chicago with approximately 125 lawyers and support staff and with over 400 partners resident in local communities across the country, also happens to be Bridge Legal's launch client. Bridge Legal currently provides business process, marketing services and sophisticated proprietary technology to UpRight Law.

The Commission heard testimony from Mr. Leibowitz that while UpRight's clients have continually expressed a high degree of satisfaction, fueling its early stage and unprecedented growth, UpRight encountered growing pains establishing its multi-state law partnership, implementing quality control and compliance systems and other occasional challenges associated with providing legal services in an innovative, technology-powered manner. Mr. Leibowitz acknowledged that many of these challenges were self-identified and self-reported, but others were highlighted by regulators and panel trustees. He advised the Commission that UpRight has evolved to focus on internal compliance together with effective mitigation and remediation of individual case issues, which represent a small fraction of the successful outcomes achieved. Indeed, after having developed and implemented a remediation plan to address past operational issues and adopt

best practices across the law firm, UpRight is pursuing cooperative resolution of any regulatory concerns that remain. Mr. Leibowitz emphasized the law firm's commitment to bridge the real disconnect between the reality of who the law firm and its lawyers are (and what they are working every day to accomplish) against how they are perceived by some of their regulators.

UpRight and other regional and national consumer bankruptcy law firms that are focused on delivering legal services on a multi-jurisdictional platform face considerable headwinds from skeptical bankruptcy judges, regulators and panel trustees among others. These concerns are well summarized by Clifford J. White III, Director, Executive Office for United States Trustees, U.S. Department of Justice and a commissioner on this Commission in his recent testimony before Congress:

> *The Program has a long history of utilizing statutory tools to sanction debtors' attorneys who fail to fulfill their basic obligations to their client through such actions as failing to meet with their client, causing costly delays by not appearing at court or "section 341" proceedings, and engaging in a range of other unprofessional behavior. The victims of such professional misconduct are not only the debtor client, but also creditors and the court, which expend scarce resources in proceedings that are unnecessarily lengthy or complex due to the failure of debtors' counsel to do their jobs properly. Under the Bankruptcy Code, this conduct may be sanctionable and debtors may receive refunds of the attorneys' fees already paid. In FY 2016, the Program increased the number of formal actions taken under sections 329 and 526 of the Bankruptcy Code by over 30 percent combined. We also utilized other statutory tools to combat this abuse.*
>
> *In a series of "town hall" meetings held with all Program employees, as well as meetings with bankruptcy judges and private trustees, almost all those surveyed said that the problem of underperforming consumer debtor attorneys was on the rise, particularly among national law firms that advertise on the Internet. Based on this information, and the need to tackle system-wide problems with coordinated national action, the USTP assembled litigation groups to investigate and take action where violations in multiple jurisdictions were identified. In fact, it appears that at least two national law firms have disbanded as a result of the Program's enforcement actions against them.*
>
> *Among the more noteworthy allegations we are investigating are instances of lawyers not merely failing to perform, but misusing the client relationship to sell services that are of little or no value to the debtor. Some of these schemes may be abusive and others may be fraudulent. Our investigations and actions are continuing and remain a top priority of the USTP in 2017.*[13]

[13] Statement of Clifford J. White III, Director, Executive Office for United States Trustees, U.S. Department of Justice, Before The Subcommittee On Regulatory Reform, Commercial And Antitrust Law Committee On The Judiciary, U.S. House of Representatives For A Hearing Concerning A Time To Reform: Oversight Of The Activities Of The Justice Department's Civil, Tax, And Environment And Natural Resources Divisions And The U.S. Trustee Program, Presented June 8, 2017.

Clearly there is an essential place in the consumer bankruptcy law system for compliant, ethical, well-managed multi-jurisdictional law firms that are held to the same ethical and practice standards as are regional, state-wide and local law firms. Firms like UpRight Law play an important national role in breaking down barriers to access for consumers and leading the technology innovations that bring consumers who need the protection and assistance of the consumer bankruptcy system into it. We expect that Bridge Legal will continue to use its vendor relationship with UpRight Law to provide it resources to facilitate Upright Law's continued improvements in the delivery of ethically-compliant legal services and demonstration to bankruptcy courts, regulators and panel trustees that it is a compliant, ethical and well-managed law firm.

Notwithstanding early-stage challenges, Upright Law is the proof of concept that national consumer bankruptcy law firms can break down barriers and provide access to justice for our nation's most underserved consumers who have otherwise been left behind in the consumer bankruptcy legal system.[14] Firms like Upright are complementary (as opposed to a threat) to regional and local law firms. Local consumer bankruptcy law firms play an important role in the consumer system but they alone have not and will not solve the "justice gap" that plagues middle-class and lower income consumers. That said, our consumer bankruptcy system is also threatened by the reality that many regional and small consumer bankruptcy law firms are facing significant challenges to their long-term financial viability. For them, legal-tech firms like Bridge Law will help them navigate to a stable and profitable future through providing business process, client acquisition and marketing services, and sophisticated proprietary technology.

So, what can this Commission do to help eliminate the "justice gap" that exists in today's consumer bankruptcy system?

First, we much acknowledge and prioritize the problem. The Commission's final report should examine the justice gap and make access to justice a prism through which its other recommendations are viewed and presented. Artificial barriers to justice must be eliminated. Let us also consider that consumers' major creditors already benefit from scaled efficiencies in their participation in consumer bankruptcy cases. We need to "even the playing field" in the consumer bankruptcy law system to foster an intelligent fabric of multi-state, regional and local law firms to serve consumers. These firms must be connected and coordinated with their clients through sophisticated technology that increases efficiencies, reduces clerical errors and creates viable long-term profitable debtor law firms.

Second, Consumer bankruptcy law firms should also play by the same rules: the Constitution and Bankruptcy Code contemplate a uniform bankruptcy system across all federal jurisdictions. The Commission should recommend that the Bankruptcy Rules Committee examine local rules nationwide to determine which rules and procedures represent best practices. Inconsistent local rules that are determined not to be best practices should be eliminated. Uniformity in rules and procedures nationally will allow for more efficient provision of legal services for all parties in interest and relieve burdens upon the courts and other interested parties. In addition, Federal Rule

[14] An accredited Better Business Bureau firm with an A+ rating, UpRight Law has filed more than 20,000 consumer bankruptcy cases to date and obtained more than 18,000 discharges that provide "fresh starts" to consumers across all 50 states represented by UpRight lawyers licensed in the local jurisdiction. The ABA Commission on the Future of Legal Services toured UpRight Law's Chicago offices in 2015. ABA Immediate Past President William Hubbard visited during his presidential term and said: "We must develop a new model to meet the needs of the underserved."

of Bankruptcy Procedure 4002(b) should be revisited and revised to promote uniformity of practice. We need to move away from a system where document production by debtors to trustees varies by different trustees within the same district.

Third, the Commission should consider recommendations to embrace the technology world in which consumers live today. Technology is transforming how we live our lives. The consumer bankruptcy system should harness the personal empowerment, convenience and peace of mind that consumers feel from controlling their world from their tablet, smart phone or wearable. We must embrace the reality that how information and services is delivered to consumers has irrevocably changed over the last two decades. People who cannot easily come to physical law offices should be able to use technology-powered legal services that meet their needs. Some rule changes, such as explicitly clarifying that electronic signatures and records from debtors are authorized, are long overdue. Other rule changes, such as expressly authorizing use of remote video access for Section 341 creditors' meetings and for court hearings, should be authorized promptly but with a delayed effective date to facilitate preparation and transition including thoughtful input from the Executive Office of the United States Trustee and local bankruptcy courts and bar organizations.

In closing, I would like to offer some personal reflections about the work of this Commission. For me, my service as a commissioner on *The ABI Commission to Study the Reform of Chapter 11* is one of the most meaningful things that I have done in my legal and business careers. What made the experience so rewarding was not only the intellectual interactions with so many talented people who care about effective business reorganizations, creditors' rights and claims adjudication but the written report that we produced (which would not have been possible without the remarkable work of now United States Bankruptcy Court Michelle M. Harner and the research assistants and empiricists who worked alongside her).

That report was constructed on several premises agreed to by the commissioners at the outset and which allowed us to write a consensual report without any written dissents. First, we agreed that we had to hear every voice in the community that we could. Second, we agreed that we could not carry out our mandate without the service of a broader group of experts in an advisory committee structure. Third, we agreed that the commissioners, alone, had to "own" our final work product so that while we were guided and influenced by advisory committee reports, we felt obliged to reach our own conclusions which meant that not every advisory committee suggestion was adopted. Fourth, we agreed that our work product had to fairly and objectively summarize the various "sides" of an issue with as much scholarly detail and reference as we could muster. Fifth, we only reported a commission recommendation when we achieved a reasonable consensus, which meant that some particularly thorny subjects received comprehensive discussion without the commissioners taking a position on an appropriate outcome.

Having taken the journey that this Commission is embarked on – albeit with respect to a different part of the Bankruptcy Code – I have enormous respect for the task that you have signed up for and how you are carrying out your mandate. Please accept my best wishes for the successful completion of the Commission's work, my admiration and thanks for your personal service, and my appreciation for the opportunity to present these observations and suggestions for your consideration.

Lawless, Robert M

From: Cerone, Rudy J. <rcerone@mcglinchey.com>
Sent: Monday, May 01, 2017 12:30 PM
To: Lawless, Robert M
Subject: ABI Commission - Chapter 7 (and Chapter 13) Issue
Attachments: In re Lempesis.pdf; NOLADB-#1330823-v3-33rd_Annual_ABI_Spring_Meeting_Class_Actions_in_Bankr....doc

Robert,

Here is an area that affects debtors and creditors in both chapter 7 and 13 cases – discharge injunction violations.

There are myriad issues which arise in this area. One that has generated considerable judicial attention, and disagreement, is whether punitive damages are available for discharge injunction violations. See *In re Lempisis* attached. Another is the use of class actions in bankruptcy court to remedy "systemic" violations. Again, there is considerable disagreement in the case law. See attached ABI ASM CLE materials.

I suggest that discussion/resolution of these issues would be welcomed by counsel for both debtors and creditors, such that they may be appropriate for the "consent" calendar.

Let me know if you need anything further from me on this.

I look forward to our first Commission public meeting on Saturday. See you in Orlando.

Rudy

Rudy J. Cerone

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Fellow, American College of Bankruptcy
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From: Lawless, Robert M [mailto:rlawless@illinois.edu]
Sent: Monday, May 01, 2017 12:04 PM
To: aholtschlag@wfactorlaw.com; bj.maley@il.cslegal.com; Cynthia@CynthiaCarrollLaw.com; dlevine@kklaw.com; dunnrandy28@gmail.com; elizabethlperris@gmail.com; joeprochaska@pqflegal.com; kcordry@naag.org; knicholson@nicholsonherrick.com; Lawless, Robert M; martin@law.unm.edu; mcleffler@bolemanlaw.com; mgoott@walkerandpatterson.com; neil.gordon@agg.com; office@stlbankruptcy.com; Cerone, Rudy J.;

rpeterson@jenner.com; ted.gavin@gavinsolmonese.com
Subject: ABI Commission, Most Recent Submissions (5/1/2017)

Dear Members of the Committee on Chapter 7:

Attached are the most recent submissions to the ABI Commission. The "topic requests" were submitted through the Commission web site. The "written statements" came in through email. .I am sending along all of the submissions that were relevant to your committee (broadly defined).

Bob

--
Robert M. Lawless
Max L. Rowe Professor of Law
Co-director, Program on Law, Behavior & Social Science
University of Illinois College of Law

2016 WL 5539813
Only the Westlaw citation
is currently available.
United States Bankruptcy Court,
N.D. Illinois, Eastern Division.

In re: Spiro Lempesis, Debtor.

Case No: 13 B 38994
|
Signed September 28, 2016

Synopsis
Background: Chapter 7 debtor filed motion for civil contempt and sanctions for violation of discharge injunction by a creditor and his counsel.

Holdings: The Bankruptcy Court, Bruce W. Black, J., held that:

[1] creditor's and his attorney's violations of automatic stay and discharge injunction by failing to timely dismiss state court lawsuit against debtor and filing second lawsuit were wilful, warranting damages award;

[2] debtor was entitled to out of pocket damages of $174;

[3] debtor was entitled to emotional distress damages in requested amount of $12,000;

[4] damages for injury to debtor's reputation were not warranted; and

[5] debtor was entitled to punitive damages in the requested amount of $50,000.

Motion granted.

West Headnotes (10)

[1] Bankruptcy

51 Bankruptcy
Facts and circumstances of a particular case often control when considering the adequacy of notice to creditors of bankruptcy filing.

Cases that cite this headnote

[2] Bankruptcy

51 Bankruptcy
Once attorneys receive notice of bankruptcy filing, they are obligated to determine the status of the bankruptcy case before pursuing litigation against a debtor.

Cases that cite this headnote

[3] Bankruptcy

51 Bankruptcy
When an attorney is representing a creditor in order to collect a debt outside of bankruptcy, notice of the bankruptcy petition sent to the attorney by the debtor can be imputed to the creditor.

Cases that cite this headnote

[4] Bankruptcy

51 Bankruptcy

Both the automatic stay and the discharge injunction prohibit creditors from taking any action to collect a debt that arose before the bankruptcy petition was filed. 11 U.S.C.A. §§ 362, 524.

Cases that cite this headnote

[5] Bankruptcy

51 Bankruptcy

Creditor's and his attorney's violations of automatic stay and discharge injunction by failing to timely dismiss state court lawsuit against Chapter 7 debtor and filing second lawsuit were wilful, warranting damages award in contempt proceeding. 11 U.S.C.A. §§ 362, 524.

Cases that cite this headnote

[6] Bankruptcy

51 Bankruptcy

As damages in contempt proceeding for creditor's and his attorney's wilful violation of automatic stay and discharge injunction by failing to timely dismiss state court lawsuit against Chapter 7 debtor and filing second lawsuit, debtor was entitled to out of pocket damages of $174 for time off work and parking. 11 U.S.C.A. §§ 362, 524.

Cases that cite this headnote

[7] Bankruptcy

51 Bankruptcy

In a contempt proceeding for a violation of the discharge injunction, a debtor is entitled to recover reasonable attorney fees. 11 U.S.C.A. § 524.

Cases that cite this headnote

[8] Bankruptcy

51 Bankruptcy

As damages in contempt proceeding for creditor's and his attorney's wilful violation of automatic stay and discharge injunction by failing to timely dismiss state court lawsuit against Chapter 7 debtor, and filing second lawsuit nearly a year after debtor's discharge, debtor was entitled to emotional distress damages in requested amount of $12,000; after being advised, presumably, by counsel that creditor's claims were forever barred, to find himself back in state court would be most distressing. 11 U.S.C.A. §§ 362(h), 524.

Cases that cite this headnote

[9] Bankruptcy

51 Bankruptcy

Damages for injury to Chapter 7 debtor's reputation were not warranted in contempt proceeding for creditor's and his attorney's wilful violation of automatic stay and discharge injunction by failing to timely dismiss state court lawsuit against debtor and filing second lawsuit, as debtor offered no evidence whatsoever regarding his reputation. 11 U.S.C.A. §§ 362, 524.

Cases that cite this headnote

[10] Bankruptcy

51 Bankruptcy

As damages in contempt proceeding for creditor's and his attorney's wilful violation of automatic stay and discharge injunction by failing to timely dismiss state court lawsuit against Chapter 7 debtor and filing second lawsuit, debtor was entitled to punitive damages in the requested amount of $50,000. 11 U.S.C.A. §§ 362, 524.

Cases that cite this headnote

Attorneys and Law Firms

Attorney for Debtor: Michael W. Huseman, Dreyer, Foote, Streit, Furgason & Slocum, P.A.

Attorney for Respondents: George P. Apostolides, Arnstein & Lehr LLP

MEMORANDUM OPINION REGARDING MOTION FOR CIVIL CONTEMPT AND SANCTIONS FOR VIOLATION OF THE DISCHARGE INJUNCTION

Bruce W. Black, Bankruptcy Judge

***1** This matter is before the court on the Debtor's motion for civil contempt and sanctions for violation of the discharge injunction by Anthony Collaro ("Collaro"), a creditor, and his counsel, Romanucci & Blandin ("R & B," collectively with Collaro, "Respondents"). After trial and post-trial briefing, and for the reasons stated below, the motion is granted, and the Respondents are found to be in civil contempt for violation of the discharge injunction provided by section 524 of the Bankruptcy Code. [1]

1 11 U.S.C. § 101 *ff*. Any reference to "section" or "the Code" is a reference to the Bankruptcy Code unless another reference is stated.

Background

The Debtor is not an admirable person. He admits to conduct that is reprehensible

and unjustifiable: sexual contact with one of his players, Collaro, when he was a college baseball coach. Nevertheless, he is a debtor, and no one has suggested that he filed his bankruptcy case in bad faith. Therefore, he is entitled to the protections afforded debtors by the Code. Moreover, the time has expired for anyone to contest the dischargeability of any debt he may owe Collaro.[2] Consequently, for purposes of the present motion, the nature of the Debtor's conduct is irrelevant.

2 An order was entered on February 21, 2014 granting the motion of another creditor to extend time to challenge the dischargeability of debt. The Order stated that the deadline for that particular creditor was sixty (60) days after the final disposition of that creditor's state court suit. The deadline for all other creditors, including Respondents, remained at January 17, 2014

Most of the facts are not in dispute. The Debtor filed for relief under chapter 7 of the Code on October 3, 2013. On Schedule F he listed Collaro as a creditor with an unliquidated and disputed claim in the form of a lawsuit filed in May of 2013 and pending in state court against the Debtor ("the first lawsuit"). On October 6, 2013, notice of the bankruptcy containing relevant information for creditors was mailed by the Bankruptcy Notification Center to creditors, including Collaro in care of his counsel in the state court case, R & B, at an address on N. LaSalle in Chicago. (Bankr. Dkt. No. 9). On November 4, 2013, upon discovering that R & B had recently moved their offices (Debtor's Ex. 3), the Debtor's attorney mailed a copy of the bankruptcy notice to R & B at their new address, 321 N. Clark Street, Suite 900, Chicago, IL 60654 and sent it via facsimile to R & B with attention to attorney Rebekah Williams ("Williams"), the lead associate at R & B assigned to the pending state court case. (Debtor's Ex. 5).

The notice included, in bold print, a warning about the automatic stay. It also included, in bold print, a statement that the deadline to object to the Debtor's discharge or to challenge the dischargeability of certain debts was January 17, 2014. No adversary proceeding regarding the Debtor's discharge or the dischargeability of any debts was ever filed in the case. The Debtor's discharge order (Bankr. Dkt. No. 20) was entered on January 21, 2014 and noticed to all creditors on the same day. (Bankr. Dkt. No. 22). The certificate of service for this notice indicates it was sent to R & B's old address on N. LaSalle in Chicago, IL. The case was closed on February 25, 2014. (Bankr. Dkt. No. 29).

***2** Also on January 21, 2014, the Debtor appeared *pro se* in the first lawsuit and filed his answer (Debtor's Ex. 6 and Respondents' Ex. 8). The answer referred to his bankruptcy case and included the case number. Nearly three months later, on April 3, 2014, the Respondents voluntarily dismissed the first lawsuit. More than eight months after that, on December 30, 2014, Collaro, through R & B, filed a second action in state court against the Debtor ("the second lawsuit") containing the allegations and claims from the first lawsuit and some additional allegations.

On February 20, 2015, the Debtor moved to reopen the bankruptcy case and brought this motion for an order of civil contempt against

the Respondents. The Debtor contends that the Respondents violated the discharge injunction by failing to dismiss the first lawsuit timely and by filing the second lawsuit. The Debtor's request to reopen the case was granted, and the motion for sanctions was fully briefed and set for trial.

Jurisdiction

The Debtor seeks to recover damages for violation of the discharge injunction. Enforcement of the discharge injunction is a core proceeding. 28 U.S.C. §§ 157(b)(2)(O).[3] Therefore, this court may conduct appropriate proceedings and enter a final order in this matter. 28 U.S.C. § 157(b)(1).

3 "Core proceedings include ... proceedings affecting ... the adjustment of the debtor-creditor... relationship."

Motion for Sanctions (Bankr. Dkt. No. 32)

The Debtor seeks to have this court invoke its equitable powers under section 105(a) to remedy the Respondents' violation of the discharge injunction set forth in section 524(a). In addition to a finding of contempt against Respondents, the Debtor's requested remedies include sanctions in the form of actual damages for emotional distress and humiliation, punitive damages, out-of-pocket expenses, as well as attorneys' fees and court costs. The request includes those fees and costs incurred for defending the second lawsuit, reopening this case, and prosecuting this motion for sanctions.

The motion does not seek damages for violation of the automatic stay even though there appears to have been such a violation from when the Respondents received notice of the bankruptcy until the discharge was entered.

Motion *in Limine* (Bankr. Dkt. No. 52)

Prior to the trial, the Respondents filed a motion *in limine* seeking to bar evidence relating to punitive damages and damages for emotional distress and humiliation. The Respondents assert that (1) punitive damages are not available in an action for civil contempt; and (2) permissable remedies for violation of the discharge injunction do not include damages for emotional distress and humiliation. The court reserved ruling on the motion.

Trial

The trial was held on November 2, 2015. Two witnesses were presented at trial: the Debtor on behalf of himself, and attorney Antonio Romanucci ("Romanucci") on behalf of the Respondents.

The Debtor testified about two relevant issues: (1) notice of the bankruptcy filing and the discharge order, and (2) his claimed damages. Romanucci's relevant testimony included the structure of his law firm and its effect on his firm's receipt of notice of the Debtor's bankruptcy, as well as his firm's actions in the two state court cases.

The Debtor's Testimony

The Debtor testified about filing his bankruptcy case. He also testified that on January 21, 2014—the day the Discharge Order was entered in this case—he filed his answer *pro se* in the first lawsuit. He further stated that when he filed the answer with the clerk of the circuit court of Cook County, he was told that he should mail a copy to R & B, and he promptly did so. (Tr. p. 15). His testimony in this regard was credible.

***3** Regarding damages, the Debtor testified that he suffered emotional distress and humiliation as a result of the filing of the second lawsuit, which was filed more than eight months after the first lawsuit was voluntarily dismissed. Again, the Debtor's testimony was credible. The Debtor contends that the filing of the second suit was leaked to the press and revived interest in Collaro's claims against the Debtor. In support of his request for damages for emotional distress and humiliation, the Debtor described relentless pursuit and threats by the media that resulted in his loss of work hours and embarrassment at his place of employment. (Tr. pp. 20-27).

In support of out-of-pocket damages, the Debtor described the numerous times he appeared in state court after his bankruptcy filing, paid state court filing fees, and several instances requiring travel to meet with his attorney regarding this motion and trial. However, the Debtor offered no specific testimony for mileage or fuel, nor any calculation for any other expenses.

Romanucci's Testimony

Romanucci testified that the structure of his law firm is such that there are three litigation teams, each supervised and led by one of three partners. Each group includes at least three associate attorneys and support staff including paralegals, legal assistants, and clerical staff. The partner assigned to the team has overall responsibility for a case, with the day-to-day responsibilities handled by the team's associate attorneys. Romanucci stated that he acted as the managing partner of the firm and that any mail addressed to the firm would initially be given to him.

Romanucci stated that he was the partner on the first lawsuit and Williams was the lead associate. This meant that he would review all pleadings and documents prior to their filing or issuance, as well as all answers. He professed not to have seen the answer filed by the debtor because the state court electronic filing system does not permit electronic access to documents that have been filed but merely allows review of the court's docket. Romanucci stated that he also attended status hearings on several occasions after Williams left the firm in December of 2013. At the time of her employment with the firm, Williams was responsible, along with Romanucci, for approximately 40 files or cases.

Romanucci described his firm's typical response to a notice of bankruptcy filing, stating that the response is to be urgent and "[w]e treat that as a statute in our office." (Tr. p. 77). He stated that although he was not a bankruptcy attorney, his

understanding of the impact of a bankruptcy filing on his practice was such that the firm would need to lift the automatic stay in order to proceed with claims against the subject debtor.

Romanucci's description of the circumstances surrounding his voluntary withdrawal of the first lawsuit in April of 2014 included his statement that the withdrawal was not in response to the bankruptcy filing because he was not aware of the filing at that time. The withdrawal was a tactical maneuver on his part to afford the firm more time in pursuing Collaro's claims against the Debtor.

Romanucci maintained that he was also unaware of the bankruptcy filing, and the existing discharge order, when he filed the second lawsuit in December of 2014. He claimed that he did not become aware of the Debtor's bankruptcy filing until late February of 2015 when he received this motion for sanctions. However, Romanucci did not dispute that R & B had received notice of the bankruptcy no later than November of 2013.

Discussion

Filing a petition for relief under the Code, in most cases, [4] triggers a stay or injunction that halts the rights of creditors, with certain exceptions, [5] to act to collect money or obtain property from the Debtor. This is known as the "automatic" stay because it is effective at the moment of filing of the petition for relief and does not require an order to institute the stay. [6]

4 See 11 U.S.C. 362(c)(4).

5 See 11 U.S.C. 362(b).

6 Section 362 provides in pertinent part:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
> (4) any act to create, perfect, or enforce any lien against property of the estate;
> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title[.]
>
> 11 U.S.C. 362(a).

***4** Absent a court order to the contrary, this stay continues from the moment the petition is filed until the entry of an order of discharge or until the case is dismissed. Although entry of the order of discharge terminates the automatic stay, a debtor is not left unprotected from the collection efforts of creditors, because the discharge injunction takes the place of the automatic stay.

The heart of bankruptcy law is the bankruptcy discharge, affording a fresh start by relieving the debtor of liability for certain pre-petition debts. Section 524(a)(2) provides:

> (a) A discharge in a case under this title ... operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of debt is waived[.]

11 U.S.C. § 524(a)(2).

The discharge order is a permanent injunction that provides the debtor with protection that survives the bankruptcy. This injunction is forever applicable to every debt that was discharged by the bankruptcy. [7]

7 Debts not subject to the discharge include debts determined to be non-dischargeable by the court, or by agreement, as well as those exceptions to the discharge as set forth in § 523.

Immediately after a petition is filed with the court, a notice is sent to all creditors containing information regarding the automatic stay and the discharge, as well as other pertinent information. *See* Fed. R. Bankr. P. 2002 [8]. Proper notice of the bankruptcy is an essential element in the implementation of the automatic stay, and in obtaining relief for its violation, as well as for violation of the discharge injunction. Additionally, the bankruptcy notice provides relevant information to creditors regarding prohibited actions relating to their debts, and includes instructions pursuant to Bankruptcy Rule 4007(c) [9] for seeking an exception to the discharge or objecting to the discharge. Accordingly, the notice of the bankruptcy also constitutes notice of the potential for the entry of the discharge, as well as the approximate date when the discharge order will be entered.

8 An exception to this procedure is the filing of an involuntary bankruptcy. See § 303.

9 Federal Rule of Bankruptcy Procedure 4007(c) permits a complaint to determine dischargeability and/or objecting to discharge to be filed up to sixty days from the first date set for the creditors' meeting under § 341.

Adequacy of Notice

[1] The facts and circumstances of a particular case often control when considering the adequacy of notice. *In re Manzanares*, 345 B.R. 773 (Bankr.S.D.Fla.2006), *In re Alton*, 837 F.2d 457 (11th Cir.1988), *United States Small Business Admin. v. Bridges*, 894 F.2d 108 (5th Cr.1990).

The Respondents appear to contend that because initial notices of the bankruptcy filing and the discharge order were mailed to an incorrect address, and because the Debtor did not inform them in person when appearing in state court that he had

filed bankruptcy, they should be excused for any behavior resulting in a violation of the discharge injunction. This contention completely misses its mark.

As the Debtor credibly testified, and the exhibits show, R & B received proper notice of this bankruptcy well in advance of the deadlines regarding the discharge. Romanucci's testimony does not refute receipt of timely and proper notice to his firm. In fact, Romanucci admitted that when he received notice of this motion, he reviewed the file regarding Collaro's claims against the Debtor and at that time found the faxed notice that the firm had received in November of 2013. (Tr. pp. 76-77). Therefore, it is beyond dispute that R & B had timely and proper notice of the bankruptcy and the approximate date of the discharge order.

***5** **[2]** It does not matter that the notice of the discharge was mailed to the old address of R & B. The initial bankruptcy notice referred to both the automatic stay and the discharge. (Bankr. Dkt. 8) Thus R & B clearly received sufficient notice of, and had actual knowledge of, the Debtor's bankruptcy case and the date after which the discharge could be entered. Specifically, the notice stated, in bold type, that the deadline to object to the Debtor's discharge or to the dischargeability of a particular debt was January 17, 2014. Once attorneys receive such notice, they are obligated to determine the status of the bankruptcy case before pursuing litigation against a debtor. *In re Constantino*, 80 B.R. 865 (Bankr.N.D.Ohio 1987); *In re Manzanares*, 345 B.R. 773 (Bankr.S.D.Fla.2006); *In re Rhyne*, 59 B.R. 276 (Bankr.E.D.Pa.1986), *In re Feldmeier*, 335 B.R. 807 (Bankr.D.Oregon 2005). That Williams may have left R & B without informing Romanucci of the Debtor's bankruptcy does not somehow absolve the Respondents from responsibility. The notice was received. It was in the file. The Respondents are bound by it.

R & B is also charged with knowledge of the contents of the answer the Debtor filed in the first lawsuit on January 21, 2014. The last sentence of the answer says "I am currently in bankruptcy—case # 13-38994—discharge date is Nov. 18." (Respondents' Ex. 8).[10] Romanucci testified that as the partner in charge of the case against the Debtor, he was responsible for reviewing answers that were filed to their complaints. (Tr. p. 60). Presumably, he reviewed the file in the first lawsuit before filing the second lawsuit. Had he checked the circuit court docket, he would have known the Debtor had answered.

10 The Debtor appears to have incorrectly noted the date of the § 341 meeting as the discharge date. The actual discharge date was January 21, 2014.

[3] Because R & B was representing Collaro in the state court litigation at all relevant times, notice to R & B is imputed to Collaro:

> When an attorney is representing a creditor in order to collect a debt outside of the bankruptcy, notice of the bankruptcy petition sent to the attorney by the debtor can be imputed to the creditor. *See, i.e., In re Schicke*,

290 B.R. 792, 803 (10th Cir. BAP 2003); *In re Linzer*, 264 B.R. 243, 248 (Bankr.E.D.N.Y.2001).

In re Herman, 737 F.3d 449, 454 (7th Cir.2013).

Violations

The parties are in agreement that (1) this court has the power to hold a creditor in civil contempt for violation of the discharge injunction; (2) a debtor must prove, by clear and convincing evidence, that the creditor's violation was willful; and (3) willfulness is proved if (a) the creditor knows about the discharge injunction and (b) intends to commit the acts that violate the injunction. (Bankr. Dkt. No. 60 p. 7; Bankr. Dkt. No. 61 p. 6). *See generally* 4 Collier on Bankruptcy p. 524.02[2][c] (16th ed. rev. 2016) (hereinafter Collier).

[4] Both the automatic stay under section 362 and the discharge injunction under section 524 prohibit creditors from taking any action to collect a debt that arose before the bankruptcy petition was filed. The Respondents willfully violated these rules in at least three ways.

[5] First, having received notice of the Debtor's bankruptcy in November of 2013, the Respondents were required to immediately dismiss or stay the first lawsuit. *Eskanos & Adler, P.C. v. Leetien*, 309 F.3d 1210 (9th Cir.2002). They did not do so until April 3, 2014. Therefore, they were in violation of the automatic stay from November of 2013 until the Debtor was granted a discharge on January 21, 2014. The effect of the discharge, of course, was to render Collaro's claim against the Debtor uncollectible, and all attempts to collect it are void, including maintaining the first lawsuit. Thus, when the discharge was entered, the Respondents' continuation of the first lawsuit switched from being a violation of the automatic stay, to being a violation of the discharge injunction. That violation ended when the first lawsuit was dismissed on April 3, 2014.

***6** Second, the Respondents again violated the discharge injunction by filing the second lawsuit on December 30, 2014. That violation continued at least until February 25, 2015, when the state court judge stayed the proceeding against the Debtor at the Respondents' request. (Respondents' Ex. 1) Moreover, because the discharge rendered Collaro's claims uncollectible, the second lawsuit should have been dismissed against the Debtor, not merely stayed.

Finally, this court concludes that the interview provided to a news reporter by Collaro and Romanucci on April 10, 2015, was a further attempt to collect the discharged debt, and thus it was also a violation of the discharge injunction. (Debtor's Ex. 9).

Accordingly, the Respondents are found to be in civil contempt of this court for repeated violations of the discharge injunction. They are also found to have violated the automatic stay. The Debtor has proved these violations

by clear and convincing evidence. The Respondents' conduct was in total disregard of the Code, and warrants the most serious sanctions.

Damages

The Debtor seeks: (1) "actual damages, including damages for significant emotional distress, humiliation, and out-of-pocket expenses, ... lost wages and mileage to meet with his attorneys," (2) "attorney's fees and court costs for defending the second lawsuit and prosecuting the present motion, including all attorney's fees and court costs, incurred to reopen the Debtor's Chapter 7 case," (3) punitive damages, and (4) "any and all relief deemed fair and reasonable." (Bankr. Dkt. No. 32, p. 3).

The Respondents argue that if they are found to be in contempt, the only possible damages are "out of pocket expenses and legal fees." (Bankr. Dkt. No. 50, p. 3).

The court will address each element of damages requested.

Out of Pocket

[6] The Debtor testified that he met with his attorney "three or four" times in response to the second lawsuit. (Tr. p. 26). He seeks compensation for mileage and time off work for each meeting—150 miles and four hours per meeting. He also seeks mileage, two hours off work, and $34 parking for attending the trial. He testified that he is paid $10 per hour.

The court will award compensation for three meetings with the attorney and for attending the trial. The total damages for time off work is $140.

The court finds that the Debtor drove 600 miles for the meetings and trial, but because the Debtor presented no evidence regarding a rate for compensation, the court declines to award any damages for mileage.

The court will award the Debtor $34 for parking. The court will take judicial notice of the case docket that reveals the no reopening fee was charged. Accordingly, total out of pocket damages are set at $174.

Attorney's Fees

[7] In a contempt proceeding for a violation of the discharge injunction, a debtor is entitled to recover reasonable attorney's fees. See *Cox v. Zale Delaware, Inc.*, 239 F.3d 910, 916 (7th Cir.2001). The parties agree on this point in their closing briefs. (Bankr. Dkt. No. 60 p. 14; Bankr. Dkt. No. 61 pp. 9-10).

Instructive on the issue of whether a fee is "reasonable" is *In re Meltzer*, 535 B.R. 803 (Bankr.N.D.Ill.2015). In *Meltzer*, where a creditor filed an involuntary bankruptcy case in bad faith against a putative debtor, the court dismissed the case and awarded attorney's fees, other compensatory damages, and punitive damages to the putative debtor. *Id.* at 807. When determining the amount of reasonable attorney's fees, such fees "are customarily determined using the 'lodestar' method," where "the hours reasonably expended

multiplied by the reasonable hourly rate" yield a presumptively reasonable fee. *Id.* at 810. Although time spent that is "excessive, redundant, or otherwise unnecessary" will be disallowed, fees incurred responding to motions filed by a creditor are compensable attorney's fees. *Id.* at 812.

***7 [8]** The Debtor is requesting a total of $10,958.75 for attorney's fees, based on 39.85 hours at the rate of $275 per hour. The Respondents have not disputed the time spent or the rate charged. Instead, they argue:

> The Debtor should not be entitled to recover attorney fees because the fees in this case could have been avoided had the Debtor or his attorneys contacted R & B before filing the Contempt Motion. The record is uncontroverted that: (1) neither the Debtor nor his counsel contacted R & B in the thirteen months between the entry of the discharge order and the filing of the Contempt Motion; and (2) had the Debtor contacted R & B prior to filing the Contempt Motion, this matter would be unnecessary. The Debtor's only quantifiable damages, arguably, are his attorney's fees relating to the Contempt Motion. The majority of the attorney fees were incurred after the motion was filed and relate only to litigating this matter.

(Bankr. Dkt. No. 61 p. 10) (emphasis and footnote omitted.)

The Respondents offer no authority in support of this argument, and the court does not understand how a phone call would have short circuited the litigation when the sanctions motion itself was met with a ten page response that reflected a fundamental lack of understanding of bankruptcy law and requested that the sanctions motion be denied "in its entirety." (Bankr. Dkt. No. 36 p. 10). The Respondents' argument is rejected, and the court concludes that the attorney's fees reflected on Debtor's Exhibit 11 are reasonable and thus are compensable.

In his post-trial brief, the Debtor "seeks leave of court to present evidence concerning legal fees and court costs that he has incurred on and since the date of the trial." (Bankr. Dkt. No. 60 p. 14). That request is granted, and the Debtor is given fourteen days from the date of this opinion to file his supplemental statement of fees. After the statement is filed, the Respondents are given fourteen days to respond to the statement.

Emotional Distress and Humiliation

The Debtor seeks $12,000 damages for emotional distress and another $12,000 for damage to his reputation.[11] The Respondents argue only that the evidence does not "establish any emotional harm and humiliation that is causally connected to the

Second Lawsuit." (Bankr. Dkt. No 61, p. 12).

11 The Debtor switches from a request for damages due to "humiliation" (Bankr. Dkt. No. 32 p. 3) to a request for damages to his reputation. (Bankr. Dkt. No. 60, p.14). Because no evidence was presented to support either request, the change is not significant.

Consideration of this issue must begin with *Aiello v. Providian Financial Corp.*, 239 F.3d 876 (7th Cir.2001). The case is a class action charging a creditor with a violation of the automatic stay by improperly pressuring the debtors into reaffirmation agreements. The issue before the court was "whether the term 'actual damages' [in section 362(h)] is intended to include damages for purely emotional injury." *Id.* at 878. The court held "[t]he office of section 362(h) is not to redress tort violations but to protect the rights conferred by the automatic stay." *Id.* at 880. It affirmed the trial court's refusal to grant class certification and granting summary judgment for the defendant. After observing that "victims of tortious infliction of emotional distress in the course of a bankruptcy proceeding," could file "suit under state tort law," (*Id.*) the court continues:

> ***8** The interest in judicial economy, as embodied in the "clean-up" doctrine of equity, ... might allow the court to "top off" relief designed to redress any financial injury inflicted by the violation of the automatic stay with an award of damages for incidental harms, perhaps including emotional distress if adequately proved, to spare the debtor from having to bring two suits. *Fleet Mortgage* may have such a case, since the misconduct of the defendant in violating the automatic stay imposed substantial legal costs on the plaintiff, which are not alleged here. No financial injury is alleged in this case, and we do not think that emotional injury is compensable under section 362(h) when there is no financial loss to hitch it to by means of the clean-up doctrine.
>
> *Id.*

This court concludes that the same reasoning in *Aiello* regarding section 362(h) should apply to a violation of the discharge injunction under section 524. Here, of course, financial injury is alleged, including substantial attorney's fees, and this court concludes that an award of damages for emotional distress is appropriate. The Debtor should not be left to seek relief in any other court.

Aiello notes that claims of emotional distress have historically been viewed with suspicion. *Id.* But recent cases are more accepting, and the leading treatise on bankruptcy law now states the general rule as follows: "Actual damages may include damages for emotional

distress, which can be just as real and sometimes far more serious than damages to property interests." *See* Collier P 524.02[2][c] at fn. 57 (16th ed. rev. 2016).

This case appears to be one in which emotional distress has been caused by the Respondents' filing of the second lawsuit. The Debtor's testimony on the topic is credible. Nearly a year after the Debtor's discharge had been issued in January of 2014, the filing of the second lawsuit was nearly certain to cause emotional distress. After being advised, presumably, by counsel that Collaro's claims were forever barred, to find himself back in state court would be most distressing.

The court finds that emotional distress damages have been proved by clear and convincing evidence and assess them in the amount of $12,000 as requested.

[9] The court declines to award damages for injury to the Debtor's reputation because the Debtor offered no evidence whatsoever regarding the Debtor's reputation.

Punitive Damages

The Debtor seeks punitive damages in the amount of $50,000. The Respondents argue that such damages are not available for a violation of the discharge injunction. Both sides are able to cite considerable case law in support of their positions, but this court concludes that punitive damages are available and should be awarded on the facts of this case.

Many other courts have also concluded that a bankruptcy court's power to sanction for section 524 violations includes the authority to award punitive damages. *See, e.g.*, *Bessette v. Avco Financial Services*, 230 F.3d 439, 445 (1st Cir.2000) (noting that "bankruptcy courts across the country have appropriately used their statutory contempt powers [to award] actual damages, attorney fees, and punitive damages" for violations of § 524); *In re Perviz*, 302 B.R. 357, 372 (Bankr.N.D.Ohio 2003) ("Bankruptcy courts have the inherent power to punish parties for their contemptuous violation of the discharge injunction through the imposition of punitive damages."); *In re Vazquez*, 221 B.R. 222, 231 (Bankr.N.D.Ill.1998) (awarding punitive damages pursuant to § 105).

These courts provide different theories regarding where punitive damages are appropriate, but most require a finding that the creditor's conduct went beyond willfulness. *See, e.g.*, *In re Arnold*, 206 B.R. 560, 568–69 (Bankr.N.D.Ala.1997) (awarding punitive damages where the creditor acted willfully and maliciously in clear disregard and disrespect of the bankruptcy laws); *In re Walker*, 180 B.R. 834, 850 (Bankr.W.D.La.1995) (awarding punitive damages for malevolent behavior and clear violation of injunction); *In re Miller*, 81 B.R. 669 (Bankr.M.D.Fla.1988) (awarding punitive damages where attorney acted willfully and in clear disregard and disrespect of the bankruptcy laws); *In re DiGeronimo*, 354 B.R. 625, 644 (Bankr.E.D.N.Y.2006) ("Punitive damages are typically awarded in cases where

there is particularly egregious creditor misconduct."); *In re Cherry*, 247 B.R. 176, 190 (Bankr.E.D.Va.2000) (declining to award punitive damages because creditor lacked specific intent to violate the discharge injunction); *In re Kamps*, 217 B.R. 836, 840 (Bankr.C.D.Cal.1998) (holding that any violation of the discharge injunction is punishable by damages, including punitive damages, and criminal contempt of court).

***9** One particularly well-reasoned case from this district is *In re Vaz quez*, 221 B.R. 222 (Bankr.N.D.Ill.1998). In imposing punitive damages for violation of the discharge injunction, the court stated:

> Relevant factors that may be considered in determining whether punitive damages are appropriate for a creditor's violation of the automatic stay (and equally applicable for violations of the discharge injunction) are: (1) the nature of the creditor's conduct; (2) the creditor's ability to pay damages; (3) the motive of the creditor; and (4) any provocation by the debtor. *Nigro v. Oxford Dev. Co. (In re M.J. Shoearama, Inc.)* 137 B.R. 182, 190 (Bankr.W.D.Pa.1992). All of these factors have been considered here. Punitive damages are awarded in response to particularly egregious conduct for both punitive and deterrent purposes.

Id at 231.

The court continued:

> [.].. the courts that have awarded punitive sanctions for violations of the discharge injunction require actions taken with either a malevolent intent or a clear disregard and disrespect of the bankruptcy laws and that it is not sufficient to merely show that the actions were deliberate.

Id.

[10] Here, the factors all favor imposing punitive damages on R & B. First, the nature of R & B's conduct was egregious. This was not an ordinary creditor acting through ignorance. These were lawyers disregarding the Bankruptcy Code. Second, Romanucci's testimony about R & B leaves no doubt about its ability to pay the amount of punitive damages requested. Third, the motive of R & B was consistent—to collect money from the Debtor, even though the claim had been discharged. Finally, the Debtor did nothing to provoke R & B's conduct.

Accordingly, the court will assess punitive damages against R & B in the requested amount of $50,000.

The court will not assess punitive damages against Collaro, however, because the Debtor has offered no evidence regarding his financial circumstances. This is appropriate because it was R & B's conduct that was egregious, not Collaro's.

The Motion to Supplement the Record (Bankr. Dkt. No. 66)

Subsequent to the trial and the post-trial briefings, the Debtor filed a motion ("new motion") in the second lawsuit seeking to lift the stay that had been imposed by the state court at the request of the Respondents. The Respondents filed a Motion to Supplement the Record in this case arguing that the filing of the new motion undermined the allegations in the Motion for Sanctions. (Bankr. Dkt. No. 66). The Motion to Supplement the Record was granted and responded to by the Debtor. (Bankr. Dkt. No. 72).

In the motion the Respondents argue that the new motion compromises the Debtor's arguments for a finding of contempt against the Respondents for violating the discharge injunction; and it compromises the Debtor's arguments in support of awarding attorneys' fees and damages for emotional distress and humiliation.

The new motion is irrelevant to all elements of contempt, as well as the arguments made by the Debtor in support of a finding of contempt. (*Supra* p. 10). The new motion has no effect on the Respondents' knowledge of the discharge. The discharge order was entered on January 21, 2014, two years before the new motion was even filed.

***10** The new motion is also irrelevant to the Respondents' intent. The Respondents do not deny intentionally filing the second lawsuit, or intentionally staying the second lawsuit rather than dismissing it. The new motion does not concern the Debtor's bankruptcy case, the discharge, or whether the Respondents' acts were intentionally performed.

The Respondents further argue that the new motion serves to generate attorney's fees that would not have been incurred if the second lawsuit remained stayed against the Debtor. In response, the Debtor claims that the new motion is part of his broader defense against criminal charges that resulted from the second lawsuit. (Bankr. Dkt. No. 72).

The attorney's fees relating to the new motion incurred in the Debtor's bankruptcy case will be recoverable. The new motion itself did not generate additional fees. The Debtor incurred attorney's fees only in the time spent responding to the Respondent's Motion to Supplement, which challenges the Debtor's allegations in litigating the motion for sanctions. *Cf. In re Meltzer*, 535 B.R. 803 (Bankr.N.D.Ill.2015).

Conclusion

Given the decisions above on emotional distress damages and punitive damages, the Respondent's Motion *in Limine* is denied.

The Debtor's Motion for Sanctions is granted.

The court awards damages to the Debtor against the Respondents jointly and severally for out-of-pocket expenses in the amount of $174, for attorney's fees in the initial amount of $10,958.75, and for emotional distress in the amount of $12,000, for a total of $23,132.75. The court will reserve ruling on an additional award of attorney's fees pending briefing as set forth above. (*Supra* p. 14).

In addition, punitive damages in the amount of $50,000 are awarded to the Debtor against R & B only.

A separate order will be entered following resolution of the supplemental attorney's fee application.

All Citations

--- B.R. ----, 2016 WL 5539813

Filings (1)

Title	PDF	Court	Date	Type
1. Docket 1:13-BK-38994 IN RE: SPIRO LEMPESIS	—	Bkrtcy.N.D.Ill.	Oct. 03, 2013	Docket

American Bankruptcy Institute
33rd Annual Spring Meeting

Renaissance Washington
Washington, D.C.

April 18, 2015

CLASS ACTIONS IN BANKRUPTCY CASES

Hon. Robert E. Grossman
U.S. Bankruptcy Court (E.D.N.Y); Central Islip
Michael H. Goldstein
Goodwin Procter, LLP; New York
Johnie J. Patterson
Walker & Patterson, PC; Houston
Rudy J. Cerone, Moderator
McGlinchey Stafford, PLLC; New Orleans

American Bankruptcy Institute
33rd Annual Spring Meeting

CLASS ACTIONS IN BANKRUPTCY

1. JURISDICTIONAL ISSUES:

a. *Wilborn v. Wells Fargo Bank, N.A. (In re Wilborn),* 609 F.3d 748, 754 (5th Cir. 2010) ("[I]f bankruptcy court jurisdiction is not permitted over a class action of debtors, Rule 7023 is virtually read out of the rules. This would ascribe to Congress the intent to categorically foreclose multi-debtor class actions arising under the Bankruptcy Code without a clear indication of such intent.")

b. R*odriguez v. Countrywide Home Loans, Inc. (In re Rodriguez),* 432 Bankr. 671, 678 (Bankr. S.D.Tex. 2010), *aff'd* 695 F.3d 360 (5th Cir. 2012).

c. Nationwide Class?

i. *In re Noletto,* 244 B.R. 845 (Bankr. S.D. Ala. 2000) (Yes);
ii. *Bank United v. Manley,* 273 B.R. 229 (N.D. Ala. 2001) (Yes);
iii. *Sims v. Capital One Fin. Corp. (In re Sims),* 278 B.R. 457 (Bankr. E.D. Tenn. 2002) (Yes);
iv. *Conley v. Sears, Roebuck & Co.,* 222 B.R. 181 (D. Mass. 1998) (Yes);
v. *Cano v. GMAC Mortgage Corp. (In re Cano),* 410 B.R. 506 (Bankr. S.D. Tex. 2009) (Yes, with a compilation of prior decisions holding both ways);
vi. *Wells Fargo Bank v. Singleton (In re Singleton),* 284 B.R. 322 (D.R.I. 2002) (No, discharge and automatic stay litigation is limited to courts "issuing" the order.);
vii. *Barrett v. AVCO Financial Servs. Mgmt.,* Co., 292 B.R. I (D. Mass. 2003) (No, discharge and automatic stay litigation is limited to courts "issuing" the order.);
viii. *Beck v. Gold Key Lease, Inc. (In re Beck),* 283 B.R. 163 (Bankr. E.D. Pa. 2002) (No, discharge and automatic stay litigation is limited to courts "issuing" the order.);
ix. *Williams v. Sears, Roebuck & Co.,* 244 B.R. 858 (S.D. Ga. 2000) (No based upon 28 U.S.C. § 1334(e) (exclusive jurisdiction of property of the estate);
x. *Cline v. First Nationwide Mortgage Corp. (In re Cline),* 282 B.R. 686 (W.D. Wash. 2002) (No based upon policy issues);
xi. *Simmons v. Ford Motor Credit Co. (In re Simmons),* 237 B.R. 672 (Bankr. N.D. Ill. 1999) (No based upon policy issues);
xii. *In re Haynes*, 2014 WL 3608891, at *7 (Bankr. S.D.N.Y. July 22, 2014) (Yes).

2. REQUIREMENTS FOR CERTIFICATION OF A CLASS - CAN THEY BE SATISFIED?

a. Rule 23(a) — applicable to all class actions

i. Numerosity(23(a)(1))- requires that the class be so numerous that joinder of all members is impracticable. There is no rule as to what specific number of class members is required for certification. The proper focus is whether joinder of all members is practicable in light of the size and other relevant factors.

    1. Must generally provide some evidence or a reasonable estimate of the number of class members (70 - 100 is generally sufficient).
    2. Is joinder of all members practicable.
    3. Interest of judicial economy.
    4. Does the class involve small individual claims.
    5. Ease of identification of members.

ii. Commonality(23(a)(2))- requires that there be questions of law or fact common to the class. The threshold of 'commonality' is not high.

    1. Requirement is easily met in most cases.
    2. Need only show that there is at least one issue whose resolution will affect all or a significant number of putative class members.
    3. *But see In re Patrick*, 2013 WL 951704, at *10 (Bankr. M.D. Pa. Mar. 11, 2013) (denying certification of a class based on alleged wrongful filing of secured claims because injury suffered would be potentially different for each individual class member).

iii. Typicality(23(a)(3)) - requires the representative parties to have claims or defenses that are typical of the claims or defenses of the class.

    1. Test is not demanding.
    2. Typicality is generally satisfied where the representative plaintiffs' claims arise out of the same event or course of conduct as the other members' claims and are based on the same legal theory.
    3. Do the class representative's claims have the same essential characteristics of those of the putative class.
    4. Rational is that a plaintiff with typical claims will pursue his or her own self-interest in the litigation, and in so doing, advance the interests of the class members.
    5. *See Alakozai v. Chase Inv. Servs. Corp.*, 2014 WL 5660697, at *13 (C.D. Cal. Oct. 6, 2014) (denying certification of a class because the named plaintiff's bankruptcy filings created defenses unique to the individual).

iv. Adequate Representation(23(a)(4)) - requires a finding that the representative parties will fairly and adequately protect the interests of the class.

    1. With respect to the class representatives, they must possess a sufficient level of knowledge and understanding to be capable of controlling and prosecuting the litigation, but need not be legal scholars and may rely upon counsel as any other client would.
    2. Class representative may not have interests antagonistic to the other class

members.

3. Class counsel must be competent to prosecute the class action, sufficiently zealous and free of conflicts with the members of the class.
4. For the class representative:
    a. Problem of settling out;
    b. Must understand the class mechanism and the claims presented;
    c. No conflict of interest with the class members.
    d. Where the class is built on a fraud claim, the credibility of the named plaintiff is especially important. *Vincent v. Money Store*, 2015 WL 412895, at *7 (S.D.N.Y. Feb. 2, 2015) (rejecting certification where named plaintiffs had history of bad faith bankruptcy filings).
5. For class counsel:
    a. Obligation to notify the court of any proposed settlement.
    b. Must protect against overbroad releases.
    c. Fees v. recovery - must settle class claims first.
    d. Include incentive awards for class plaintiffs.
    e. Adequacy of representation flows to the class v. the class representatives.

b. Rule 23(b) - Once all the elements of 23(a) have been met, Plaintiffs must satisfy one or more of the three prongs of 23(b) for certification.

i. Rule 23(b)(1)(A)

1. A class may be maintained if the prosecution of separate actions by or against individual members of the class would create the risk of inconsistent or varying adjudications which would thereby create incompatible standards of conduct for the party opposing certification.
2. Generally applies to lawsuits seeking injunctive or declaratory relief.
3. Contrary rulings by different courts could create a situation where a party may be ordered to engage in irreconcilable conduct.
4. Mere fact that some plaintiffs prevail and some lose in separate lawsuits does not justify (b)(1)(A) certification.
5. A request for money damages is not evidence of a potential irreconcilable conduct.
6. *See In re Integra Realty Res., Inc.*, 354 F.3d 1246, 1264 (10th Cir. 2004) (reviewing the bankruptcy court's certification of a class under both Rule 23(b)(1)(A) and Rule 23(b)(1)(B), holding that (b)(1)(A) certification was not proper, because it "requires that there be more than the mere possibility that inconsistent judgments and resolutions of identical question of law would result if numerous actions are conducted instead of one class action.")

ii. Rule 23(b)(1)(B)

1. Mandatory "limited fund" certification.
2. Designed to preserve a limited fund for the entire class against the individual

claims of class members, which claims might otherwise exhaust the limited fund and thereby leave subsequent plaintiffs with no remedy.

3. Does not provide class members with an automatic right to opt-out of the class (discretionary with the court).
4. Commonly utilized to avoid an unfair preference for the early claimants at the expense of later claimants.
5. *Compare In re Integra Realty Res., Inc.*, 354 F.3d 1246, 1264 (10th Cir. 2004) (upholding the bankruptcy court's certification of a class under (b)(1)(B) where "fraudulent transfer and unlawful dividend claims against one defendant shareholder would present more than the mere possibility of a stare decisis effect on future dividends."), *with Tilley v. TJX Companies, Inc.,* 345 F.3d 34, 42 (1st Cir. 2003) (vacating a district court's certification of a class under (b)(1)(B), holding "class certification based solely on the prospect of stare decisis effect is improper" and requiring a "stare decisis plus" standard for certification).

iii. Rule 23(b)(2)

1. A class may be maintained if the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.
2. Subsection (b)(2) class actions are limited to those class actions seeking primarily injunctive or corresponding declaratory relief.
3. Because a (b)(2) class must be homogeneous and cohesive, a class can be certified under subsection (b)(2) only where the defendant has acted in the same way toward all members of the class, or has acted on grounds applicable to all members of the class.
4. Pattern and practice cases.
5. Monetary damages must only be incidental - capable of calculation by objective standards.
6. *See Tilley v. TJX Companies, Inc.,* 345 F.3d 34, 40 (1st Cir. 2003) (holding that defendant classes cannot be certified under Rule 23(b)(2) grounds).

iv. Rule 23(b)(3)

1. A class may be maintained if the questions of law or fact common to the class members predominate over any questions affecting only individual members and the class action is superior to other available methods for fairly and efficiently adjudicating the controversy.
    a. "Predominance" is similar, but more demanding than the "commonality" requirement of 23(a).
    b. Predominance tests whether proposed classes are sufficiently cohesive to warrant determination by representation and requires the court to assess how the case will be tried by identifying the substantive issues that will control the outcome, assess the issues which will predominate and then determine whether the issues are common to the class.

c. The most common factor destroying certification is the necessity for individualized damage determinations, thereby failing the predominance test.
d. *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432, 185 L. Ed. 2d 515 (2013) (noting Rule 23(b)(3) is an "adventuresome innovation" that requires a predominance criterion more demanding than that found in 23(a)).
e. *See generally Rodriguez v. Countrywide Home Loans, Inc. (In re Rodriguez),* 432 B.R. 671 (Bankr. S.D.Tex. 2010) *aff'd* 695 F.3d 360 (5th Cir. 2012).

3. CERTIFICATION STANDARDS DO VARY BY DISTRICT - CURRENT DECISIONS (STARTING POINTS):

a. *Wal-Mart Stores, Inc. v. Dukes,* 131 S.Ct. 2541 (2011);
b. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013);
c. *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013);
d. *Garcia-Rubiera v. Calderon,* 570 F.3d 443 (1st Cir. 2009);
e. *Shahriar v. Smith & Wollensky Restaurant Group, Inc.,* 659 F.3d 234 (2nd Cir. 2011);
f. *Monique Sykes, et al. v. Mel S. Harris and Assocs. LLC,* Nos. 13-2742-cv, 13-2747-cv, 13-2748-cv, 2015 WL 525904 (2d Cir. Feb. 10, 2015)
g. *Marcus v. BMW of North America, LLC,* 687 F.3d 583 (3rd Cir. 2012);
h. *Brown v. Nucor Corp.,* 576 F.3d 149 (4th Cir. 2009);
i. *M.D. ex rel. v. Perry,* 675 F.3d 832 (5th Cir. 2012);
j. *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig.*, 722 F.3d 838, 844 (6th Cir. 2013) *cert. denied sub nom. Whirlpool Corp. v. Glazer*, 134 S. Ct. 1277 (2014);
k. *Spano v. The Boeing Co.,* 633 F.3d 574 (7th Cir. 2011);
l. *DeBoer v. Mellon Mortgage Co.,* 64 F.3d 1171 (8th Cir. 1995);
m. *Evon v. Law Offices Of Sidney Mickell,* 688 F.3d 1015 (9th Cir. 2012);
n. *D.G. ex rel. Stricklen v. DeVaughn,* 594 F.3d 1188 (10th Cir. 2010);
o. *Vega v. T-Mobile USA, Inc.,* 564 F.3d 1256 (11th Cir. 2009).

4. WHAT DEFENSES/ARGUMENTS ARE AVAILABLE TO THE TARGETED DEFENDANT IN OPPOSING CLASS CERTIFICATION?

a. Rule 23 Requirements.

i. Plaintiffs' claims fail under predominance requirement of Rule 23(b)(3) where the Plaintiffs fail to link their damages model directly to the theory of liability, and therefore, cannot establish that damages are susceptible of measurement across entire class. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013).
ii. Plaintiffs' claims fail under the predominance and superiority inquiries of Rule 23 because individual issues for each class member, particularly with respect to damages, override class concerns. *Wilborn v. Wells Fargo Bank, N.A. (In re Wilborn),* 609 F.3d 748 (5th Cir. 2010)
iii. Plaintiffs' claims fails the Rule 23(b)(2) predominance test "because individual issues for each class member, particularly with respect to damages, override class concerns

when we consider how the case may be tried", and fails the Rule 23(b)(3) test because the monetary relief sought does not flow directly/automatically from a determination of liability. *Gilliland v. TSYS (In re Gilliland),* 474 B.R 482 (Bankr. N.D. Miss 2012).

b. Jurisdiction.

   i. Nationwide class action cannot be certified for civil contempt claims as only the court where the contempt occurred has jurisdiction to issue a civil contempt award. *In re Death Row Records,* 2012 WL 952292 at *12 (BAP 9th Cir. 2012) (citing Bankruptcy Rule 9014); *but see In re Haynes*, No. 11-23212 (RDD), 2014 WL 3608891, at *7 (Bankr. S.D.N.Y. July 22, 2014) (finding that enforcement of discharge injunctions and automatic stays is not limited to the issuing court and therefore can form the basis for a nationwide class).

c. Standing/Conflict of Interest.

   i. Chapter 7 Trustee had a sufficient stake in the outcome of the proceeding to confer standing and fiduciary duties of Chapter 7 Trustee were not incompatible with being a class representative. *In re Death Row Records,* 2012 WL 952292 at *13 (BAP 9th Cir. 2012).

d. Class Representative Individual Defenses.

   i. Plaintiff's claim is subject to unique defense (waiver, arbitration, consent, 12(b)(6) merit defenses) that destroys the ability to satisfy the typicality requirement. *Sandlin v, Ameriquest Mortgage Co., Inc. (In re Sandlin),* 2010 WL 4260030 at *7 (N.D. Alabama S.D. 2010).

e. Adequacy of Representation.

   i. Adequacy of counsel and class representative is not established. *Sandlin v. Ameriquest Mortgage Co., Inc. (In re Sandlin),* 2010 WL 4260030 at *8-*9 (N.D. Alabama S.D. 2010);
   ii. Alleged wrong action is different for each class claimant, as distinguished from alleged a wrong based upon a general policy. *Mazzei v. The Money Store,* 2012 WL 6622706 (S.D.N.Y. 2012);
   iii. "Serious concerns" about named plaintiff's credibility precluded class certification for fraud claim where plaintiff had a history of dismissed bad faith bankruptcy filings. *Vincent v. Money Store*, 2015 WL 412895, at *6 (S.D.N.Y. Feb. 2, 2015);
   iv. *Alakozai v. Chase Inv. Servs. Corp.*, 2014 WL 5660697, at *13 (C.D. Cal. Oct. 6, 2014) (Named plaintiff was an inadequate class representative where he failed to disclose the class action in their bankruptcy filings and failed to disclose the revocation of is state insurance license.).

f. Fail Safe Class.

   i. A fail safe class is one that by definition shields the plaintiff from an adverse decision as

the class is defined in terms of the alleged unlawful conduct. *Compare Mazzei v. The Money Store,* 2012 WL 6622706 (S.D.N.Y.2012) (Court modifies class definition to avoid fail safe designation), *with Rodriguez v. Countrywide Home Loans, Inc.,* 695 F.3d 360 (5th Cir. 2012) (approving fail safe class).

ii. There is a circuit split regarding the permissibility of fail safe classes. The Sixth and Seventh Circuits preclude certification of any fail safe class, while the Fifth and Ninth Circuits have declined to issue such a blanket prohibition. *Zarichny v. Complete Payment Recovery Servs., Inc.*, 2015 WL 249853, at *13 (E.D. Pa. Jan. 21, 2015) (disallowing Fail Safe Class and discussing circuit split).

5. SAMPLE OF CERTIFIED CASES:

a. *Conley v. Sears, Roebuck & Co.,* 222 B.R. 181 (D. Mass. 1998);
b. *In re Coggin,* 155 B.R. 934 (Bankr. E.D. N.C. 1993);
c. *In re Noletto,* 280 B.R. 868 (Bankr. S.D. Ala. 2001);
d. *In re Powe,* 278 B.R. 539 and 280 B.R. 728 (Bankr. S.D. Ala. 2002);
e. *In re Sheffield,* 281 B.R. 24 (Bankr. S.D. Ala. 2000);
f. *In re Harris,* 280 B.R 876 (Bankr. S.D. Ala. 2001);
g. *Tate v. Nationsbanc Mortgage Corp. (In re Tate),* 253 B.R. 653, 663 (Bankr. W.D. N.C. 2000);
h. *Harris v. Washington Mutual Home Loans (In re Harris),* 297 B.R. 61 (Bankr. N.D. Miss. 2003), *aff'd Harris v. Washington Mut. Home Loans, Inc. (In re Harris),* 312 B.R. 591 (N.D. Miss 2004);
i. *In re Montano,* 398 B.R. 47 (Bankr. D.N.M. 2008). Class later decertified for failure to properly identify class members. *In re Montano*, 493 B.R. 852, 860 (Bankr. D.N.M. 2013);
j. *Rodriguez v. Countrywide Home Loans, Inc. (In re Rodriguez),* 695 F.3d 360 (5th Cir. 2012) (affirming the certification of the injunctive class);
k. *Brannan v. Wells Fargo Home Mortg., Inc. (In re Brannan),* 2013 WL 85158 (Bankr. S.D. Ala. Jan. 8, 2013) (determining class could be certified for injunctive relief);
l. *Wilborn v. Wells Fargo Bank (In re Wilborn),* 609 F.3d 748 (5th Cir. 2010) (holding that bankruptcy court had authority to certify debtors' class action);
m. *In re Death Row Records, Inc.,* 2012 WL 952292 (B.A.P. 9th Cir. Mar. 21, 2012) (remanding matter to bankruptcy court to issue a certification order solely under Civil Rules 23(a) and (b)(2) and narrowing scope of class action by excluding claims for interest damages and claims for willful violation of automatic stay);
n. *Mazzei v. Money Store,* 2012 WL 6622706 (S.D.N.Y. Dec. 20, 2012) (certification of class of borrowers was warranted where borrowers were charged late fees after their loans were accelerated and loans were paid off);
o. *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 570 (S.D.N.Y. 2014) *reconsideration denied*, 2014 WL 1301857 (S.D.N.Y. Mar. 19, 2014) (allowing certification of nationwide class based on fraud and misrepresentation despite the possibility that the laws of multiple states might apply);
p. *In re Truland Grp., Inc.*, 520 B.R. 197, 208 (Bankr. E.D. Va. 2014) (finding class action mechanism was the superior method for settling WARN Act claims).

6. SAMPLE OF CERTIFICATION DENIED CASES:

a. *Sandlin v. AmeriquestMortg. Co. (In re Sandlin),* 2010 WL 4260030 (Bankr. N.D. Ala. Oct. 21, 2010) (deciding to deny motion for class certification because debtors failed to establish typicality or adequacy of representation);
b. *In re Motors Liquidation Co.,* 447 B.R. 150 (Bankr. S.D.N.Y. 2011) (disallowing class certification of proofs of claim since individual issues would predominate);
c. *In re Circuit City Stores, Inc.,* 439 B.R. 652 (E.D. Va. 2010*) aff'd in part on other grounds sub nom. Gentry v. Siegel,* 668 F.3d 83 (4th Cir. 2012) (holding that bankruptcy court's findings that proposed class litigation of claims against debtors for alleged violations of state labor laws would be inferior to individual bankruptcy claims resolution process and would unduly complicate administration of other claims before court against debtors were not clearly erroneous, and therefore denial of motion to apply class certification rule to class proofs of claim was not abuse of discretion);
d. *In re Blockbuster Inc.,* 441 B.R. 239 (Bankr. S.D.N.Y. 2011) (finding that proposed classes did not satisfy either commonality prerequisite to class certification or provision of certification rule allowing for class certification when common issues predominated);
e. *In re Gilliland,* 474 B.R. 482 (Bankr. N.D. Miss. 2012) (deciding debtor class could not be certified on theory that credit card company had acted on grounds generally applicable to class);
f. *Teta v. TWL Corp.*, 2012 WL 469872 (E.D. Tex. Feb. 14, 2012) (finding that the bankruptcy court's denial of class certification as failing to meet the superior method requirement does not amount to abuse of discretion);
g. *In re Movie Gallery, Inc.*, 2012 WL 909501, at *5 (Bankr. E.D. Va. Mar. 15, 2012) (finding class certification was neither practical nor efficient when the Rule 7023 motion is not filed until after consideration of the case was "well underway.");
h. *In re Patrick*, 2013 WL 951704, at *10 (Bankr. M.D. Pa. Mar. 11, 2013) (denying class certification for debtors alleging false filing of secured claims by creditor because of uncertainty of common injury and fail to show predominance and superiority);
i. *Vincent v. Money Store*, 2015 WL 412895, at *6 (S.D.N.Y. Feb. 2, 2015) (denying class certification based on alleged fraud where court would have to consider the content of individual mailings delivered to each class member and where named plaintiff had credibility issues due to past bad faith bankruptcy filings);
j. *Alakozai v. Chase Inv. Servs. Corp*., 2014 WL 5660697, at *13 (C.D. Cal. Oct. 6, 2014) (declining to certify class and discussing class's failure to properly demonstrate typicality, adequacy of representation, predominance and superiority);
k. *Zarichny v. Complete Payment Recovery Servs., Inc.*, 2015 WL 249853, at *10 (E.D. Pa. Jan. 21, 2015) (finding that "fail safe class" would require extensive and individualized "mini-trials" in order to identify class members and therefore failed the ascertainability requirement).

7. "REPRESENTATIVE CLAIMS" OR CLASS PROOF OF CLAIMS:

a. Expanded Notice = Expanded Discharge (?);
b. A majority of courts allow class proof claims, but see *Unioil v. Elledge (In re Unioil, Inc.),* 962 F.2d 988 (10th Cir. 1992);
c. Must comply with Rule 23/7023 either pre- or post-petition. The issue is timing (after an

objection is filed?) and who carries the burden of requesting application from the court;

d. May also need to comply with Rule 2019 if in a chapter 11;
e. *In re American Reserve Corporation,* 840 F.2d 487, 488 (7th Cir. 1988) ("Bankruptcy Rule 9014, which applies to 'a contested matter in a case ... not otherwise governed by these rules' states that '[t]he court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply.' Rule 9014 thus allows bankruptcy judges to apply Rule 7023 — and thereby FED.R.Civ.P. 23, the class action rule — to 'any stage' in contested matters." Filing a proof of claim is a "stage.");
f. *In re Dynegy, Inc.*, 770 F.3d 1064, 1070 (2d Cir. 2014) (To assert a claim on behalf of a class in a contested matter, the class representative must first properly file a Rule 9014 motion in the bankruptcy court. Otherwise, the class representative does not have standing to act on behalf of a class as part of the bankruptcy proceeding);
g. *Gentry v. Siegel,* 668 F.3d 83 (4th Cir. 2012) (The bankruptcy court retains significant discretion to determine whether and when to apply the requirements of 7023 to the claim process);
h. *The Certified Class In The Charter Securities Litigation v. The Charter Company (In re The Charter Company),* 876 F.2d 866, 873 (11th Cir. 1989) (Class proof of claims allowed in bankruptcy.);
i. *Reid v. White Motor Corporation,* 886 F.2d 1462, 1472 (6th Cir. 1989) (While the rules permit the filing of a class proof of claim, compliance with Rule 7023 to commence a class action is required.);
j. *In re Musicland Holding Corp.,* 362 B.R. 644 (Bankr. S.D. N.Y. 2007) (Detailed explanation of the legal basis and procedural requirements for filing a class proof of claim.);
k. *In re Craft,* 321 B.R. 189 (Bankr. N.D. Tex. 2005) (Burden on claimant to seek application of Rule 7023 in a timely manner and questions applicability of 2019 to class claims);
l. *In re MF Global Inc.*, 512 B.R. 757, 768 (Bankr. S.D.N.Y. 2014) (Class proof of claim may be filed any time after the Chapter 11 case is filed, no need to wait for objection);
m. *In re Associated Cmty. Servs., Inc.*, 520 B.R. 650, 658 (Bankr. E.D. Mich. 2014); (where late-filed class claim would unreasonably delay consideration of debtor's reorganization plan, court dismissed class claim as untimely filed).

8. SPECIAL EFFECTS:

a. Arbitration – Mandatory arbitration clauses may prohibit class action

i. Bankruptcy Court may have the authority to deny enforceability of arbitration provisions;
ii. *Insurance Co. of North America v. NGC Settlement Trust & Asbestos Claims Management Corp. (In re National Gypsum Co.),* 118 F.3d 1056 (5th Cir. 1997);
iii. *In re Gandy,* 299 F.3d 489 (5th Cir. 2002);
iv. *In re Belton*, 2014 WL 5819586, at *9 (Bankr. S.D.N.Y. Nov. 10, 2014) (denying motion to compel arbitration despite an otherwise valid arbitration agreement between the debtor and creditor);
v. Core Proceedings – Discretion To Refuse To Compel Arbitration;
vi. Non-Core Proceedings – No Discretion.

b. Debtor member of a non-bankruptcy class

i. Many class actions allow or require an election by potential class plaintiffs;
ii. Bankruptcy may be filed prior to election deadline;
iii. Is the right to opt-in/opt-out property of the estate?;
iv. What if the proposed settlement includes a release of all counterclaims?;
v. Is the automatic stay implicated?;
vi. Does 11 U.S.C. § 108 automatically extend the deadline to opt-in/opt-out?;
vii. What is the effect of confirmation and vesting/non-vesting of property of the estate?;
viii. *Santangelo v. Fairbanks Capital Corp. (In re Santangelo),* 325 B.R. 874 (Bankr. M.D. Fla. 2005) (The chapter 13 debtor's failure to opt-out found to be similar to a failure to file a claim within statute of limitations, and confirmation of the plan vested the claims/right in the debtor and property of the estate was therefore not implicated.).

9. ARTICLES/TREATISES:

a. Corrine Ball & Michelle J. Meises, *Current Trends in Consumer Class Actions in the Bankruptcy Arena*, 56 BUS. LAW 1245 (May 2001);
b. Elizabeth Warren and Jay Westbrook, *Class Actions for Post-Petition Wrongs: National Relief Against National Creditors*, 22-2 ABIJ (March 2003);
c. Robert P. Wasson, Article: *Remedying Violations of the Discharge Injunction Under Bankruptcy Code 524, Federal and Non-Bankruptcy Law and State-Law Comports with Congressional Intent, Federalism and Supreme Court Jurisprudence for Identifying the Existence of an Implied Right of Action*, 20 BANKR. DEV. J. 77 (2003);
d. COLLIER PAMPHLET ED. OVERVIEW 1334, Mathew Bender & Co., Inc., 2006, p. 6-7;
e. Kara Bruce, *The Debtor Class*, 88 TUL. L. REV. 21 (2013);
f. Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX.L.REV. 1 (2008).

Lawless, Robert M

From: Marsha L. Combs-Skinner <marsha@danville13.com>
Sent: Wednesday, May 03, 2017 3:02 PM
To: ConsumerCommission@abiworld.org
Cc: Marsha L. Combs-Skinner
Subject: Comment

I would hope that the Commission on Consumer Bankruptcy would truly listen to those who are on the front lines everyday as Trustees. I previously served as a Chapter 7 Trustee and I have served as a Chapter 13 Trustee for over 7 years.

I agree much with what my peers have stated already but particularly would request that the Commission consider the following:

1. The initial pre-counseling course is a waste of time and money. It is the budget education course that benefits the debtors. When I have asked if the debtors have found the course useful each has indicated without exception that they wished that the budget course was done from the very beginning. I always encourage the debtors to complete that course as soon as possible to help them through the Chapter 13 process.
2. I do not like the National Plan and my District will opt out.
3. I think the Means Test is useless except for determining who must be in a Plan for 60 months. I and J are the true measure of what people can pay in terms of disposable income.
4. Mortgage claims are still not being timely filed.
5. I think mortgages should be able to be crammed down to the true value of the home. This would deter lenders from helping debtors to obtain debt that is not truly secured by the collateral.
6. I think there must be a cap put on how much anyone can borrow for student loans depending on the profession or educational achievement that person is seeking. Once that cap is reached they cannot borrow anymore. That would force schools to hold down the costs of higher education. Anyone who cannot pay their student loans should have to file Chapter 13 for 60 months and pay all disposable income in the Plan. Upon completion of the 5 years debtors should be able to discharge their student loans. I think this would do more to spur our economy than anything that Congress has come up with. We would have people working and spending money and buying products and homes. It would encourage people to seek education knowing that there is a light at the end of the tunnel and that they will not be punished for the rest of their lives because they wanted an education.

Thank you for listening.

Marsha L. Combs-Skinner
Chapter 13 Standing Trustee
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Lawless, Robert M

From: Marsha L. Combs-Skinner <marsha@danville13.com>
Sent: Friday, June 09, 2017 9:20 AM
To: ConsumerCommission@abiworld.org
Cc: Marsha L. Combs-Skinner
Subject: Chapter 13 Issues

I was reading the List of Topics for ABI Commission on Consumer Bankruptcy, specifically for Chapter 13 and I wanted to add to the previous comments I submitted. In particular the topic under CH13.4.(g) Strict compliance with the 60 month rule. My comment is that if we continue with the statute that the longest period of time for a Plan is 60 months, a Trustee should be given specific authority to help the debtor complete the Plan when the debtor has shown good faith in paying the Plan payments but for whatever reason, has not been able to complete the Plan within the 60th month. It is not unusual for debtors to run over the 60 months. This may be due to some sort of emergency having risen during the Plan period and the debtor had to use what otherwise would have been Plan payments for that emergency, or situations of short term lay –offs or illness. I think it is up to the Trustee to help the debtor complete the Plan when the debtor has demonstrated good faith in trying to complete the Chapter 13. It is unfortunate that a Trustee is given a bad mark on a UST Audit when a case has remained open 65 months. Having worked with the debtors for years we Trustees know which debtors are truly making a good faith effort to complete a Plan and which ones are not. I would rather take a hit on my Audit than dismiss a debtor who has worked hard to complete a Plan and just needs a little more time to be successful.

Thank you for your consideration.

Marsha L. Combs-Skinner
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United States Bankruptcy Court
Western District of Virginia

The Honorable Rebecca B. Connelly
United States Courthouse and Federal Building, Room 320
116 North Main Street
Harrisonburg, Virginia 22802

John W. L. Craig, II
Clerk of Court

(540)434-6747
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September 29, 2017

Re: Request to speak at public meeting during the annual conference for the National Conference of Bankruptcy Judges (NCBJ) on October 10, 2017

To the Committee on Case Administration and the Estate:

I wish to highlight two of the topics identified on your published list of considered topics. These two topics are: 1) notice and service issues, and 2) payment of chapter 7 debtors' attorney fees.

Notice and service are pivotal to an effective bankruptcy system. Accomplishing sufficient notice and effective service is challenging. In particular I note three challenges: (1) verifying that service has been made to the appropriate party and that all affected parties have notice of the action before the Court, (2) managing the cost to accomplish the notices and the appropriate service, and (3) providing clear notice of how or whether the action before the Court will impact a parties' rights or interests, whether the failure to express opposition may be deemed consent, and what is required to effectively oppose entry of an order granting the action.

I ask the Commission to consider some recommended improvements to how notice is managed in consumer bankruptcy cases. I believe the following may be appropriate improvements.

Pursuant to section 342(f), creditors may provide the bankruptcy court with preferred addresses to be used in chapter 13 and chapter 7 cases. These addresses are used by the Bankruptcy Noticing Center (BNC) to send notices anytime a bankruptcy court is mailing notices.

Many courts have outsourced or referred the responsibility of mailing notices in chapter 13 cases to either the chapter 13 trustee or debtor's counsel. In this way, the chapter 13 trustee and debtor's counsel are serving the Court's function. It is logical, and helpful to the creditor community, for the trustees and debtors to use the same addresses as the Court. Indeed if it is not permitted, the benefit of section 342 to the creditor is lost. To accomplish this sharing requires access to the BNC addresses. This could be accomplished through a link on each court website. The result is greater transparency and more effective notice in all chapter 13 and chapter 7 cases. Stated differently, these measures achieve transparency by allowing all affected parties, and the Court, to easily verify if the addresses used for the affected parties are those provided by the affected parties.

Along these lines, under the new rules, debtors will need to provide notice related to the plan and accompanying motions in chapter 13 cases (see for example proposed amended Rule 3015(d)). To best ensure that the creditors and parties in interest are provided notice at the address requested, it is fitting to permit, or require, a debtor to use the national addresses maintained and used by the BNC. In this way, a Court can better determine that notice has been provided to the appropriate addresses. This may be accomplished through a link on each bankruptcy court website to the BNC registry of addresses, or a similar task.

In addition, creditors should be required to designate a person to receive service in accordance with Rule 7004 as required under section 342. This name and address should likewise be accessible to all users of the bankruptcy system. This could be maintained through the national registry, or a separate clearing house (National Data Center (NDC) or even through a third party vendor such as EPIQ). The appropriate name and address for service under Rule 7004 is all the more important because proposed amended Rules 3007, 3012, 4003 and 5009 mandate service pursuant to Rule 7004. This simple requirement will aid the Court in determining that the appropriate party has been served, aid debtors and trustees in locating the appropriate party for such service, and will provide assurance to creditors that they will receive information affecting their rights in a timely manner.

Finally, we can no longer ignore the need to accept and incorporate electronic communication as a form of service and notice. Electronic communications are so common and non-electronic communications so rare, that it is simply short-sighted and naïve to believe that a party should "consent" to such means of communication before it is used. It is so frequently used, and preferred, in fields other than law, that it is likely some creditors will no longer accept non-electronic communications. For these reasons, the Commission should, at a minimum, strongly encourage amendments to bankruptcy rules to permit email or electronic bulletin boards as sufficient means of *initial* service, without requiring consent of the creditor, or encourage its use as an appropriate method to bolster notice. Alternatively, the Commission should encourage creditors to be required to provide an electronic address as part of their preferred address pursuant to section 342.

That is not all. In addition, we should begin to consider how new platforms will be incorporated. I know that references to such platforms as Twitter and Facebook strike fear in lawyers and judges. Although their use is abhorrent to most lawyers and judges, the concept behind the technology is not. We should not reject these means, but suggest rules regarding appropriate use of these means.

It is my hope that the Commission will submit recommendations to the Rules Committee regarding greater use of electronic means for service in bankruptcy cases, and will recommend expansion of the language in Bankruptcy Code section 342 to incorporate these objectives.

The use of electronic notice, and allowing electronic service, will reduce mailing and printing costs, as well as reduce labor costs. This leads to my next topic I wish to address: debtor's attorney fees.

I wish to highlight obstacles to paying debtor's attorney fees in chapter 7 cases. Notwithstanding Bankruptcy Code 524(f) ("nothing in subsection (c) or (d) prevents a debtor from voluntarily repaying any debt."), current practice nationally is to prohibit a chapter 7 debtor from entering into an agreement to pay his attorney fees over a period of time, including the period after discharge.

This restriction has created a barrier to chapter 7 for some debtors who simply cannot obtain the funds to pay their debtor attorney fees prior to filing the petition. In some cases, those debtors have filed chapter 13 in order to have the flexibility to pay attorney fees over time, only to find another barrier in the form of dismissal of their chapter 13 case as a "bad faith filing," because the debtor filed "an attorney fee only plan" or a "disguised chapter 7." In such a context, I suppose it is not surprising that we now find ourselves surrounded by increasing skepticism toward chapter 13 consumer chapter choice, and cynicism toward consumer debtor attorney motivation. I think it is time we "re-think" how consumers may pay their professionals. It is unclear why we have restricted chapter 7 debtors from the freedom to enter into a contract to pay an attorney over time, out of exempt assets or property that is not property of their estate. It is unclear why we do not allow debtors to voluntarily repay their attorney fee debts, or permit such debt to be excepted from discharge (either by request or a statutory change). I hope the Commission will embrace recommendations for such changes as: (1) authorization to a chapter 7 debtor to contract to pay attorney fees, over a period of time, from exempt assets or other non-property of the estate; (2) permitting voluntary repayment of attorney fees; (3) permitting reaffirmation of attorney fees debts; or (4) excepting debtor attorney fees in chapter 7 from discharge.

Thank you for the valuable service you are performing. I appreciate the opportunity to comment. I hope to participate in future meetings.

Sincerely,

Rebecca B. Connelly

Rebecca B. Connelly
Chief United States Bankruptcy Judge, Western District of Virginia

Testimony Before ABI Commission on Consumer Bankruptcy

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I would like to thank the Commission for inviting me to appear and testify with respect to governmental issues in consumer bankruptcy cases. I would like to begin with the standard disclaimer of all governmental (or, in my case, quasi-governmental) witnesses – that, while we are attempting to make statements that correspond with the views of the officials with whom we work, our statements should not be taken as official statements of policy, nor should they be viewed as the view of any or all of the state Attorneys General, in my case. I would also add that, my personal work with the States tends to be more business-bankruptcy oriented, so I do not have the degree of personal experience with individual debtor cases that others on these panels may have. That said, though, I hope the comments below are useful in illustrating at least some of the many issues governmental counsel may deal with on a regular basis.

1. Uniform Plans

Under the Constitution, Congress is required to enact *uniform* laws of bankruptcy. The Supreme Court majority held in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006) that the concept was so crucial that it showed that Congress had decided (without ever uttering a word to that effect) that it warranted overriding State sovereign immunity that carried over intact under the new Constitution in every other Article I area. The need for such uniformity is particularly important to creditors with respect to Chapter 13 plans in light of the large number of such cases and the variety of plan payments and structures that are allowed (as compared to the relatively straightforward process in Chapter 7 cases). A creditor seeking to deal with those variables in cases where the dollars available are usually quite small and the plans are expected to be confirmed quickly has a difficult task to be able to actually analyze and react to problems with such plans. Yet the Supreme Court's decision in the *Espinosa* case made it imperative to find and ferret out problems – and leaving the task to overworked bankruptcy judges to find them for creditors and revise plans *sua sponte* was not likely to work out well.

That is why States were happy to see the project over the last several years that tried to move Chapter 13 cases in the direction of a truly uniform plan. As largely involuntary creditors, whose debtors can readily move all over the country, while owing debts to the States for which they often will have no ability to obtain security or other controls, they frequently needed to cope with plans whose variety was limited only by the ingenuity of debtors' counsel. In addition, even as courts began to move towards uniform or model plans in a district, there was still nothing that required District A's uniform plan to be consistent with District B's plan. As a result, trying to train staff to know what to look for, where to find it, and where to check for the hidden booby traps required starting over with each new district, if not each plan. A truly uniform plan, on the other hand, would make it far easier to train staff working on such cases to review the plans,

determine the government's treatment and evaluate if the attorney might need to object. In light of the volume of cases, this initial triage almost inevitably will have to be done by paralegal staff, so it is critical to ensure that they can be trained as to what for and where to look. In short, Judge Wedoff and I may have been the two most enthusiastic supporters of a national plan.

The final result of all of those efforts was a mixed bag – notwithstanding a great deal of work, it proved to be impossible to convince many to move away from the comfort of what was familiar. So, a truly national plan could not be reached, but at least a requirement was put into place that requires each district to adopt *a* uniform plan. As a result, the number of potential plan variants has gone from infinite to less than 85. 13 districts are using the national plan and the remaining 81 adopted their own plan.

Even with the differences, though, the process undoubtedly served to bring plans a good deal closer together. And the Rules required several minimum provisions be included in any district plan, including an opening paragraph dealing with several crucial issues and a closing paragraph describing any nonstandard provisions. Both of those requirements tell creditors where to look for what is likely to be most important to them. And, from my perspective, one of the most important requirements for these plans – and I take some credit for hammering on this point – is the provision in rule 3015(c) that "a nonstandard provision is *effective only if it is included in a section of the form designated for nonstandard provisions and is also identified in accordance with any other requirements of the form*" and the even clearer language in Rule 3015.1 that any nonstandard provision placed other than in the appropriate spot is void. With those provisions, I trust that the sort of ambush provisions that could slide by under *Espinosa* will no longer work. I am looking forward to the panel on Saturday about experience to date under Rule 3015.1 and I urge every judge to make sure these provisions are applied as they read.

Now that we have a degree of uniformity I hope we will be able to generate meaningful data that will allow us to evaluate the effects of different provisions that are used in various "standard" plans. If, for instance, there are 10 districts whose Plan A is essentially equivalent to the Plan B adopted in 15 other districts with the one distinction that Plan A has the trustee make all mortgage payments while in Plan B payments are made directly by the debtor, which district has better results in terms of payments made and plans completed? Or Plan C districts where property revests in the debtor and Plan D districts, where it remains property of the estate? In short, can we actually get credible, detailed data to allow the bankruptcy system to determine "best practices?" There are many such issues that now are largely debated in the abstract – if the trustee is to make payments to creditors, should it be for all obligations or only major ones? Do such provisions better ensure that the plan is followed? And do they allow the trustee to know if there is a problem early enough to try to fix it? Similarly, do plans work better if payments are made *to* the trustee via wage order rather than by having the debtor send in a payment?

If those determinations can be made, we suggest that the Commission should strongly encourage districts using the other approach to rethink their decision and adopt those best practices. Which, dare I say it, might move us closer towards a truly uniform national plan over time! Certainly, to the extent we know what works best, it should not necessarily be left to the debtor's voluntary choice (or more likely what his counsel chooses). While having trustees make payments to creditors undoubtedly causes some increase in trustee costs and debtor fees,

there is not at least the conflict of interests seen in Chapter 7 where added activity benefits the trustee by costing the debtor.[1] And, to the extent there is some debtor who is uniquely benefitted by doing something different than the norm, the model plans still accommodate that approach.

Another area is the question of whether debtors should be able to choose whether or not to keep post-confirmation property in the estate or not. This is something that should be uniform, rather than what individual debtors happens to think will best suit them. Since many consequences flow from whether property remains in the estate or not – including, most importantly, whether the automatic stay still applies or not – this means the debtor and only the debtor decides how much control other parties can assert over the course of the next five years of his life. This ties in to my next point which deals with how plans handle postconfirmation expenses.

2. Administrative expenses, 28 U.S.C. 959-type governmental claims, and property of the estate.

Unlike most parties that deal with the debtor during the course of the debtor's life under his or her Chapter 13 plan,[2] the government will, in most instances, be an involuntary creditor. This applies most obviously to ongoing taxes, but it also applies to many other aspects of the debtor's life where he or she is obligated to make payments to the government but does not – in matters ranging from traffic and parking tickets to water bills to dog licenses. To be sure, for some expense, like utility bills, the government is eventually able to cut off the supply and stop accumulating debt but, in the meantime, significant liabilities may have been incurred.

The debtor is certainly required to propose a plan that shows that it can feasibly pay expected ordinary course post-confirmation bills including those for existing long-term secured debt and those payments are worked into the plan before any payments are designated for unsecured prepetition creditors. Indeed, a debtor may be able to confirm a Chapter 13 plan without setting aside *any* funds for unsecured creditors even if it has done so by devoting all of its payments to postpetition expenses that it has budgeted for. Such expenses are functionally equivalent to administrative expenses since they are paid before claims filed in the case, even those with priority status. And those expenses may well include luxury items that are not, in any way, reasonably necessary for the debtor's existence. *See, e.g*., *Drummond v. Welsh (In re Welsh)*, 711 F.3d 1120 (9th Cir. 2013) where the court held that the debtor was entitled to pay on secured claims relating to an expensive home, several vehicles, an Airstream trailer, and two

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[1] See Henry E. Hildebrand, III, *Behind the Curtain: The Chapter 13 Trustee's Percentage Fee*, ABI Journal, p. 24 (December 2014). " Unlike chapter 7 trustees, chapter 13 trustees do not "eat what they kill" but are paid a fixed compensation, which is to be paid from the percentage fee that has been established by the attorney general in accordance with 28 U.S.C. § 586. A little like Nathan Detroit in "Guys and Dolls," the chapter 13 trustee takes a small piece of every pot."

[2] The discussion here will focus on Chapter 13 debtors and plans. However, although there are a substantially smaller number of cases involving individual Chapter 11 debtors, much the same problems can arise there under the equivalent provisions in that chapter, including Sections 1115 and 1141.

ATVs, while at the same time excluding Mr. Welsh's social security income as a source for plan payments to unsecured creditors.[3]

Yet, when it comes to governmental claims for postpetition expenses that the debtor has not budgeted for and/or has chosen not to pay, it is not at all clear that such claims will be paid at all during the case, much less treated like administrative expenses. The decision in *City of Chicago v. Marshall*, 281 F. Supp. 3d 702 (N.D. Ill. 2017), which dealt with an effort by the City to enforce parking and traffic tickets the debtors ran up during the term of their case, is a good example. The court comes up with numerous reasons as to why governments should not be allowed to enforce the laws against debtors in Chapter 13 that are operating in much the same way as debtors-in-possession in Chapter 11. Primary among them is the concern that requiring a debtor to pay his new expenses from his current income comes at the potential expense of the debtor's ability to pay its prepetition creditors – but is that not already the case with budgeted expenses? Why is it different just because these expenses are ones the debtor didn't necessarily plan to pay? And, what kind of mischief can arise if debtors know they can operate with a degree of impunity during the case?[4]

This problem is greatly exacerbated when the debtor's plan provides for all of the debtor's property including all of his future wages to remain property of the estate throughout the time the plan is being paid.[5] In Chapter 11, a plan may provide for a debtor to make payments over an extended time, but substantial consummation with its limitations on the debtor's ability to modify the plan occurs once payments have begun, not at the end when they have been completed. Similarly, Section 1141 (like 1327) ordinarily vests property of the estate in the debtor on confirmation and, unlike the emerging trend in Chapter 13, that remains the norm in Chapter 11. That is why there are numerous cases that state that, post-confirmation, a debtor must on its own two feet and is no longer a ward of the court. It must balance its post-

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[3] While the States in these comments are generally looking at issues that are more specific to governmental entities, this case is a good example of all of the problems with the way the means test and related provisions are drafted. It was meant to ensure that those who "could pay, should pay" and that only the minimum amount of bankruptcy relief necessary to protect the "poor but honest" debtor was provided. As drafted, though, the provisions far too often fail to meet those basic goals, providing unneeded relief to those with higher total incomes who could and should pay (including by allowing deductions for luxury items and by failing to count all sources of income such as Social Security) while imposing burdensome requirements on those at the bottom end of the scale. A thorough review and revision of these provisions with the experience gained from the last 13 years of cases is critically needed.

[4] A search of the bankruptcy docket, for instances shows that these debtors filed a Chapter 7 case in 1991, a Chapter 13 case in 1996, a Chapter 7 case in 2005, and three more (partially overlapping) Chapter 13 cases, in 2014 and 2015. That history answers, in part, the court's suggestion that the city was dilatory in not trying to collect the tickets prior to the November 2015 petition date – a suggestion that overlooks the fact that the debtors had been in two prior cases for the year before that date.

[5] *In re Jemison*, 2007 Bankr. LEXIS 3107 (Bankr. N.D. Ala. 2007) has a good discussion of the absurd results that follow if one tried to literally apply the concept that all of the debtor's income remains property of the estate subject to the supervision of the bankruptcy court.

confirmation earnings and expenses – all of its expenses – on its own and, if the result doesn't add up, so be it. The automatic stay does not stand in the creditor's way and, by virtue of being able to enforce its claim in the normal course, the payments automatically have the equivalent of administrative expense status.

In Chapter 13, though, only the postpetition expenses that the debtor anticipates and deals with in the plan are allocated a payment that the debtor is expected to abide by. Other costs, whether anticipated or not, are given only very limited options for enforcement that do not necessarily work for those creditors, and that are not necessarily even better for debtors or the prepetition creditors.

Section 1305(a)(1) and (b) allows postpetition taxes to be allowed claims – but requires that they be treated as if they were incurred prior to the case – which limits them to being priority taxes at best. And, while the claim is allowed, it is far from clear whether the debtor *must* or merely *may* amend its plan to provide payment for that claim. If it does so, that should, in most instances, at least theoretically require full payment over the term of the plan since the taxes would normally enjoy priority status. Interest and penalties for failure to make timely payment, though, could not be included since the tax debt is deemed to only come into play at the petition date and to be subject to payment under the terms of the plan. So, at best, the taxing authority will find that its payments are severely delayed for what should be an ordinary course timely expense. Conversely, if the debtor chooses not to include those claims, or the government decides not to file a claim for those costs in order not to forego those other aspects of the claim, the question as to how the government is to enforce its rights to those taxes becomes very uncertain.

The problem for other types of costs the government may incur, such as the traffic fines in the *City of Chicago* case, or other governmental postpetition expenses, is even greater since it is not clear that there is any provision that deals with them. (Section 1305(a)(2), for instance, appears to be more geared to expenses such as replacing a car or stove that dies during the course of the case, not the incurral of a ticket for running a red light, since it is difficult to envision a circumstance in which doing so is "necessary for the performance of the plan.") The court in *City of Chicago* suggested three alternatives for a creditor in the scenario where the debtor retains property in the estate until the completion of the plan – a) move to lift the stay to allow the creditor to collect, b) move to dismiss the case, or c) simply wait out the five years of the case and try to collect then.

All of those have obvious flaws:

a) the cost for a lift-stay motion (a minimum of $181 before even counting the attorney time and expense to both the creditor and the debtor) hardly makes it realistic for many of these debts which are often relatively small; moreover, if granting the motion is expected to be relatively automatic, why impose those costs on either side when it will only diminish the small likelihood of creditors being paid?

b) having the case dismissed (assuming the court would agree it should do so based on failing to pay postpetition debts if the debtor was otherwise complying with the payment terms) would often require the creditors to cut off their nose to spite their face. Certainly, the prepetition creditors who are being paid want the case to continue and, postpetition creditors will often also have other prepetition claims on which they are being paid and that they would like to continue. Nor would the debtor seem to be benefitted by that result. Although it might be able to refile and try to treat those debts as subject to a new plan, the limits on serial filings in the Code may make that option unavailable.

c) waiting five years to be able to collect any funds is 1) unfair to the new creditors (especially those who are owed relatively small amounts and may not be in a position in try to resume collecting after they have already waited five years), and/or 2) likely to merely set up a debtor to need a new filing as soon as he finishes the first one if the debts are significant in scope.

Moreover, taking the position that a debtor doesn't need to abide by the laws post confirmation or pay the costs imposed for violations of those laws is bad public policy for any number of reasons. A prior witness, Elizabeth Gunn from the Office of the Attorney General in Virginia, has already spoken to you about the problems she and others dealing with domestic support issues have found in trying to ensure that ongoing payments are made, even with the enhanced tools given by the BAPCPA. A substantial part of that problem arises from trying to deal with the issues that arise when the debtor's plan purports to retains all of his earnings for up to five years as property of the estate.

Accordingly, I believe that a more appropriate approach would consider the complex of issues that arise from the current structure of Section 1305, 1306, and 1327. To the extent that the new model plans require a debtor to more clearly spell out what he or she is attempting to do with property of the estate that may help with trying to figure out how to interpret the overlap between the default language in Sections 1306 and 1327. It would be useful, though, to have some revisions to those sections so that the courts are not left to try to determine which of the multiple approaches to that issue they should adopt. The confusion leaves taxing authorities and other postpetition creditors between a rock and a hard place in trying to decide when, whether, and how they can try to collect on amounts that are owed postpetition. In *Cal. Franchise Tax Bd. v. Kendall (In re Jones*), 657 F.3d 921 (9th Cir. 2011), for instance, the court dealt with a Chapter 13 case where the debtor's plan did not directly address the question of vesting of property of the estate. The debtors filed a postpetition tax return but did not pay the $6,000 of taxes that were owed. The plan was dismissed several years later and a year thereafter one of the debtors filed a Chapter 7 case and treated the debt as discharged because it accrued more than three years before that petition date. The Ninth Circuit held that, under any of the three applicable theories that it might be inclined to adopt, that the state was not precluded from attempting to collect the debt because "at, the very least, some estate property revests in the debtor at confirmation," and the state could have tried to collect from that property – whatever it was, however its extent could be determined, and whether or not there was any chance that it

came close to meeting the amount of the debt at issue. *Id*. at 928. That uncertain prospect hardly gives any comfort to a taxing authority that it can proceed without requiring costly litigation and stay determinations in virtually every case. Better clarity would be much appreciated.

Interestingly, the one approach the court rejected, as a matter of statutory reading, the "estate preservation approach," is one that is now explicitly treated as being an appropriate option under the model plans. That approach, the court stated, "holds that although property of the estate "vests" in the debtor upon plan confirmation under § 1327(b), the property does not become property of the debtor. Instead, the estate remains fully intact and protected by the automatic stay until the case is closed, dismissed, or converted." *Ibid*. It noted that no court had adopted that reading of the default meaning of Sections 1306 and 1327. However, since Section 1327 says the plan may "provide otherwise," and since one may now do so, merely by checking a single box, many debtors now do obtain exactly that maximum level of protection. (A drawback of that approach, though, is that debtors will presumably ensure that, under *Jones*, tax debts will remain nondischargeable since collection is precluded during such a plan.)

The problems created by an ever-growing number of plans that include broad retention of property of the estate (and the scope of the stay) underscore the need for improved provisions dealing with postpetition debt. With respect to Section 1305, at a minimum, the Commission should consider expanding its bounds to include a greater collection of postconfirmation debts, especially those owed to the government. That is particularly needed where a debtor is allowed to choose whether to maintain the stay in place for the entire plan. It is not fair to hold postconfirmation creditors hostage to the stay but not require that they be dealt with in a timely fashion during the case, or do son only on condition that they forego a substantial portion of their claim.

Simply expanding its scope, though, is not enough since, as discussed above, it is by no means an optimal solution even for the areas it currently covers. One suggestion would be that, to the extent creditors are included in Section 1305, they could send the debtor a deficiency notice for unpaid postpetition obligations. The debtor could request a show-cause hearing before the bankruptcy court to contest the notice, but, if found to owe the funds, the debtor must either arrange to have them paid immediately or, with the creditor's consent, paid through the plan, or the case will be dismissed. Similarly, if the debtor does not respond or contest the amounts within a specified time, the case will also be dismissed. Alternatively, the creditor may be able to opt to have the stay lifted at the end of this process. In either case, the process should go forward without additional costs being imposed on the creditor. When the debtor is receiving the value of a Chapter 13 filing, and is opting to maintain the stay in place for its own benefit, it should not be able to impose the costs of its non-compliance on its creditors when it fails to meet its obligations.

3. Student loans

Turning to some completely different topics, another area of great interest to the states is student loans. Unlike most parties in the process, governmental entities have dueling interests. On the one hand, they may have obligations to enforce and collect on student loans and are deeply interested in having greater clarity as to when and if a student loan may be discharged and how it should be treated in Chapter 13 in terms of separate classification and other special

payment provisions. On the other hand, the Attorneys General are often at the forefront of investigating educational institutions that fail to serve the interests of students, whether due to deliberate fraud or mere incompetence. When an institution lures students in with promises of great career opportunities and high-paying jobs and sends them out with massive debts and an education that is wholly inadequate to qualify them for such jobs, the Attorneys General have not hesitated to sue those institutions and to appear in bankruptcy to protect the interests of the students in not being forced to repay those fraudulently incurred debts. It would be a distinct understatement to say that this raises issues within their offices. (It does, though, make for great topics for our ethics session at our most recent NAAG Bankruptcy Seminar where the program was based on a hypothetical derived from exactly that fact pattern.)

The prior administration had issued some guidance on when and whether collection efforts should continue in those situations and had agreed to voluntarily cease trying to collect on some of those loans and allow them to be discharged. The current administration has pulled back from that process which does raise concerns. However, one helpful thing it has done is to issue a request for comments about what standards should be used for evaluating hardship discharges and when, and under what circumstances, the lender should voluntarily discharge the debt. *See*: https://www.federalregister.gov/documents/2018/02/21/2018-03537/request-for-information-on-evaluating-undue-hardship-claims-in-adversary-actions-seeking-student.

The deadline for comments is May 22: to the extent that the Commission has a position by then it would be useful to submit it. I expect that some or all of the Attorneys General will have comments that they will choose to submit by that time, but they haven't been formulated yet so I will not purport to speak for the Attorneys General. I would only say that, as my purely personal opinion, I tend to think student loans don't belong in the bankruptcy system at all. Not, I hasten to say, that I believe they should be automatically dischargeable at once or after a period of years. Rather, I think it would make more sense to treat them in an administrative process within the Department of Education for instance. You could have a single national set of standards that could be enforced with some uniformity. There would not have to be the stigma, costs, and burdens imposed on a person by being forced to file bankruptcy when their only real problem is the student loans. Nor would you have the wholly inappropriate (although wholly understandable) situation in which courts are objecting to being forced to dismiss cases in which the debtor has too much student loan debt to file in Chapter 13, even though that is otherwise the best choice for them. *See In re Pratola*, 578 B.R. 414 (Bankr. N.D. Ill. 2017) and *In re Fishel*, 2018 Bankr. LEXIS 965 (Bankr. W.D. Wi. 2018).

The decision of how much someone would have to pay could be integrated with the Income Contingent Repayment Plans and/or other loan forgiveness programs so that the discharge would come automatically at the end of that process. I would suggest that the Commission recommend that those programs be changed so that at the end of the payment process, the debts are treated as if they were discharged in bankruptcy. It does a debtor little good to pay faithfully for 25 years what they could afford and be left at the end with a huge tax liability for the cancellation of the indebtedness. If we believe in that program, we have to make it an offer that, in the words of the Godfather, the students "can't refuse" and that won't happen if the debt has not really been dealt with. And, finally, to the extent that the Department determined that there were serious problems with the college, so that the debts deserved to be

discharged without payment, that decision could be made and applied across the board.

All of that said, I would also note that dealing with the student loan problem goes far beyond anything the bankruptcy system can remedy on its own. It is a function of declining public support for colleges coupled with rising tuition; of the decline of apprenticeship programs that directly match training with job needs; and of the well-meant effort to send everyone to college when that may not be what they want or need (or what employers want or need). Those are matters for those who have a broader ability to grapple with these problems in the legislatures and many are discussing such ideas. What this group can do in the meantime is to try to help the group that is still caught in the current system until other forms of help can arrive.

4. Tax sales

In *BFP v. Resolution Trust Corporation,* 511 U.S. 531 (1994), the Supreme Court gave categorical protection to the results of foreclosure sales as opposed to attempts to attack them as being constructively fraudulent transfers. What that case did not address, and which has begun to arise in an increasing number of cases, is the status of tax sales; i.e., sales of real property for nonpayment of property taxes owed thereon. The basic problem is that, unlike foreclosure sales that do operate under a single paradigm – obtain as much money as possible for the property via competitive bidding (even if the result does not reach an ideal "market value"), tax sales use a variety of approaches. Some, like foreclosures, try to obtain a maximum price for the property from which the taxes are deducted first; in other cases, the system appears to be designed to generate the smallest amount of revenue necessary to ensure payment of the taxes so that the debtor will have the greatest ability to redeem the property. While the latter approach is useful for the debtor that can do so, it becomes a great deal more problematic if the debtor cannot and files bankruptcy with the prospect of permanently losing his home over a relatively small debt.

The courts are all over the map on this with respect to both the possibility of an avoidance action and whether the debtor can pay off the redemption amount over the course of a Chapter 13 plan. Without trying to recommend what the final result should be, it is clear the States would benefit greatly from having a uniform decision on what they can and cannot do to protect their ability to collect and retain their taxes. And, even if the effect of an avoidance action may fall initially on the private party that made the tax sale payment, it is clear that, just as was noted in *BFP*, the existence of doubt and the possibility of losing their rights can only serve to chill the willingness of parties to buy these tax debts and ensure that governments are paid. The net result will be adverse to government's ability to predict and collect revenue, which as the Supreme Court said is the "lifeblood of government." In short, there ought to be clear and predictable rules that government can rely on in deciding how to write their laws.

5. Zombie properties.

Others have, I am sure, discussed the problems with properties that the debtor wants to surrender but the lender does not wish to accept. This obviously creates problems for the debtor, but it also creates significant problems, especially for municipalities. Properties where a debtor has abandoned his or her claim and moved away, but the lender is refusing to accept title to, quickly become eyesores and likely magnets for criminal activities. No one keeps up the

property so squatters may move in and take over. No one mows the lawn during the summer to keep down pests, or shovels the sidewalks in the winter, creating hazards to everyone living around the area. These properties bring down the value of neighboring homes by their presence.

At the same time, debtors who have complied with all applicable provisions of the Code and have received their discharge remains saddled with costs of a property they no longer occupy. They are forced to pay utilities, insurance, HOA fees, etc. or risk being sued for those debts even after they are nominally discharged and have received their fresh start. The end result is that debtors find that fresh start to be significantly hampered, hindering them from returning to being a productive citizen in the economy. Conversely, the lender whose rights to proceed *in personam* against the debtor have been discharged is effectively continuing to put the economic burden of the property on the debtor, in direct contravention of the Bankruptcy Code's intent.

To whatever extent you believe the bankruptcy laws can impose a duty on the lender to accept the property after a specified time has passed since the debtor has surrendered the home, we urge you to recommend such a provision. Or if you wish to make it clear to debtors that, after offering the property to the lender, they can stay without making payments unless and until the lender formally takes over the property, that may be useful too. At least, that would keep someone in the house so it does not just sit vacant and deteriorate. The status quo is simply unacceptable – while the problem has lessened in recent years as housing prices have started going back up again, it will likely come to the fore again with the next recession. It would be good to start the process now of getting these "Walking Dead" homes out of the system and back into productive use. Certainly, if the bankruptcy system does not do so, it may well be the role of state and/or local government to take over these houses after a time and fix them up or sell them for whatever can be obtained and provide nothing to either the lender or the debtor. That is plainly not optimal for those parties but it will ensure that the government can provide for the common welfare of the neighborhood.

6. Rules on *pro hac* admissions and local counsel requirements

While these may or may not be viewed as falling within the purview of this commission, the States take the occasion to raise these concerns whenever possible. Another consequence of being involuntary creditors is that it is fairly common for the debtor to incur debts in one locality (without any voluntary action by that governmental entity or the ability to protect its interests by obtaining security interest) and then move elsewhere. Thus, it is quite common for governmental entities to be forced to follow their debtors to other states in order to try to collect. Many courts routinely allow attorneys for the federal government to appear in without local counsel and with, at most, minimal admission requirements for out of state counsel, even though the federal government has offices throughout the country. Some (but a much smaller number) do so for state and local counsel, even though they do *not* have the same option that the United States does to use local designee. We believe that, in the current day – and in a system that operates under a *uniform* law of bankruptcy, there is little reason to make governmental counsel comply with burdensome and/or costly admission and local counsel processes – certainly they will not be in a position to represent numerous clients and set up a local practice without being admitted to the local bar. Delaware, for instance, with numerous out of state cases, does have very simple rules in this regard. We would urge the Commission to recommend that all districts do the same.

OBSERVATIONS OF A PANEL TRUSTEE

The repetition of bankruptcy filings, particularly among pro se filers seems to grow with each 341 Meeting session.

One of the initial questions I ask at a 341 Meeting is, "have you ever filed a bankruptcy before, if so, when?"

The answer seems to indicate a growing use of the filing of a Chapter 7 by a significant number of debtors.

Those people not covered by legal aid in today's society have escalated to a larger class of what we call the "working poor." When the Office of Economic Opportunity (Poverty Program), started a federal legal aid system, it was acknowledged that the hard core person needing legal service to the extent of the program coverage would be accommodated. Working people who still did not meet the requirements of the program because they exceeded the allowed maximum income did not qualify for hard core poor coverage under these programs and thus pre-paid legal systems came into existence.

UNDERSTANDING THE DEBTOR

The code provisions allowing pro se filings and lay petition preparers created a dual system of representation. Those who can afford an attorney, receive one level of care, while the poor who could not afford an attorney had access to a lesser care for their debt problems. (See American Bankruptcy Trustee Journal, Vol. 33, Issue 03, Summer 2017 page 38, "Why we should not allow non-attorney Petition Preparers to Practice Law" by Eugene Crane).

The proliferation of repeated bankruptcy filings might be explained through one case. I can still recall one of my first Chapter 7 cases over 50 years ago. I was perplexed as to why a debtor being interviewed wanted to reaffirm a debt for a Cadillac automobile, since it was an expensive item. In response to my questions, the debtor, rather eloquently, but sadly, gave me his explanation.

"Lawyer, he said, I am a person of modest ability and few real skills. At my age, I can not apply for work that requires more training, education, or skill than I possess. So I live from credit surge to credit surge. I will never have enough money to buy appliances, cars or anything else without accumulating cash which I can not do. So, what do I do to give my family transportation, shelter, and the items used in our modern life? I acquire what ever my available few dollars will buy on credit. If I can get a car for $10 or $100 a month, I have a car. If I can get a TV and appliances for $50 a month or $75 or whatever cash I have available at that point, I can live like other people. When for any reason my available payment amount does not exist and my car is repossessed or my small salary is garnished, I find another lender who will sell to me on credit at a rate I can afford, or I just file bankruptcy."

His history is one of repeated bankruptcies, and credit purchases since he never accumulated enough cash to buy anything other than at the highest credit rates. How can a sympathetic legal

system modify the effect of an economy which does not provide sufficiently for a comfortable lifestyle for many? I am more than willing to try for a reasonable solution.

INVASION OF TRUSTEE'S PROVINCE

The question of limitations on the trustee's sale of debtor's assets is somewhat cloudy and lacking in clear guidelines. The old case of *Reconstruction Finance v. Cohen* made the finding that a trustee should only sell assets if such sale would result in a meaningful dividend to creditors; asset sales are not solely to provide funds for the costs of administration (fees of trustee counsel and perhaps trustee statutory fees).

Therefore, what is meaningful???

Should sales of the debtor's personal, but very limited property, be sanctioned, or should anything beyond the value of the exemption statute amounts be mandatory? For example, should the debtor's house, pets, vehicles resulting in amounts under $1,000.00 etc., be sold?

The role of the Office of the United States Trustee (bankruptcy administrators) should be limited to accounting, reports, following provisions of the code and law, NOT invading the independent fiduciary realm and practice of the trustee, nor the legal decisions of an attorney/trustee.

Query: should lay personnel and administrators invade the province of the trustee's ethical and/or business decisions, if yes, when?? Most trustees are attorneys bound by their respective jurisdiction's code of ethical conduct. A licensed attorney in pursuit of administrative or other pursuits is always bound by the codes of professional responsibilities of both state and federal jurisdictions. The US Trustee and their administrators, should not override these obligations by onerous regulations and interference in decision making of trustees and their attorneys.

What limitations are to be imposed upon administrators, auditors, and the like, when in conflict with the trustee's legal interpretations or decisions?

Legal ethics, rules of professional conduct prudence and commons sense are standards both lauditory and sometimes difficult to decipher or contradictory. (See the annotated "Trustees Rules of Ethical Conduct" edited and annotated by Chief Judge Steven Rhode of Michigan, written with input from the committee of NABT.

DEBTOR'S ATTORNEY PRACTICES

A) Filling out debtor's schedules based solely on a credit report, and listing debts long paid and barred just because it's easy.

B) Allowing mass filings by lay persons employed by debtor's attorney with some indications of less than thoughtful legal pleadings and inquiries. Chapter 7

originator for individuals, Landon L. Chapman, was in the habit of checking all defendant indexes of local courts to insure proper listing of creditors and checking legal records of title and liens for proper listing of real estate.

MEANS TEST FOR INDIVIDUAL DEBTORS,
NONE FOR BUSINESS DEBTORS, FAIR?

Respectfully submitted by: Eugene Crane, just a Bankruptcy Panel Trustee

Lawless, Robert M

From: Annette Crawford <acclsu@annettecrawford.com>
Sent: Sunday, July 09, 2017 9:23 PM
To: consumercommission@abiworld.org
Subject: Comments regarding Chapter 13

These are comments pertaining to the Chapter 13 arena of the commission.

First comment:

The rulings allowing debtors to exclude social security are based on the language in the current law which should be changed and legislation should be drafted to advance that end. Although the original idea was merit worthy, in practice it has led to a lot of abuse. As a result of this interpretation that debtors can leave out their social security income on the means test *and schedule I*, is that debtors are keeping thousands of dollars paying for boats, Cadillacs, golf carts, fishing camps, etc. There seems to be some mistaken idea that everyone who receives social security has no other income which is frequently not the case. In Chapter 13 this leads to a lot of abuse.

Second comment:

Related to the first. Many debtor attorneys and possibly some courts have interpreted this free pass on social security income to extend beyond the debtors so that they think they can remove it for adult children, other family members living for free in the home, mothers, grandparents, and children when the social security is actually meant to be child support for a deceased parent. Not amending the law to clarify that non-debtors (which should include non-filing spouses) creates a large amount of discretionary income which enables debtors to discharge huge amounts of debt while continuing their pre-bankruptcy excessive lifestyle.

Third Comment:

The “new forms” are incredibly onerous to the actual people who practice bankruptcy law day in and day out, in exchange for some perceived benefit to pro se debtors.
Here are some suggestions to make them a little better:

Spend some extra ink and put the column heads on each page:

For example, here is the top of Schedule D

Official Form 106D

Schedule D: Creditors Who Have Claims Secured by Property 12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, copy the Additional Page, fill it out, number the entries, and attach it to this form. On the top of any additional pages, write your name and case number (if known).

1. Do any creditors have claims secured by your property?

☐ No. Check this box and submit this form to the court with your other schedules. You have nothing else to report on this form.

■ Yes. Fill in all of the information below.

Part 1: List All Secured Claims

2. List all secured claims. If a creditor has more than one secured claim, list the creditor separately for each claim. If more than one creditor has a particular claim, list the other creditors in Part 2. As much as possible, list the claims in alphabetical order according to the creditor's name.	Column A Amount of claim Do not deduct the value of collateral.	Column B Value of collateral that supports this claim	Column C Unsecured portion If any
2.1 Capital One Auto Finance Creditor's Name P.O. Box 259407 Plano, TX 75025 Number, Street, City, State & Zip Code Describe the property that secures the claim: 2014 Chevrolet Dart (in daughter's possession-she pays note) As of the date you file, the claim is: Check all that apply. ☐ Contingent ☐ Unliquidated ☐ Disputed Who owes the debt? Check one. Nature of lien. Check all that apply.	$14,649.61	$12,075.00	$2,574.61

But move to the next page and no headings so you are constantly flipping back and forth which is needlessly time consuming when you have a debtor with a lot of real estate that you are trying to match up between Schedule A/B, D, the plan, Schedule J, and the means test. This is the current top of page two:

Case 17-10307 Doc 18 Filed 04/26/17 Entered 04/26/17 15:12:40 Desc Main Document Page 13 of 57

Debtor 1 Maurice Lemon Smith (First Name Middle Name Last Name) Case number (if know) 17-10307

Debtor 2 Lanca Walker Smith (First Name Middle Name Last Name)

2.3 Harley Davidson Creditor's Name 5505 Cumberland Ave. Suite 307 Chicago, IL 60656 Number, Street, City, State & Zip Code Describe the property that secures the claim: 2014 Harley Davidson Ultra Classic 25,500 miles As of the date you file, the claim is: Check all that apply. ☐ Contingent ☐ Unliquidated ☐ Disputed Who owes the debt? Check one. ☐ Debtor 1 only ☐ Debtor 2 only ☐ Debtor 1 and Debtor 2 only ■ At least one of the debtors and another ■ Check if this claim relates to a community debt Nature of lien. Check all that apply. ■ An agreement you made (such as mortgage or secured car loan) ☐ Statutory lien (such as tax lien, mechanic's lien) ☐ Judgment lien from a lawsuit ■ Other (including a right to offset) Mortgage Date debt was incurred 06/18/15 Last 4 digits of account number 9764	$23,861.00	$17,825.00	$6,036.00
2.4 Ocwen Creditor's Name Describe the property that secures the claim:	$95,202.74	$90,000.00	$5,202.74

Comment 4 :

Schedules A/B have far too much writing on them so that it is easy to miss what is there and what is not. Pro se debtors mess this up as much as everything else they mess up. Their aim is generally not to file accurate pleadings, it is to stop the sheriff's sale tomorrow.

Current A/B which you can see is a page full of words.

18. **Bonds, mutual funds, or publicly traded stocks**
Examples: Bond funds, investment accounts with brokerage firms, money market accounts

■ No
☐ Yes..... Institution or issuer name:

19. **Non-publicly traded stock and interests in incorporated and unincorporated businesses, including an interest in an LLC, partnership, and joint venture**

■ No
☐ Yes. Give specific information about them.....
Name of entity: % of ownership:

20. **Government and corporate bonds and other negotiable and non-negotiable instruments**
Negotiable instruments include personal checks, cashiers' checks, promissory notes, and money orders.
Non-negotiable instruments are those you cannot transfer to someone by signing or delivering them.

■ No
☐ Yes. Give specific information about them
Issuer name:

21. **Retirement or pension accounts**
Examples: Interests in IRA, ERISA, Keogh, 401(k), 403(b), thrift savings accounts, or other pension or profit-sharing plans

■ No
☐ Yes. List each account separately.
Type of account: Institution name:

22. **Security deposits and prepayments**
Your share of all unused deposits you have made so that you may continue service or use from a company
Examples: Agreements with landlords, prepaid rent, public utilities (electric, gas, water), telecommunications companies, or others

■ No
☐ Yes. ..... Institution name or individual:

23. **Annuities** (A contract for a periodic payment of money to you, either for life or for a number of years)

■ No
☐ Yes..... Issuer name and description.

24. **Interests in an education IRA, in an account in a qualified ABLE program, or under a qualified state tuition program.**
26 U.S.C. §§ 530(b)(1), 529A(b), and 529(b)(1).

■ No
☐ Yes..... Institution name and description. Separately file the records of any interests.11 U.S.C. § 521(c):

25. **Trusts, equitable or future interests in property (other than anything listed in line 1), and rights or powers exercisable for your benefit**

■ No
☐ Yes. Give specific information about them...

26. **Patents, copyrights, trademarks, trade secrets, and other intellectual property**
Examples: Internet domain names, websites, proceeds from royalties and licensing agreements

■ No
☐ Yes. Give specific information about them...

27. **Licenses, franchises, and other general intangibles**
Examples: Building permits, exclusive licenses, cooperative association holdings, liquor licenses, professional licenses

■ No
☐ Yes. Give specific information about them...

Money or property owed to you?	Current value of the portion you own? Do not deduct secured claims or exemptions.

This is the same debtor in a prior case (similar page of Sch B):

Debtors

SCHEDULE B - PERSONAL PROPERTY
(Continuation Sheet)

Type of Property	NONE	Description and Location of Property	Husband, Wife, Joint, or Community	Current Value of Debtor's Interest in Property, without Deducting any Secured Claim or Exemption
10. Annuities. Itemize and name each issuer.	X			
11. Interests in an education IRA as defined in 26 U.S.C. § 530(b)(1) or under a qualified State tuition plan as defined in 26 U.S.C. § 529(b)(1). Give particulars. (File separately the record(s) of any such interest(s). 11 U.S.C. § 521(c).)	X			
12. Interests in IRA, ERISA, Keogh, or other pension or profit sharing plans. Give particulars.		401K with Employer	C	Unknown
		Police Retirement	C	Unknown
13. Stock and interests in incorporated and unincorporated businesses. Itemize.	X			
14. Interests in partnerships or joint ventures. Itemize.	X			
15. Government and corporate bonds and other negotiable and nonnegotiable instruments.	X			
16. Accounts receivable.	X			
17. Alimony, maintenance, support, and property settlements to which the debtor is or may be entitled. Give particulars.	X			
18. Other liquidated debts owed to debtor including tax refunds. Give particulars.	X			
19. Equitable or future interests, life estates, and rights or powers exercisable for the benefit of the debtor other than those listed in Schedule A - Real Property.	X			
20. Contingent and noncontingent interests in estate of a decedent, death benefit plan, life insurance policy, or trust.	X			

You can see what is there and what isn't immediately.

Comment Five :

There studies based on potentially inaccurate premises being published and their results deciminated as if they are the truth. This is very dangerous as it forms ideas in people's minds that can be entirely inaccurate. There are many dedicated practitioners on every side of the Chapter 13 table without giving undue weight to academics who don't have experience in the actual practice and who make a lot of assumptions because of that. Once such study is heavily represented on the Chapter 13 ABI committee. Although not wishing to antagonize this one member, it is too important not to raise red flags on the result and the methods used. It is very important to look at the survey itself to see what kind of questions it asks and whether it leads the responder to answer a certain way, and important to look how the samples are taken. Most of the defending of the report seems to start after the responses are received back and "analyzed" and the proponent of the study skips to what she thinks it shows at speaking engagements. One issue which is perhaps easiest to illustrate is when race data is not collected through official bankruptcy means but a survey's big conclusion is that black filers are treated far worse than white filers you have to wonder how that supposition could be made. It was probably made the same way that all the other suppositions were made, on *debtor's self- reporting*. It

doesn't appear to be an even sampling of debtors self-reporting, they responses appear to be pre-dominantly California and Texas debtors based on the anecdotes. The survey refers to 200 surveys being sent per quarter but sent to who? And how many are returned and who interprets the response and are the questions asked unbiased enough to illicit an uninfluenced response? Seems like you would get a better cross section of opinion, if there is such a thing when using self-reporting of individuals who like to cast a rosier light on their own conduct, would be to evenly disburse the surveys across the country much like Congress is designed. Each state gets two regardless of population and then the surveys are divided by numbers of cases filed in each district per state. Less California, more New York, Pennsylvania, Louisiana, Tennessee, Michigan, etc. Evenly disbursing them doesn't make them accurate but you'll hear from more than one type of debtor.

Regarding the survey questions, what are they asking? Something like " why did you file bankruptcy" or worse, "what caused you to file bankruptcy" which would make it seem some outside force caused it. How many debtors or people in general really see their own culpability in what happens to them? They will naturally try to blame any and everything else, like most of us would until we are called on it. There answer won't be because they bought two new Cadillacs and a $400,000 house on $60,000 income and then furnished them with all new furnishings, that made them have to file bankruptcy and flush those unsecured creditors, it is because they were sick that one week of work. If a person is predisposed to feel put upon, they will answer a survey that way. There is no one there to explain any legal terms or to call them on their own excuses. Is this how we should re-make all of Chapter 13 or bankruptcy law? Do we just shove all the unsecured creditors over a cliff now?

Comment Six:
It would appear that we are too throw the debtor attorneys off the same cliff. The Study's author is at one point so worried about the poor innocent filer but not so when it comes to the actually poor filer being able to pay up front attorney fees. That's is when the line gets drawn. If you can't pay it up front, per her findings, you must lose your house. There is again a lot of anecdotal, uneducated surveys verified by no one, etc. propping up the notion that attorneys are putting people in Chapter 13's only to be paid their attorney fees. There are a lot easier things they could be doing than going through all the hoops of a Chapter 13 for fees, and in my district which I do have firsthand knowledge about, that is not the kind of cases being filed (disguised Chapter 7's who would actually qualify for a Chapter 7 because they don't have a discharge during the ineligibility period).
Please do more research before assuming this presumption is true and driving away the bankruptcy professionals who actually can help debtors.

Comment Seven-

The student loan dilemma-
If student loans start becoming dischargeable, why would anyone ever pay them back again? Why would anyone ever loan money to students again? I sure don't want my tax money being paid out to untold numbers of people who won't have to pay it back. No one put a gun to anyone's head and made them borrow the money or made them borrow the max amount every year, or go to the most expensive public or private colleges. Many students do work to cover their expenses on their own without loans and making loans dischargeable is a slap in the face to them. Many others only use student loans to just pay tuition, fees and books. I think there are accommodations that can be made to assist but making all student loans dischargeable isn't one. I don't even know if wholesale making them dischargeable is on the table but I thought I'd mention it.

Reducing higher interest rates and consolidating student loans, as long as they have to be paid in the plan, definitely sounds like a good idea. I'm sure there are many ideas that provide some relief but don't buy into the student loan hysteria today. There are a lot of very smart and experienced people in the NACTT who have given it a lot of thought and have some options worth considering before the baby gets thrown out with the bath water.

Thank you for your time.

Annette Crawford

Annette Crawford
Chapter 13 Trustee
Middle District of Louisiana
Baton Rouge, LA
(225) 928-4046

Statement of Nathan Delman to the ABI Commission on Consumer Bankruptcy

My name is Nathan Delman, I am a consumer debtor's attorney with The Semrad Law Firm, practicing in the Northern District of Illinois. My firm has several offices in the Chicagoland area, as well as Metro Atlanta, and we represent a significant percentage of all consumer debtors in the Districts we practice. Working with a high volume of cases provides its own unique angle of the practice of bankruptcy. Below I have listed several areas where I believe attention is needed to improve the overall practice.

Electronic Service to Creditors

One area of bankruptcy practice which needs modernization is the requirement of noticing creditors via U.S. Mail. On any given day my office files a host of motions. As any practitioner knows, notice for most motions must be sent by First Class U.S. Mail to every creditor involved in the case. In a high-volume practice, the overhead for not just the postage and envelopes, but also the labor for preparing all copies can be staggering. Electronic service to creditors could significantly reduce costs and labor.

Since December 2004, almost thirteen years ago, the local rules in the Northern District of Illinois have required all attorneys to file all documents electronically. In 2006, FRBP 5005(a)(2) was amended to recognize this shift towards e-filing and formally approved local rules mandating e-filing for attorneys. The committee notes express a concern that e-filing should not be required if it "constitutes an unreasonable denial of access to the courts."

Although I advocate electronic notice, I do think this concern of access should be considered for noticing creditors. After all, creditors are being forced into this proceeding, they should not also be forced to have certain technology. Perhaps it should initially be introduced as a method of service which creditors can consent, maybe with formal encouragement by the Court. Smaller creditors, like a doctor's office or a residential landlord with a single piece of real estate should be permitted to receive notice through the mail, for now. But, larger creditors like Chase, Bank of America, Ford Motor Credit, etc., can easily set up a dedicated email address to obtain bankruptcy notices which would be at least as effective as regular mail. Eventually, all forms of notice will be done electronically. It is a matter of when not if. There is no reason to delay a gradual shift to this new reality.

Protection from Employment Discrimination

Sections 525(a) & (b) of the Bankruptcy Code purport to protect employees against discrimination from employers based on filing bankruptcy. However, an analysis of the caselaw shows the legal protection is quite slippery. Unless the employer confesses to discrimination based on a bankruptcy filing, these claims can be rather difficult to win. Plus, there is no explicit private right of action in §525 like there is in §362. Also, §525(b) gives far more leeway to private employers to discriminate against debtors than §525(a) does for public sector employers.

Section 525 needs to be rewritten to provide greater protection for debtors from employment discrimination. A private right of action allowing for compensatory and punitive damages needs to be explicitly part of the law. Nothing can derail a fresh start for a newly discharged debtor quite like losing employment because of a bankruptcy filing. The Code

should do what it can to prevent debtors from losing their income so they can rebuild themselves financially. Lessons from a personal financial management course are rendered hollow if a debtor is terminated due to filing and left only with a potential lawsuit based on a weak statute.

Unwanted Vehicles

For good or bad, a significant portion of consumer filings are motivated by problems associated with vehicles. One scenario which I have repeatedly seen involves debtors trying to shed lemon cars through Chapter 7. Complications arise when upon filing, and stating the intent to surrender, the secured creditor (knowing the vehicle is not worth the retrieval expense) declines to take possession of the vehicle. So, although the debtor has now discharged the lien, the debtor still has all of the liabilities associated with ownership: it must be parked legally, all stickers must be current, and the debtor does not have a clear title so it can't be sold or even junked. Bankruptcy should have some legal mechanism available for unwanted vehicles. Perhaps in situations where the stated intent is to surrender a vehicle, the fee for stay relief motions could be waived to encourage the creditor to retrieve the vehicle. More drastically, the Code could be modified to allow for vesting of unwanted vehicles in Chapter 7.

Post-Confirmation Stay Relief and Chapter 13 Discharge

Chapter 13 plans are filed with the best intentions. But with the peaks and troughs of a debtor's life over 36 to 60 months, plans frequently go awry. A common goal in Chapter 13 is to save a house from foreclosure. The debtor may start the plan with a strong performance, but along the line old problems reemerge, or new ones develop, and the debtor falls behind in post-petition mortgage payments. At some time after confirmation, the debtor may finally decide enough is enough and will let the house go. Even without the mortgage arrears, there may be other creditors getting treatment in the plan (a crammed down car, tollway violations, etc.) which will induce the debtor to remain in Chapter 13 and make a Chapter 7 discharge less desirable.

Currently, many judges follow the Sixth Circuit's approach (*In re Nolan,* 232 F.33 528 – Court of Appeals, 6th Circuit 2000)) and will not allow post-confirmation modification of secured claims. This prohibition on modification renders the mortgage deficiency nondischargeable. The new national model plan also does not provide for this relief. This current incarnation of the law limits the fresh start. I would also advocate this treatment for vehicles, but the mortgage deficiencies are even more worthy of a wholesale modification of the law.

Schedules D, E & F

Three creditors listed on a page is insufficient. All the same information could be put on a graph or spreadsheet and realistically 10-25 creditors could be listed per page. Perhaps on a single petition it doesn't seem like such an issue, but when you factor in the hundreds of thousands of cases filed per year, and the need to printout petitions to verify clients have reviewed the documents, as well as providing a copy to the client, it would not be surprising to believe that a literal forest is destroyed every year due to only three creditors being listed per page on Schedules D, E & F. Other parts of the petition have room for stream-lining, but for me Schedules D, E & F is the most glaring example.

Credit Counseling

A strong chorus can be heard from other practitioner's commentaries calling for the elimination of the pre-filing credit counseling requirement. I join them. A functioning debtor's attorney office needs to have computer stations dedicated for clients to take the mandatory course. So, I routinely witness clients completing credit counseling. Often it is just a race to the end of the class so the case can be filed. Rarely do clients enjoy any great purpose from credit counseling. Often, debtors file because they have lost employment, are seriously ill, or just can't earn high enough wages to live without debt. While some debtors may be filing due to poor decision-making, the credit counseling course offers nothing but a slight delay to filing. It scarcely ever dissuades the debtor from filing. Also, it is counter intuitive for a client to seek the advice of a website quiz and live chat after receiving a consultation from an attorney. I echo other attorneys' call for preserving the second personal financial management course, but the first course is an unnecessary.

I humbly thank the Commission for granting us the opportunity to engage in a meaningful dialogue with the Bankruptcy Community.

Regards,

/s/ Nathan Delman

11/10/2017

Lawless, Robert M

From: Jacob Eaton <JEaton@KleinLaw.com>
Sent: Monday, July 17, 2017 11:35 AM
To: ConsumerCommission@abiworld.org
Subject: Comments on Consumer Bankrutpcy

1. Credit counseling should be removed as a requirement both pre- and post-filing. This is a hoop to jump through, not really beneficial. At a minimum, two courses should not be required. One course post-filing should be sufficient.
2. Discharging student loans must be made easier. This issue is larger than bankruptcy only because it involves the ever-increasing cost of higher education and the lack of responsible borrowing and lending. To address this problem correctly, you need to collaborate with groups that are involved on the front-end of the student loan problem (prospective students, students, parents, universities, and lenders).
    a. One real problem is that people that really need to discharge their student loans, cannot afford to pay an attorney to obtain the discharge.
3. New forms are terrible. I have not met anyone that likes them and everyone complains about them. They are hard to read. When flipping through, you cannot tell which schedule you are in at glance. And they are too long. Let's get new forms by going back to the old forms.

Thank you for your time.

Jacob Eaton, **Partner**

Klein · DeNatale · Goldner
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Lawless, Robert M

From: Miles Ennis <bluskydev@gmail.com>
Sent: Monday, May 01, 2017 1:35 PM
To: ConsumerCommission@abiworld.org
Subject: Disputed Debt

Regarding a Chapter 7 bankruptcy discharge in the Northern District of California.

I filed twice a Chapter 7 petition & listed a debt as disputed on the appropriate schedule. The presumed debtor never filed a proof of claim, but only waited until the case was completed and then foreclosed on the debt without providing any proof of claim to the trustee.

If a claim is disputed it seems to me that a proof of claim should be ordered prior to discharge, otherwise the debt should be included and discharged in the final decree?

Thank you for your review on thus issue.

Best Regards
MJ Ennis

Dan Fisher
General Counsel
Educational Credit Management Corporation
111 Washington Avenue South, Suite 1400
Minneapolis, MN 55401

Ladies and Gentlemen:

Thank you for the opportunity to discuss the important matter of the treatment of student loans in bankruptcy. Educational Credit Management Corporation (ECMC) is a nonprofit guaranty agency that helps the U.S. Department of Education (ED) administer the Federal Family Education Loan (FFEL) Program. As a nonprofit organization, our mission includes providing financial literacy and college access services to families and default prevention services and default resolution services for schools and student loan borrowers. ECMC is one of the largest guaranty agencies in the country and is the designated guarantor for six states. In addition, ECMC administers FFEL loans in bankruptcy for the Department of Education as well as 21 of the other 25 guaranty agencies. Since our founding in 1994, ECMC has serviced 682,000 student loan borrowers who have filed for bankruptcy and we have returned nearly $6 billion to the U.S. Treasury.

Changes to the Higher Education Act of 1965 (HEA) ended new originations in the FFEL Program in 2010 and all originations since then have been made in the Direct Student Loan (DSL) Program. DSL loans are administered by ED, which is represented in Bankruptcy Courts by local U.S. Attorney's offices.

As a major holder of student loans in bankruptcy, we are uniquely positioned to offer insights into the process to assist borrowers and other stakeholders.

Non-Bankruptcy Alternatives

As a service to ED and the other FFEL Program guaranty agencies, ECMC regularly defends adversary proceedings in bankruptcy where the borrower claims the student loan should be included within the general discharge as an undue hardship under Section 523(a)(8). For many years, a significant number of student loan borrowers have filed adversary proceedings alleging a permanent disability that causes a hardship in the repayment of their student loans. This is unnecessary as there are processes outside of bankruptcy to administratively discharge student loans for a borrower who meets the Total and Permanent Disability (TPD) standard under 34 CFR § 402(c). In recent years, ED has expanded the ways a borrower can show disability. For example, a military veteran can now use documentation from the VA showing a service-connected disability; a borrower who receives Social Security Disability

benefits can use documentation showing the SSA's notice of award. These are in addition to a borrower submitting a certification from a physician.

In addition to TPD, borrowers can file for administrative discharge of their student loans if they were fraudulently induced to enroll in a school and took out loans to attend this school. These claims, known as Borrower Defense to Repayment (DTR) discharges have become more common since the collapse of several large for-profit career schools. Similarly, borrowers whose schools close while they are enrolled or shortly thereafter are eligible for administrative relief if the closure precluded them finishing their education. Borrowers who can show that they were the victims of identity theft are also eligible for administrative discharge without the need to file an adversary proceeding.

Because we continue to see adversary proceedings alleging facts that would support administrative discharges, ECMC urges the Commission to work with consumer attorney groups to ensure that borrowers and their counsel are aware of these remedies that can avoid expensive and unnecessary adversary proceedings – especially for those borrowers for whom student loan debt is a major reason for filing bankruptcy.

Plan Language Issues

Student loan holders, like ECMC have a heightened sensitivity to improper Chapter 13 plan provisions after the Supreme Court's decision in *Espinosa*. ECMC encourages bankruptcy judges and trustees to share this sensitivity to preclude improper plan language involving student loans. We continue to see improper provisions that purport to cure defaults.[1]

The HEA and its implementing regulations allow defaulted student loan borrowers to cure a default through a specific process known as rehabilitation, as detailed in 34 CFR § 682.405. This process includes an agreement with the guaranty agency to make nine monthly, on-time payments in 10 months in an amount that is reasonable and affordable to the borrower. At that point, the guaranty agency will certify these regulatory provisions were satisfied and will return the loan to good standing with an eligible lender. The guaranty agency then directs the credit bureau to remove the default status and the borrower is thereafter eligible for additional federal student aid.

While the borrower cannot merely state that the loan default is cured, both ED and ECMC can allow the borrower to complete the rehabilitation within bankruptcy. But to do this, the court needs to be aware of this process,

[1] Under the Higher Education Act and implementing regulations, a student loan defaults after at least 270 days without payment. This only occurs after the guaranty agency assists the servicer with default prevention efforts between days 60 and 270 of delinquency.

including the requirements under § 682.405, which includes an agreement with the guaranty agency, on-time monthly payments, and the return of the loan to an eligible lender – which cannot occur until the bankruptcy is completed.

Undue hardship

There have been many articles written in industry press and media outlets about undue hardship adversary proceedings. ED has issued a Request for Information on this topic that asks for responses by May 22. While Congress has not further defined what constitutes undue hardship in Section 523(a)(8), it is important to discuss the guidance that ED has issued on this topic for guaranty agencies and its own portfolio. Federal regulations currently require guaranty agencies to evaluate each undue hardship adversary proceeding to determine whether repayment would constitute an undue hardship under the legal standards in effect in that jurisdiction. If the agency concludes that the borrower does not meet the legal standard, and it is economically feasible to do so, the agency is required to defend the adversary proceeding. ED has also released industry guidance in DCL GEN 15-13 that details this process and includes hypothetical situations providing additional guidance and also notes that guaranty agencies are subject to reviews by ED to ensure that they comply with these regulations.

It is important to note that ECMC, like others, take this obligation seriously and will engage in discovery to determine whether the borrower meets the applicable undue hardship standard. If so, ECMC will stipulate to the discharge of some or all of the student loan debt. This is not an uncommon occurrence.

For many years, bankruptcy and appellate courts have differed in their approaches to analyzing various Income-Driven Repayment (IDR) Plans in undue hardship matters. Some courts consider IDR Plans in the first prong of the *Brunner* test as whether borrowers can make the monthly payment of the most favorable repayment plan available to the borrower. Others consider this in the analysis of the third prong – whether the debtor has made a good faith effort to repay his or her loans. While policy makers have created several different IDR Plans in an effort to shift the national educational priority from access to assistance with debt loads, we do not believe that the availability of an IDR Plan for a borrower is determinative on the undue hardship issue. But if the borrower is eligible for an IDR Plan payment, this should be the appropriate measure under the first prong. And the borrower's measure exploration of IDR Plans is highly probative on his or her good faith effort to repay the student loan.

From: Ed Flynn <eflynn@abiworld.org>

Sent: Wednesday, September 13, 2017 12:27 PM

To: Lawless, Robert M

Subject: Chapter 7 Trustee Compensation

Hi Bob:

I see that chapter 7 trustee compensation is one of the topics for the chapter 7 committee.

I have looked at this issue a few times in my career. Here is an ABI Journal article on the topic from three years ago.

https://s3.amazonaws.com/abi-org-corp/journals/2014/april/numbers.pdf

Fortunately, this is one area in which very comprehensive Government statistics going back to 2000 are available.

See: https://www.justice.gov/ust/bankruptcy-data-statistics/chapter-7-trustee-final-reports

This database includes cases-by-case data for every chapter 7 asset case closed between 2000 and mid-2016 (excluding North Carolina and Alabama).

I think most would agree that an increase for the trustees is long overdue. How to accomplish this is another matter. Over the years leadership of NABT has seemed to me to be fixated on raising the filing fee as a means to increase trustee's compensation. This may make sense intellectually, but it would not work on a practical basis.

During CY 2015, chapter 7 trustee compensation was as follows (actual figures would be a few percent higher because this doesn't include NC and AL).

Trustee Compensation CY 2015	
Source	**Total (in Millions)**
$60 Fee at Filing	**$31**
Trustee Fees $167	**$167**
Trustee Attorney Fees	**$155**
Other Trustee Professional Fees	**$13**
Total Trustee Compensation	**$366**

Excluding the fees trustees received for attorney fees and other non-trustee duties, they received more than five times as much in percentage fees in asset cases ($167 million) than they did from the $60 fee from the case filing fees ($31 million).

The current percentage fee for asset cases is:

25% of the first $5,000

10% of distributions $5,000 - $50,000

5% of distributions $50,000 to $1,000,000

3% of distributions over $1,000,000

Following is what the impact would have been on trustee compensation, under various revised percentage fees.

Scenario 1

25% of the first $25,000

10% of distributions $25,000 - $100,000

5% of distributions $100,000 to $1,000,000

3% of distributions over $1,000,000

This would have increased trustee compensation by **$46 million**. To raise an equivalent amount from the filing fee would require raising the trustee portion by **$90** per case to $150.

Scenario 2

25% of First $25,000

15% of distributions $25,000 - $100,000

10% of Distributions $100,000 to $250,000

5% of Distributions $250,000 to $1,000,000

3% of Distributions over $1,000,000

This would have increased trustee compensation by **$81 million**. To raise an equivalent amount from the filing fee would require raising the trustee portion by **$160** per case to $220.

These are just two possible revisions to the trustee percentage fee scale. Because we have detailed case-by-case data, it is fairly easy to determine the impact of any proposed revisions to the fee scale.

Personally, I think that the chapter 7 trustees deserve a substantial raise. Practically, the only way of accomplishing this is to revise the percentage fee on disbursements.

Ed

Lawless, Robert M

From: Ed Flynn <eflynn@abiworld.org>
Sent: Tuesday, October 03, 2017 3:37 PM
To: Lawless, Robert M
Subject: Consumer Commission - statistical reporting
Attachments: BBTN BAPCPA report.docx

Hi Bob:

I am not sure if the Commission is going to be making any recommendations regarding bankruptcy statistics.

Each year the AOUSC dutifully publishes a detailed report, as required by BAPCPA, Unfortunately, the report is fairly useless, and is almost never used by researchers.

http://www.uscourts.gov/statistics-reports/analysis-reports/bankruptcy-abuse-prevention-and-consumer-protection-act-report

About 2 years ago I looked at this report and wrote it up for the ABI Journal. Apparently my article was as worthless as the AO's report, because it never got published (copy attached).

However, if the Commission is going to recommend any additional statistics from the AO, elimination of most or all of the BAPCPA report could possibly be used as a bargaining chip to get them to provide more useful data.

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Regards,

Ed

Bankruptcy By The Numbers

By: Ed Flynn

AO BAPCPA – The Report That Nobody Reads

Many Government agencies and branches are required to submit reports to Congress. In 2014 the Washington Post reported that there were 4,291 such required reports.[1] A presumably complete list of these reports is prepared each year (as required) by the Clerk of the House of Representatives.[2] The 2015 report on reports came in at concise 365 pages.[3]

Some of the reports are required on a one-time basis, others are required when specific circumstances occur, but many are required annually. Each report is keenly anticipated by members of Congress and their staff who pore over it for vital information. (Actually, the last statement isn't true. According to the Washington Post article, many reports are not looked at all, and there are no records to show if the required reports are even submitted). The number of required reports continues to grow because the Government does not appear to have an effective mechanism to eliminate reports that are no longer necessary.

This is the story of one of those reports.

One of the provisions of BAPCPA was that the Director of the Administrative Office of the United States Courts (AO) is required to prepare and submit to Congress an annual report containing a wide variety of statistics on consumer debtors.[4] The report is to include data for each judicial district on debtors' assets, debts, income, and expenses, creditor misconduct, sanctions, reaffirmations, time intervals from filing to disposition, and property evaluation orders, outcomes and repeat filings in chapter 13 cases. The AO presents the required data each year in a report that has 21 tables with 143 separate data items covering 9 specific areas each year. To date the AO has published 8 of these annual reports covering Calendar Years 2007 through 2014.[5]

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[1] See: David Fahrenthold, "Unrequired Reading", Washington Post (May 3, 2014), *available at* http://www.washingtonpost.com/sf/national/2014/05/03/unrequired-reading/

[2] See Rules of the House of Representatives, Rule II, Clause 2(b), available at http://clerk.house.gov/legislative/house-rules.pdf

[3] See: House Document No. 114-4 (January 6, 2015) *available at*: https://www.gpo.gov/fdsys/pkg/CDOC-114hdoc4/content-detail.html

[4] See: 28 USC §159. https://www.law.cornell.edu/uscode/text/28/159

[5] The report for 2015 is due in July 2015. For all prior reports , see: http://www.uscourts.gov/statistics-reports/analysis-reports/bankruptcy-abuse-prevention-and-consumer-protection-act-report

Background: The Report of the National Bankruptcy Review Commission devoted more than 20 pages to the topic of bankruptcy data.[6] Their recommendations were largely ignored in the legislative proposals that followed. Instead, what we now have can be traced back to S. 2500 which was introduced in September 1997.[7] Every subsequent legislative proposal for bankruptcy reform contained fairly similar statistical reporting requirements.[8]

Ten other one-time reports to Congress were also mandated by BAPCPA.[9] Each of these reports was submitted timely and pretty much ignored. What sets the AO's BAPCPA report apart is that it has no sunset provision. The result is that the BAPCPA annual report, which contains data that someone nearly 20 years ago thought was needed, has achieved near immortal status.

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[6] See: Report of the National Bankruptcy Review Commission, pp. 921-943 http://govinfo.library.unt.edu/nbrc/report/21bdata.pdf

[7] See: https://www.congress.gov/105/bills/hr2500/BILLS-105hr2500ih.pdf

[8] There were, however, a number of amendments along the way. For example, the requirement to report on creditor misconduct first appeared in the Consumer Bankruptcy Reform Act of 1997 (S.1301), and the requirement regarding attorney sanctions first appeared in The Bankruptcy Reform Act of 1999 (S.625). Additionally, The Bankruptcy Reform Act of 1998 (H.R. 3150) required that the Executive Office for United States Trustees compile and report these statistics, but all other versions placed this duty with the AO. For a complete legislative history of BAPCPA and its predecessors see: http://thomas.loc.gov/home/multicongress/multicongress.html

[9] The reports covered such topics as means testing, debtor education, reaffirmations, child support notifications, household goods, tax returns, small businesses, and consumer credit lending. See: sections 103, 105, 205, 230, 313, 315 443, 1301, 1307 and 1308 of BAPCPA (S. 256), available at: http://thomas.loc.gov/cgi-bin/t2GPO/http://www.gpo.gov/fdsys/pkg/BILLS-109s256enr/pdf/BILLS-109s256enr.pdf

Limitations with the data: Any statistical report can be criticized, and the BAPCPA report is no exception. Following are some of the problems associated with the BAPCPA report data.

- Some of the tables seek to capture data on rare or non-existent events. For example, Table 8b shows that there have only been 2 chapter 11 cases closed with creditor abuse in the past 8 years, and no reported cases of monetary sanctions against attorneys in these cases.
- An occasional cases slips through that whether on purpose or by accident a value may be exceptionally high. An outlier, if not adjusted, will skew the data for the nation for an entire year. This has rendered unusable much of the data on debtor assets, liabilities, and incomes.
- The source of the information is the debtors' petitions. These are not always accurate or complete.
- Data on many cases is missing. (Schedules are missing or incomplete for approximately 5% of chapter 7 cases, 11% of chapter 13 cases, and 20% of chapter 11 cases. Additionally, converted chapter 13 cases are not included on a number of tables.)
- Some of the required items are of fairly low interest. (Does anyone care how many property valuation orders are entered in chapter 13 cases each year?)
- Many of the required items reflect local practices. As a result, a number of the tables show that most of the measured activity occurs in only a few districts.
- Some of the data is not meaningful without additional information. For example data on the interval from filing to disposition is not very meaningful without information on information on case outcomes.
- Traditionally, the bankruptcy statistical data reported by the AO revolved around case level activity (e.g., filed, pending, terminated). The BAPCPA report requires data on individual events within cases. Some activity may be missed (e.g., sua sponte orders) if the correct event is not noted at docketing.
- The reports are published by the AO in pdf (portable document format). Analysis of the data requires all of the data to be converted to a spreadsheet or database program – which can be a tedious process.
- Narrow interpretations by the AO on how to classify items (e.g., most secured debt is classified as dischargeable), and inclusion of items that are not clearly defined (e.g., creditor abuse) lead to misleading data.

To me, the most valid criticism of the BAPCPA report is that it seems to be largely irrelevant. The BAPCPA reports have almost never been cited in scholarly research, or relied on by policy makers. What is the point of using court resources to compile large amounts of data if no one uses it?

Following is a brief discussion of the tables in the BAPCPA report.[10]

[10] The tables are listed by (in my opinion) descending order of usefulness.

Debtor Financial Profiles (Tables 1A, 1B, 1D, 1X, 2A, 2B, 2D, 2X): These tables contain some very interesting data on debtor incomes, expenses, assets and debts. For example, it shows that in recent years, as case filings have fallen, debtor's financial profiles have changed. The typical debtor in 2014 had lower income, expenses, assets, and debts than a typical debtor in 2010.

Between 2010 and 2014 the financial profiles of chapter 7 and 13 debtors changed. During this period the typical debtor had lower income, expenses, assets and liabilities. The one exception was priority debt levels which increased for both chapter 7 and chapter 13 debtors. These tables reaffirm prior research that debtors tend to have low incomes, few assets and relatively high debts.

Consumer Debtor Financial Profiles			
Year	**2010**	**2014**	**Percent Change**
Chapter 7 Average Per Case*			
Total Assets	**$131,446**	**$97,127**	**-26.1%**
Real Property	$104,714	$62,309	-40.5%
Personal Property	$26,732	$24,817	-7.2%
Total Liabilities	**$235,608**	**$162,646**	**-31.0%**
Secured	$142,783	$77,366	-45.8%
Priority Unsecured	$3,047	$3,725	22.3%
General Unsecured	$89,778	$81,555	-9.2%
Chapter 7 Median (50th Percentile)			
Current Monthly Income	$2,823	$2,715	-3.8%
Average Monthly Income	$2,550	$2,413	-5.4%
Monthly Expenses	$2,841	$2,632	-7.4%
Chapter 13 Average Per case*			
Total Assets	**$187,730**	**$140,202**	**-25.3%**
Real Property	$144,398	$104,625	-27.5%
Personal Property	$43,320	$35,577	-17.9%
Total Liabilities	**$249,391**	**$183,403**	**-26.5%**
Secured	$189,331	$130,526	-31.1%
Priority Unsecured	$3,832	$4,757	24.1%
General Unsecured	$56,228	$48,120	-14.4%
Chapter 13 Median (50th Percentile)			
Current Monthly Income	$3,899	$3,283	-15.8%
Average Monthly Income	$3,584	$3,115	-13.1%
Monthly Expenses	$2,953	$2,525	-14.5%

***Note: The average figures do not include cases from the District of New Jersey and the Southern District of Texas because extreme outliers in those districts skew the national totals.**

Chapter 13 Repeat Filings (Table 7): Nearly 30% of chapter 13 filings are made by debtors who report that they have filed one or more times in the prior eight years. The number of repeat filings is quite consistent from year to year – coming in between 105,000 and 113,000 during each of the last seven years. There is no data available on the chapter or outcome of the prior case filings.

The refiling rate varies among districts ranging from a low of 12.5% in Vermont to a high of 52.4% in the Western District of Tennessee. Chapter 13 debtors in districts with high chapter 13 refiling rates also tend to have lower income and expenses, higher dismissal rates, and higher plan modification rates.

Chapter 13 Cases Closed by Dismissal or Plan Completion (Table 6): The BAPCPA report is the first to make publicly available comprehensive data on plan modifications. It illustrates the effects of the extreme differences in local chapter 13 practices. For example, more than one-half of the plans completed in four districts (Pennsylvania Western, Kentucky Western, Eastern Oklahoma and Texas Northern) had been modified at least once. In contrast, seven other districts report that none of the successful repayment plans had been modified (Massachusetts, Texas Western, Virginia Western Alabama Southern, California Eastern, Rhode Island, and Tennessee Western).

Unfortunately, this table cannot be used to determine overall plan completion rates because it contains no data on chapter 13 cases that are converted to another chapter.

Reaffirmations (Table 4): From 2007 to 2014 about one in five chapter 7 cases had at least one reaffirmation. The Northern District of Mississippi had the highest reaffirmation rate (42.3%), while Puerto Rico had the lowest (1.2%). The total number of reaffirmation agreements filed fell by more than one-half between 2010 and 2014. This is a result of both lower case filings and a decrease in the percentage of cases with reaffirmations.

Sanctions Imposed Against Debtors' Attorneys (Tables 9A, 9B, 9D and 9X): Bankruptcy Rule 9011 allows for sanctions against attorneys who make improper or frivolous representations to the court.[11] The BAPCPA report shows that such sanctions are rarely imposed - only 238 times in more than 8 million cases. The total amount of sanctions to date has been about $136,000 – an insignificant amount considering that fees for debtors' attorneys in these cases were almost certainly over $10 Billion.

More than one-half of all cases with attorney sanctions reported were in the Middle District of Louisiana. Although this district accounts for less than 1/600th of all case filings, it had 132 of 238 cases with sanctions and 78 of 133 cases with damages imposed. There have been no reported instances of sanctions in more than one-half of judicial districts.

[11] The ABI website contains up-to-date copies of the Bankruptcy Code and Rules. See: http://law.abi.org/#/rules/9011

Creditor Misconduct (Tables 8A, 8B, 8D, and 8X): The AO is required to report on "the number of cases and the amount of punitive damages awarded by the court for creditor misconduct. The AO has noted that: "Creditor misconduct, however, is not a specific cause of action under Title 11." The AO has identified a number of Bankruptcy Code violations and litigation-related activities that could be considered creditor misconduct.[12]

Over the 8-year period in the 8.2 million cases closed there have been 916 cases with what the AO considers to be creditor misconduct. Of these cases, 585 were in chapter 7 cases, 329 were in chapter 13 cases and 2 were in chapter 11 cases. Punitive damages of $503,000 were assessed in 105 cases. A majority of districts have reported 5 or fewer cases with creditor misconduct over the 8 years, and only four districts reported punitive damages assessed in more than 5 cases.

The creditor abuse tables in the BAPCPA report have limited value. There is little to be learned from reporting on undefined abusive behavior that only occurs in about one in 9,000 cases.

Filing to Disposition Times (Table 3): This table shows the median and average times from filing to disposition for chapter 7, 11 and 13 cases. However, for a variety of reasons there is actually very little of value in this table. The primary problem is that different case outcomes lead to different disposition times. A chapter 13 case that results in a completed repayment plan generally is open much longer than a case which is converted or dismissed. Chapter 11 cases with confirmed plans are open longer than dismissed or converted cases, and chapter 7 asset cases are open much longer than no asset cases. Without information on case outcomes the data on average and median disposition times doesn't reveal much.

A second problem arises with the universe of the database. It reflects all cases filed on or after October 17, 2006, which are closed during a particular year. The maximum possible age of the oldest cases increases each year, giving the false impression that cases processing times are increasing. Other concerns by chapter include:

- **Chapter 13:** Cases that were filed under chapter 13 but converted to another chapter are not included.

- **Chapter 7 Cases:** The national median disposition time has been between 112 and 120 days each year since 2007. At best the data can identify a few districts in which the processing of routine no asset cases is delayed by a few weeks or so.

- **Chapter 11:** Very few districts have 10 or more non-business chapter 11 cases filed in a single year, so no information is given at all.

Property Valuation Orders (Table 5): Bankruptcy courts may enter orders regarding the value of certain secured properties. Four judicial districts have accounted for about 60% of cases with

[12]**Elizabeth – I really just need to refer to footnote 5 – but I am not sure how to do it properly. Ed** See: http://www.uscourts.gov/statistics-reports/bapcpa-report-2014

property valuation orders (Eastern District of California, District of South Carolina, and the Middle and Southern Districts of Florida) and over 90% of the property valuation orders have come in just 11 judicial districts. More than one-third of judicial districts reported no property valuation orders during the three-year period. Every year the AO dutifully reports on this, but I wonder if anyone cares.

Conclusion: Nearly 20 years ago someone decided that certain data regarding bankruptcy cases was should be compiled and made publicly available. The resulting BAPCPA report contains a great deal of data of dubious value that has been of little interest to researchers and policy makers. Since it is required to be prepared annually, and there is no review process to determine its continuing value, the BAPCPA report may outlive us all.

To some extent this report is illustrative of the level of dysfunction that exists with Government data. Federal agencies tend to be unwilling to make public the data they have compiled. This can prompt Congress to make very specific demands for data. Unfortunately, the data when supplied may not be all that informative.

At some point it might be useful for Congress to examine the continuing need for the BAPCPA report. If this were done, most of the data in the current report could be eliminated. The remaining tables that contain useful information could still be compiled and posted on the AO's website each year.

Lawless, Robert M

From: Ed Flynn <eflynn@abiworld.org>
Sent: Thursday, November 02, 2017 2:02 PM
To: Lawless, Robert M
Subject: Data on Chapter 7 asset cases and the attorneys used by trustees
Attachments: Chapter 7 Asset Cases & Attorneys.docx

Bob:

Attached is what I came up with regarding chapter 7 asset cases, trustee compensation, and trustees or their firms serving as attorneys in their cases. Hopefully, it will help the Commission in its' deliberations.

Overall it appears that asset cases in which the trustee or firm serves as attorney are processed more quickly and a higher percentage of the proceeds go to unsecured creditors (except in the very large cases).

One topic I did not directly address was instances of trustees serving as attorneys (and billing for these services) where they are basically doing trustee work listed in 11 USC §704. I saw some of this back in the 1980's when I was in an office at the AOUSC that did court reviews. Also, when I was at the EOUST, I saw instances where I was fairly certain this was a routine practice of some trustees. This could skew the comparisons between cases where the trustee serves as counsel and cases where the trustee employs outside counsel. They trustee/firm cases might look good compared to cases with outside counsel, but the cases would not be equivalent.

The EOUST deserves some recognition for making the asset case information publicly available – because I don't think there is any requirement that they do so. Also, from working with this data, it is clear that some effort has been made at quality control – which is not always the case with bankruptcy data.

A few other thoughts:

Also, I noted that **N. Neville Reid** testified that chapter 7 debtors in 2016 listed $137 billion in net general unsecured liabilities. The figure he cited comes from the AOUSC's BAPCPA report and actually included secured debt, non-dischargeable debt and one mysterious mega-case in Western Washington with about $85 billion in unsecured debt. The current amount discharged per year in chapter 7 is actually probably more in the $30 billion range. (Another example of lack of quality control by the AOUSC's Statistical Division.)

Assuming that **Raymond Obuchowski's** figures regarding IFP are correct (and they look good to me), trustees have lost about $14 million due to fee waivers over the last 10 years. During the same period total trustee compensation (including attorney fees) has been in the $3 billion range, so IFP-related losses account for less than one-half of one percent of their total chapter 7 revenue. Fixing the IFP problem might remove what is an irritant to the trustees, but it won't do much to get them the increase in compensation that they seek.

Let me know if there any other topics for which the Commission could use some statistical data.

Ed
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November 2017

The Numbers Behind Chapter 7 Asset Cases and, Attorneys Employed by Trustees

Prepared By: Ed Flynn
American Bankruptcy Institute

Summary

- About 8.5% of chapter 7 cases are closed as asset cases;
- Trustees employ attorneys in about 30% of chapter 7 asset cases;
- When an attorney is employed, in more than one half the cases the attorney is the trustee or a member of his/her firm;
- Cases in which the trustee or firm serves as attorney tend to be fairly small. Outside counsel or a combination of the trustee and outside counsel tend to serve in the larger cases;
- After adjusting for case size, average case processing times are shorter in cases with the trustee/firm as counsel compared to cases with outside counsel;
- For cases with under $500,000 in assets, payments to unsecured creditors are higher where the trustee/firm serves as counsel compared to cases with outside counsel;

Statistical Notes:

- Data on filings is from the Administrative Office of the United States Courts. See: http://www.uscourts.gov/statistics-reports

- Data on asset cases is from the Executive Office for United States Trustees. See: https://www.justice.gov/ust/bankruptcy-data-statistics/chapter-7-trustee-final-reports

- The US Trustee data includes both business and non-business cases. It is likely that most of the cases with over $500,000 in assets were business cases, and most of the smaller cases were non-business cases.

- The figures in this report do not include cases in North Carolina and Alabama. These states are served by Bankruptcy Administrators, and asset case info is not publicly available. During the 10-year period there were 206,363 chapter 7 cases filed in these two states – 2.7% of total chapter 7 filings nationwide.

Chapter 7 Caseload:

- **7,457,049** chapter 7 cases were filed nationwide during Calendar Years 2007 -2016.
- **630,970** cases were closed as asset cases during the same period - **8.5%** of total. (An asset case is defined as a case in which the trustee collected and distributed funds to creditors).

Of the asset cases:

- **438,615** reported no attorney fees (**69.5**% of asset cases).
- **192,355** had attorney fees (**30.5%** of asset cases).

Of the asset cases with attorney fees paid:

- **110,347** (57.4%) the attorney was the trustee or his/her firm.
- **70,177**(36.4%) the attorney was from an outside firm.
- **11,831** (6.2%) cases employed both the trustee and an outside firm as attorneys.

Assets Administered: Chapter 7 trustees administered nearly $30 billion in chapter 7 asset cases over the 10-year period. About two-thirds of this amount was distributed to creditors, and one-third was consumed by various fees and expenses.

Chapter 7 Asset Cases Completed
Calendar Years 2007 -2016

	Amount (In $ Millions)	Percent of Gross Receipts
Gross Receipts	$29,537	
Total Distributions	**$19,863**	**67.2%**
Secured Creditors	$8,701	29.5%
Priority Creditors	$1,273	4.3%
Unsecured Creditors	$7,892	26.7%
Funds Paid to Debtor & Third Parties	$1,998	6.8%
Total Fees & Costs	**$9,674**	**32.8%**
Trustee Fees	$1,589	5.4%
Trustee Legal Fee	$939	3.2%
Other Firm's Legal Fees	$2,582	8.7%
Trustee Accounting Fees	$90	0.3%
Outside Professional Fees	$1,022	3.5%
Administrative Costs	$2,706	9.2%
Prior Chapter Costs	$745	2.5%

A total of $3.521 billion was spent on legal fees in the asset cases. A little over one-quarter of this amount ($939 million) was paid to the trustee or his/her firm.

Chapter 7 Trustee Compensation: The number of active panel trustees nationwide has been in the 950 – 1,200 range over the last 10 years. During this period chapter 7 trustees and their firms have received a little over $3 billion for their efforts. About one-third of this has come from attorney and accounting fees.

Chapter 7 Trustee Compensation 2007 - 2016		
Type of Compensation	(in $ Millions)	Percent of Total
Total Compensation	$3,057.0	
Percentage Fee	$1,589.3	52.0%
Attorney Fees for Trustee or Firm	$939.4	30.7%
Accountant Fees for Trustee or Firm	$89.8	2.9%
Filing Fee ($60 per case - discounted 2% for IFP cases)	$438.5	14.3%

Size of Cases: The cases in which trustees or their firms serve as counsel are generally smaller than cases in which outside counsel is employed. Over three quarters of the trustee/firm cases had assets of under $25,000.

Size of Asset Cases Closed Calendar Years 2007 - 2016			
Type of Attorney -->	Trustee or Firm	Outside Counsel	Both
Total Asset Cases	110,347	70,177	11,831
Amount Administered	Percent of Asset Cases		
Under $5,000	35.0%	17.5%	2.5%
$5,000 - $24,999	42.4%	39.3%	23.2%
$25,000 -$99,999	14.9%	24.5%	37.2%
$100,000 - $499,999	6.2%	13.5%	24.8%
$500,000 - $999,999*	0.9%	2.6%	5.6%
$1 Million or More*	0.6%	2.5%	6.8%
Median Case Size	$7,550	$18,457	$60,003

*Most of these larger cases were probably business cases. The EOUST database does not distinguish between business and non-business cases.

Speed of Case Administration: Cases in which the attorney is the trustee or his firm tend to be completed 1 – 4 months faster than cases with outside counsel, and are completed 1 -2 years faster than cases in which both inside and outside counsel are used.

Case Processing Times for Asset Cases Closed 2007 - 2016			
Type of Attorney -->	Trustee or Firm	Outside Counsel	Both
Total Asset Cases	110,347	70,177	11,831
Amount Administered	Average Time From Filing to Closing		
Under $5,000	827	923	1,257
$5,000 - $24,999	968	1,046	1,382
$25,000 -$99,999	1,241	1,277	1,493
$100,000 - $499,999	1,365	1,496	1,784
$500,000 - $999,999	1,571	1,687	2,233
$1 Million or More	2,014	2,141	2,667

Note: Although the cases were grouped in categories based on the amount of assets administered, it is not possible to tell if the legal issues encountered were equivalent. The available data does not allow us to determine if the differences in case processing time were due to which attorneys were employed or by the legal issues that arose in the cases.

Payments to Unsecured Creditors: In the smaller asset cases (under $500,000 administered), the percentage of total receipts paid to unsecured creditors was higher in cases where the trustee or his/her firm served as attorney. In the cases with over $500,000 assets (most of which were business cases) returns to creditors were generally higher in cases where outside counsel was employed.

Asset Cases Closed Calendar Years 2007 - 2016			
Percent of Receipts Paid to Unsecured Creditors			
	Trustee/Firm	Outside Counsel	Both
Total Cases	110,347	70,177	11,831
Amount Administered	Percent of Receipts Paid to Unsecured Creditors		
Under $5,000	41.9%	29.3%	15.4%
$5,000 - $24,999	46.4%	38.1%	24.9%
$25,000 -$99,999	45.0%	36.1%	13.8%
$100,000 - $499,999	26.5%	24.7%	23.5%
$500,000 - $999,999	19.7%	19.2%	23.0%
$1 Million or More	29.6%	24.2%	37.7%
$1 Million or More, Excluding Cases Over $100 Million	*20.2%*	*28.2%*	*25.9%*
Number of Cases Excluded	*1*	*4*	*6*

3002.1 NEEDS TO INCLUDE REVERSE MORTGAGES

Amending Rule 3002.1(a) by utilizing the proposed strikethroughs illustrated below, will protect our seniors and hold reverse mortgage companies accountable:

Rule 3002.1 Notice Relating to Claims Secured by Security Interest in the Debtor

(a) IN GENERAL. This rule applies in a chapter 13 case to claims ~~(1)~~ that are secured by a security interest in the debtor's principal residence~~, and (2) for which the plan provides that either the trustee or the debtor will make contractual installment payments~~. Unless the court orders otherwise, the notice requirements of this rule cease to apply when an order terminating or annulling the automatic stay becomes effective with respect to the residence that secures the claim.

In the current form, 3002.1 does not protect seniors who have a reverse mortgage because this specific mortgage does not contain "contractual installment payments". Seniors therefore are exposed to the very behavior 3002.1 was designed to eliminate.

Lack of communication between the lender and the senior is why the loan has reached a foreclosure status. The lack of communication continues when the senior files for bankruptcy and lenders realize they are not regulated under 3002.1. As a result, lenders are loading appraisal fees, attorney's fees, BPO fees, and monthly drive-by inspection fees to the senior's account.

If the senior **is** informed, the lender tries to convince the senior the additional amounts are inconsequential because they themselves do not have to pay back the loan. The lender fails to explain that if the senior wish to sell the home or a non-qualifying spouse or an heir decides to purchase the home, **they will be paying** these unregulated and potential illegitimate fees.

The most common fees being added to a senior's loan are those associated with taxes and insurance. Many seniors qualify for a quad or tax delay program. These tax programs allow qualifying seniors to pay the real property tax in four installments **without interest**. The senior may only participate in these programs if the program's lien remains subordinate to the one that the reverse mortgage holds.

The reverse mortgage company ignores these senior programs by issuing a corporate advance if the tax is not paid "timely" per non-senior standards. When the corporate advance for the taxes and insurance has been issued by the reverse mortgage lender, it must be **paid back with interest** within 5 years or the lender may file a request to foreclose. Again, there is often no authority to issue these corporate advances and without a 3002.1 amendment it is cost-prohibitive to hold these lenders accountable during a Chapter 13.

Why should we be concerned? We should be concerned as reverse mortgage foreclosures are on the rise:

> CRC said that HUD data revealed 32,976 foreclosures on federally insured reverse mortgages from April 2016 to December 2016. In response to an earlier

> FOIA request, the HUD disclosed that there were 41,237 foreclosures in the HECM program during the seven-year period from April 2009 to April 2016.
>
> When computed as a monthly average, foreclosures increased to 3,664 per month from April 2016 to December 2016 from 491 per month from April 2009 to April 2016, or an increase of 3,173 foreclosures per month.
>
> Francis *Monfort, Reverse mortgage foreclosures balloon to 'alarming rate' in 2016,* Mortgage Professional America, (Nov. 20, 2017), *http://www.mpamag.com/news/reverse-mortgage-foreclosures-balloon-to-alarming-rate-in-2016-85313.aspx#.WhNJNBmlos0.facebook*

If seniors are unable to seek financial assistance through their lender or their family to halt a foreclosure, they will have to move from their home or **seek limited protection** through the bankruptcy court.

Chapter 13 remains a stopgap measure for the mortgage abuse **unless** Rule 3002.1 is amended to include reverse mortgages thereby promoting "further transparency and more emphatically safeguard debtors' fresh starts." *In re Nicholas and Amanda Gravel*, 2016 Bankr. LEXIS 3322, at 11.

COMMENTS TO ABI'S COMMISSION ON CONSUMER BANKRUPTCY

Chief Judge Catherine J. Furay
U.S. Bankruptcy Court for the Western District of Wisconsin

October 6, 2017

1. Credit Counseling and Financial Management Course.

While education with respect to credit is a laudable goal, the requirement merely adds cost to the process and, further, is simply lip service in most cases. By the time debtors file, their circumstances are often so dire they have no meaningful alternatives. Often, the debtor completes the required course within days or minutes of the filing. Similarly, debtors often scramble to get the certificate of completion of the post-petition financial management course. In fact, it is not unusual in pro se cases for the case to be closed when the certificate is not filed only to have a motion to reopen so the debtor can file the certificate and obtain the discharge. The on-line nature of most courses (both credit counseling and financial management) is merely a pro forma exercise with little actual benefit. In short, the requirements should be eliminated.

2. Trustee Compensation.

Change to, and increase in, the current $60 per no-asset case is long overdue. It is inadequate compensation for the work performed, and the financial stress this places on standing trustees has resulted in the resignation of several well-qualified trustees. It needs to be increased.

3. Filing Fee Waivers and Payment of Chapter 7 Attorneys.

In some jurisdictions, if an attorney is paid any compensation the court will deny a fee waiver even if the debtor otherwise qualifies under the applicable standards. Exceptions to this may be made if, for example, the source of the payment to the attorney is not from the debtor but from a third party. While I have no actual empirical, verifiable data, it is my experience and that of my predecessors, Robert D. Martin and Thomas S. Utschig, that permitting reasonable compensation to attorneys reduces the number of pro se filings and makes the system more efficient. The use of attorneys reduces the number of continued section 341 hearings and helps assure the pleadings filed are complete and correct the first time without the necessity of filing numerous amendments (and thereby reduces the cost to debtors by eliminating the filing fees associated with amendments). This also assists the standing trustees. Our District has a very small proportion of pro se filings. We believe it is because we do permit fee waivers for debtors who otherwise qualify even if there have been reasonable attorney's fees paid by the debtor.

Prior to taking the bench, I practiced in a firm that included a Chapter 7 trustee. He had been a panel trustee for more than 25 years. I often acted as attorney for the trustee in his cases. Those cases where there was an attorney required far less work for both the trustee and the attorney for the trustee. We could review and address those cases more efficiently and, looking at the economics, lost less money when there was an attorney. The pro se cases took geometrically more time. The practical result was that when comparing the additional time in a pro se case to the $60 trustee fee, our firm was far better off foregoing the $60 if it meant there would be an attorney representing or assisting the debtor.

Denying fee waivers if an attorney has been paid anything to represent a debtor does not and will not relieve any financial burden on trustees in an IFP. Let's face it, $60 per case is minimal compensation and a small percentage of the total filing fee. Frankly, I am told by various trustees that looking at IFP pro se debtors and their impact on the average per case fee received by trustees make the actual compensation something in the range of $40 or less. My District is fortunate that only something in the range of 2 to 4% of our cases are pro se filers and slightly more than 3% of our cases are IFP.

4. Student Loans.

The private student loan lobby managed to obtain the same nondischargeability provisions and benefits previously afforded to government loans without any of the additional considerations or options provided to students for repayment of government loans. For example, there are numerous alternative repayment-related options with government loans, including income-based repayment, extension of term, and suspension of payment in the event of a disability. None of these options are required of or available from most private lenders. Additionally, these general unsecured loans may receive only pro rata distributions in a Chapter 13, leaving balances after completion of the plan that are often greater than the balance at the beginning of the case.

The *Brunner* test is outdated and inconsistently interpreted. Clearer standards for determination of undue hardship are needed. In addition, the Code should incorporate flexibility in permitting discharge of a portion of the loans. For example, the debtor may not have the ability to pay $100,000 in student loans but may have the ability to make payments on $20,000 in loans. Courts should be permitted to determine that $20,000 is nondischargeable while $80,000 is dischargeable. Another example would be to permit the court to impose income-based repayment and provide that at the end of a specified period the balance of the loans is discharged.

The income-based repayment plans and other federal repayment suspension and forgiveness programs present potential unanticipated

consequences for debtors. If the balance is forgiven rather than discharged, it creates potential tax liability for forgiveness of indebtedness income. It should be possible to capture that forgiveness in the bankruptcy case and avoid the potential tax impact.

If the case is not an abuse, either after a certain period of repayment or term of years, those debts should be dischargeable.

5. Reaffirmation Agreements.

Section 524(c) makes judges gatekeepers. This becomes an issue in all pro se cases and in those cases where the debtor's attorney fails or refuses to sign the certification that the reaffirmation is not an undue hardship.

If the concern is that the agreement is knowing and voluntary, then leave certification to the attorney where a party is represented. If the attorney certifies, so be it. The attorney is in a far better position than the court to determine if the agreement is voluntary, knowing, and not an undue hardship. If the attorney won't certify the reaffirmation, then it should not be approved and the court should be left out of the matter.

The judge is not the attorney for the debtor. Requiring the court to be involved places on the court the obligation to represent and advise the debtor. That is incongruous with our job. Further, even if we run through a list of questions—What is the collateral worth? What do you use if for? Do you want to keep it? Do you understand the consequences of reaffirming? Do you understand you cannot be required to do so? Can you afford the payments?—we cannot be assured of the answers. Often the reaffirmation agreement is prepared by the creditor and the debtor has no real idea of the value of the collateral. Creditors tell debtors they must also reaffirm unsecured debts to the creditor to reaffirm secured debts. Debtors are also told that, even if they have never defaulted and are current on all payments that they must sign a reaffirmation agreement or the collateral will be repossessed. The Code does not address the effect of not reaffirming but continuing to make payments. The right to repossess under such circumstances may be governed by state law and that may be different from state to state. Consistency of the effect should be a matter of federal bankruptcy law.

My docket is sometimes filled with pro se reaffirmation agreements for unsecured payday loans at an interest rates of 20% or more. The dealings of those creditors can be predatory and the Code should strictly limit or eliminate the instances when any unsecured debt can be reaffirmed.

6. Forms.

Official Form 427 needs revision. Part 1, Question 6, is supposed to be a straightforward way to get a view of whether there would be an undue hardship. Although the columns are supposed to provide monthly expenses excluding payments on the reaffirmed debts not included in monthly expenses, debtors regularly double count or misunderstand what is or is not included.

This comment is also but one related to the revised official forms. Clearly someone thought the revisions would modernize and enhance the forms. At least with respect to Schedules A, B, C, and D, that is clearly not the case. The information is now far more awkward to review and less usable. The old forms contained information on Schedules A and B about the amount of debt as well as current values. Old Schedule C gathered in one place the value of the collateral, debt, and amount claimed exempt so it was possible to determine how the claimed exemption squared with the equity in the property. The old Schedule D also asked for information regarding the nature of the collateral and information about perfection. This information should, once again, be part of the official forms.

7. Notice and Hearing.

Some matters require a hearing under the Code and Rules. Other matters simply require the *opportunity* for a hearing. Scheduling hearings in uncontested matters is a waste of both judicial time and resources and of money for the parties. Every time an attorney must appear, it increases the cost of the case to his or her client and, perhaps, to other parties. As caseloads increase and the resources of the courts continue to be stretched, it is time that the Rules were changed to provide that in those matters where the Code does not require a hearing, there should not be a hearing unless a party objects or requests a hearing.

8. Local Rules.

There should be few, if any, local rules. Congress adopted the Code. The Rules were promulgated. Parties should follow the Code and Rules. The instances where local rules should exist in consumer cases should be few and far between. Local rules simply increase the differences from District to District.

While I generally abhor local rules, I understand they have a place in some instances, so prohibiting them entirely doesn't work. However, I have also noted an explosion of what are being referred to as "Chambers Procedures." Having different procedures for each judge that are enforced as if they have the force and effect of a rule is just plain wrong. Not only does it geometrically increase differences making things less predictable, but it goes against all

reason because at least with local rules there is notice, publication, and opportunity for comment. This seems to be a substitute for the practice of "General Orders" that was a growing trend a few years ago. Unless "Chambers Procedures" are merely advisory or simply indicate items with no substantive component, they should be absolutely prohibited!

9. The U.S. Trustee.

It should perform the duties listed in section 704(b). It should appoint qualified standing trustees to the panel of trustees and supervise the panel trustees including monitoring their financial recordkeeping. It should monitor and address unlawful practices by petition preparers. Finally, it should monitor cases to address/identify instances of bankruptcy fraud and coordinate those cases with the U.S. Attorney or such other law enforcement agencies as appropriate.

The U.S. Trustee should principally limit itself to Chapter 7, 12, and 13 cases. This means it should stay out of Chapter 11 cases if there is a Committee representing unsecured creditors. It should focus on consumer cases as may be needed and only on matters not within the purview of the standing trustee in those consumer cases.

Chapter 11 is unique in that all the real stakeholders are usually represented. In those cases, the U.S. Trustee should stay out of the case. In the instances where there is not a Committee, it may make sense for the U.S. Trustee to appear and assert the questions, objections, or issues that might affect unsecured creditors.

10. Unbundling of Services.

This raises both ethical and practical issues. Lawyers should be able to define for clients the services that are being performed for the fee being paid. However, clients often do not truly understand what might be excluded in such an instance. Although the retainer may clearly define what is included, that should not relieve the attorney from all responsibility for matters not included in the defined services to be performed. There is a tension between permitting attorneys and clients to define the scope of representation and assuring the process works in situations that arise that may be outside of that scope. For example, lawyers may, understandably, exclude representation in actions under section 523. If an adversary proceeding is filed, as a pro se the client may not understand the need for an answer, what constitutes an answer, or other related considerations. This can result in confusion and delays.

This issue may not, ultimately, be one that can be addressed by changes to the Code or Rules. Rather, the best method of addressing this may simply be under the Rules of Professional Responsibility. On the other hand, as

unbundling becomes more and more common, the complications it presents become more of an issue for the courts, attorneys, and parties-in-interest.

There also appears to be some difference in the actions attorneys take depending on whether the "unbundled service" is in the main case or in an adversary. While I would not compel an attorney who excluded the defense of nondischargeability actions from services covered by the retainer agreement to defend an adversary, at a minimum there should be some requirement that the attorney explain the nature of the action, the obligation to answer or respond, and the consequences of failing to do so.

If an attorney wants to unbundle services or otherwise define the scope of representation, then (1) it should be required to be in writing, and (2) a copy of that written agreement should be included as a required attachment to B2030 – Disclosure of Compensation of Attorney for Debtor.

11. Sale by Trustee and A "Right of First Refusal."

This is a bad idea. A right of first refusal will likely chill potential offers and the value obtained by the estate. If a debtor wants to purchase nonexempt property (and can obtain the funds to do so) at a fair price, the debtor should certainly make an offer to the trustee, but there should not be a right of first refusal.

12. Chapter 13 Proof of Claim vs. Confirmed Plan.

The interplay between an "allowed" claim under section 502(a) and the binding effect of a confirmed plan under section 1327(a) is murky. Further, we have Rule 3021 which provides that once the bankruptcy court confirms a plan, "distribution shall be made to creditors whose claims have been allowed. . . ." However, section 1326(a)(2) does not limit distributions in accordance with Rule 3021. The ideal situation would be for creditors to timely file proofs of claim and, if they fail to do so, for debtors to file on their behalf within the time limits. When there is a plan and the creditor receives notice of the terms as it applies to the creditor, the creditor should be bound if the plan is confirmed. This avoids the creditor who lays in the weeds, fails to file a claim, accepts payments, and then, at the end of the plan term, can play "gotcha."

13. Debt Limits.

The debt limits in both Chapter 13 **and** Chapter 12 cases should be increased. This would benefit all parties in interest by making a less-costly alternative available. Currently, many individuals who might otherwise qualify for a Chapter 12 or 13 are forced to file a Chapter 11 because of the debt limits. In those instances where the debtor engages in business (such as the

farmer in a Chapter 12 or a small business owner who might otherwise file a Chapter 13), providing the option of a Chapter 12 or 13 would provide the flexibility of making a reasoned decision about the debtor's options. Although not directly a subject for this Commission, if the debt limits of Chapter 12 and 13 were increased and debtors had an option to file under one of those chapters or to utilize Chapter 11, then you should also eliminate the Small Business Chapter 11 provisions which really serve no useful purpose.

Statement of H. Jason Gold, Chapter 7 Trustee to the Committee on Chapter 7 for the ABI's Commission on Consumer Bankruptcy

September 14, 2017

I am Jason Gold, a partner in the Washington, D.C. office of Nelson Mullins Riley & Scarborough LLP, a law firm with over 540 lawyers in seventeen offices around the country. I am the Chair of our firm's Bankruptcy and Financial Restructuring Practice.

Relevant to this hearing, I have been a Chapter 7 panel trustee in the Eastern District of Virginia, historically one of the nation's busiest courts, for more than 25 years.

I am a member of and this year I serve as Secretary to the Board of Directors of The National Association of Bankruptcy Trustees (NABT). Previously, I was the Editor of The American Bankruptcy Trustee Journal, the NABT's quarterly periodical. The views I express in this statement are mine but they are certainly shared by nearly every Chapter 7 trustee nationwide.

Increasing compensation for Chapter 7 trustees in the 90 percent of the Chapter 7 cases filed nationally in which there are no-assets to administer, is critical. The $60 no-asset fee has not been raised since 1994 while the responsibilities placed upon Chapter 7 trustees have increased substantially. The increase is necessary, long overdue and essential to the operations of our bankruptcy system.

Since being appointed as member of the panel of trustees, I have served in over 30,000 cases. I first started practicing law as a solo practitioner in 1979 after graduating from law school and passing the bar exam. I later established and developed my own private law firm, and am now a partner at a major national multi-practice firm. I was certified as a business bankruptcy law specialist by the American Board of Bankruptcy Certification in its first class in 1991, and have maintained that certification to date. I have served on the American Board of Bankruptcy Certification's Board of Directors since 2010 and I am currently the Vice-Chair of the Standards Committee – the body that board-certifies applicants. During my legal career, I have represented the poorest of the poor in their individual consumer bankruptcy filings, small "ma and pa" businesses that failed and needed to be reorganized or liquidated, and represented local, regional and national banks and private lenders in their efforts to mitigate their losses upon being confronted with a bankruptcy filing. I have also been involved in some of the largest, most prominent bankruptcies in the country.

I provide this detail because I have experience in virtually every perspective and facet of liquidation and reorganization in the wake of insolvency.

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The Bankruptcy Trustee's Vital Role in Our System

The Chapter 7 trustee is, in most cases, the face of the bankruptcy system to the consumer debtor. The trustee meets the debtor for the first time at the 341 meeting. But the initial work starts prior to that.

The Trustee must review the bankruptcy petition, the schedules of assets and liabilities, and the statement of financial affairs as well as the other required filings, prior to the 341 in each of the cases assigned every month.

Then the trustee must determine that the debtor has met the requirement to state his or her intention with respect to encumbered property, ensure that the debtor has filed tax returns - along with a review of the most recent return, review the debtor's pay advices, review the debtor's bank statements, provide important notices to holders of domestic support obligations about the bankruptcy filing, review the filings to see if the debtor is eligible under the means test for Chapter 7 relief, conduct the 341 meeting and examination, among the other statutory duties. In the 90 percent-plus cases that are "no-asset cases" and result in the filing of a "No Distribution Report," trustees nevertheless have continuing responsibilities and duties. All of this for $60 per case, and in those cases where the debtor is appearing *in forma pauperis,* for free. As can be seen, "no-asset" does not mean "no work."

Of course certain responsibilities are more demanding and challenging than others. If the debtor served as an administrator of an employee benefit plan, the trustee may be obligated to continue to perform the duties required of that administrator. In health care bankruptcies, trustees may also have obligations to transfer patients from facilities that are being closed and to safeguard patient privacy and healthcare records.

Serving as a cop on the beat is also an essential part of the Chapter 7 trustee function. The Chapter 7 trustee is initially responsible for any determination of potential misconduct on the part of the debtor, including criminal activity to be reported to the United States Trustee for referral to the United Sates Attorney. Those debtors who seek to game the system are first rooted out by the Chapter 7 bankruptcy trustee. Meeting this obligation is essential for the bankruptcy system to be properly policed.

The Economic Burdens on Trustees

The Chapter 7 trustee executes the important public policy initiatives set forth in the Bankruptcy Code, serving a diverse constituency of creditors, the debtor, the Bankruptcy Court and the Office of the United States Trustee. There is much routine and mundane work. But there are often legal and factual issues presented that can be complicated and challenging. These tasks and responsibilities are not waived or reduced because the case is a no-asset case.

Over the course of my career and tenure as a Chapter 7 trustee, there have been hundreds, if not several thousand cases where substantial amounts of time and out-of-pocket costs have been incurred to only realize at the end of the case that there is no recovery at all, and only the $60 fee is available as compensation. Trustees in smaller practices find this to be quite burdensome and unfair. Without an increase in compensation experienced and effective trustees may not be able to continue to serve.

Conclusion

No segment of the legal system in our country touches more people than the bankruptcy process. And no player within that process reaches both debtors and creditors like the Chapter 7 trustee. No system, however well designed, can be better than the people who operate within it. Therefore, we must retain and attract competent, honest and committed trustees. As designed, our present system simply will not work effectively without them. In other insolvency systems around the world, government officials on a public payroll handle the duties of administration, oversight, monitoring and investigation. But our system relies on private parties to provide these functions, at a fraction of the cost to the system and the taxpayers.

Statutory fees have been increased from time to time for Court appointed counsel to the criminally accused, to jurors and others. But the $60 no-asset fee to trustees, as quasi-judicial officers of the bankruptcy courts, has not been increased in decades. Given the vital role that bankruptcy trustees play in the bankruptcy system, I urge the commission to include in its report a recommendation that Congress increase this fee to $120.

Arnall Golden Gregory LLP

Memorandum

TO: Committee on Case Administration and the Estate of the ABI Commission on Consumer Bankruptcy Law
Attn: Professors Bruce Markelll and Robert Lawless

Via Email

FROM: Neil C. Gordon

DATE: September 12, 2017

RE: Should debtors receive all or some portion of the post-petition appreciation of their assets beyond the exempted amount

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I. INTRODUCTION

This is an issue that seems to produce a visceral reaction from the consumer debtors' bar and their allies. As will be shown below, there are both legal and practical reasons why this is not an acceptable idea.

II. BACKGROUND

Prior to *Schwab v. Reilly*, 130 S.Ct. 2652 (2010), many courts and practitioners believed that an asset could be removed from the bankruptcy estate merely by exempting the same dollar amount as the dollar value placed on that asset. This was called an "in-kind" exemption. However, the Supreme Court disagreed and clarified the law in *Schwab*, holding that the exemption would not remove the asset from the bankruptcy estate. Instead, the debtors were only exempting their interest in the asset stated in dollar terms rather than exempting the asset itself. Thus, the asset itself remained in the bankruptcy estate. As such, all appreciation flowed to the bankruptcy estate and not to the debtor. Circuit court cases quickly followed and confirmed this result. *See,* e.g. *In re Gebhart,* 621 F.3d 1206 (9th Cir. 2010), and *In re Orton,* 687 F.3d 612 (3rd Cir. 2012).

The consumer debtors' bar and their allies were very unhappy with the Supreme Court's holding. They first tried to circumvent it through the Rules Committee by proposing that a box could be checked to remove the asset from the estate. Ultimately, the committee did not approve that form of "check box." Now, the effort is made to

legislatively mandate that the appreciation go to the debtor in full or in part and regardless of the claimed exemption amount. In addition to the practical problems this poses, it does great violence to the statutory scheme that presently exists under the Bankruptcy Code and distorts the balance in the Code between the rights of debtors and creditors.

III. STATUTORY PROBLEMS

In addition to obtaining a discharge of all dischargeable debts, the other key ingredient to a debtor's "fresh start" is the ability to retain a certain amount of property through exemptions so the debtor does not begin with nothing. Many states follow the federal exemption scheme and many opt-out and follow their state law exemption scheme. A few states allow an election between state or federal. However, the basic scheme is the same. If an asset is sold by the trustee, the debtor is paid the dollar amount of the exemption up to the amount of available proceeds. The bankruptcy estate receives nothing until the exemption has been funded. Once the exemption has been funded, the remaining proceeds (absent a surplus case) flow through to the bankruptcy estate for the benefit of the estate, and most importantly creditors of the debtor.

No asset is sold on the petition date. Every asset is sold post-petition. Even after an asset comes under contract, either by auction or listing agreement or some other method, there can be a substantial delay before there is actually a closing. Some assets are difficult to sell, and in other cases, debtors actively interfere with the trustee's efforts to list, market and sell real estate or other assets. In some cases there is active concealment. Trustees are constantly filing motions to compel debtors to perform their statutory duties and to cooperate with the trustee. Nevertheless, the debtor will receive the exemption to which the debtor is entitled, but nothing more (except in a surplus case).

To effect a legislative change that would provide the debtor more than the exemption amount would do great violence to the statutory scheme. This would be turning the debtor's "fresh start" into a "head start" that was not contemplated by Congress. Whether the asset is sold three months or three years after the petition date, the debtor receives the exemption amount as part of the "fresh start". Nothing more is due the debtor because it would be the creditors funding it. Indeed, if the asset were sold on the Petition Date, debtor would have no expectation or entitlement to more than the allowed exemption amount claimed in that asset. Congress made sure to take care of the debtors with the exemption scheme but to balance the rights of creditors by providing for the estate to receive the excess. Exemptions are not open ended. Exemptions are not merely the starting point. They are the end point for the debtor. Thus, the statutory problem.

IV. PRACTICAL PROBLEM

In addition to the legal flaw in the Proposal set forth above, there are egregious practical problems with the Proposal that would apply to every sale, since there are no sales on the petition date itself.

If the debtor were to receive all post-petition appreciation or any portion of it, the trustee would not be able to conduct a sale without first going before the bankruptcy court and having a valuation hearing with historical appraisals prepared by appraisers all of which would have to be paid for by the estate to establish the value of the asset on the petition date versus the sale date. So the creditors are being prejudiced in at least the following five ways:

1. Creditors have to essentially fund the cost of the valuation expert;
2. Creditors have to essentially fund the increased administrative costs of the trustee and counsel;
3. Creditors lose the post-petition appreciation to the debtor in full or in part;
4. Creditors lose out entirely if the finding of petition date value prevents the sale from being approved due to a lack of benefit to the estate; and
5. Buyers will not be willing to pay fair market value for an asset that must undergo this type of analysis before the asset can be approved for sale and closed. A risk premium will be necessary, further reducing the value to the estate.

Eventually, with all of the problems this proposal would create, it will be hard for trustees to sell anything given this uncertainty and additional cost factor. At best, a buyer would charge a substantial risk premium thereby reducing the sale price substantially. This again hurts the estate and the creditors. So for these practical reasons, the Proposal is a bad one. It greatly upsets the balance that exists under the Code between debtors and creditors.

V. CONCLUSION

Given the statutory scheme and debtor/creditor balance under the Code, this proposal is a bad one for both statutory and practical reasons.

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Neil C. Gordon is a partner in the Atlanta office of Arnall Golden Gregory LLP. He served for two years as a law clerk in Atlanta for United States District Court Judge Robert L. Vining, Jr. followed by 36 years in private practice, with the last 33 years being exclusively in the areas of bankruptcy, business reorganization, fraud investigations, and creditors' rights. Mr. Gordon represents trustees and receivers throughout the country, including in Delaware litigation that recently settled for approximately $40 million. Mr. Gordon chaired the Bankruptcy Law Section of the Atlanta Bar Association from 1992 to 1993, and has been a panel trustee since 1994, and also serves as a SEC Receiver. Mr. Gordon was first elected to the Board of the National Association of Bankruptcy Trustees in 2000. He has held every office including President (2011-2012) and for eight years chaired its Amicus Committee. Mr. Gordon has authored or co-authored over 70 scholarly articles and book chapters on bankruptcy law related topics and made over 120 seminar presentations throughout the country. He served for three years ending in April 2015 as the Co-Chair of the ABI's Legislation Committee. He is a Lifetime Member of the ABI and the NABT President's Circle, a Master of the Bench in the W. Homer Drake, Jr., Georgia Bankruptcy American Inns of Court, a Full Member of the National Association of Federal Equity Receivers, and a Fellow of the American College of Bankruptcy.

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Arnall Golden Gregory LLP

Memorandum

TO: Committee on Case Administration and the Estate of the ABI Commission on Consumer Bankruptcy Law
Attn: Professors Bruce Markell and Robert Lawless

Via Email

FROM: Neil C. Gordon

DATE: September 28, 2017

RE: Short Sales by Trustees of Exempted Assets

I have lectured for many, many years on short sales and carve-outs. My 2009 article "Art of the Carve-Out" is attached. The premise of this was how successful I had been at negotiating carve-outs in chapter 7 cases similar to those I had done in chapter 11 cases. However, I limited these efforts to commercial properties and very expensive homes. Occasionally, I would do the carve-out with the junior mortgage holder and then block stay relief by the senior mortgage holder. This actually benefitted the debtors by allowing them several extra months in some cases in their home that would otherwise be rapidly foreclosed under Georgia's non-judicial foreclosure process, which only takes about 30 to 45 days from the time stay relief is obtained to a foreclosure sale. Helping the debtor buy time is actually a benefit to both the debtor and the estate.

Unfortunately, the premise of the article has been fairly distorted in practice by many trustees, particularly in judicial foreclosure states where the process can take years. Mortgage holders and servicers approach the trustees with *de minimis* proposals that result in a short sale, the loss of the home to the debtor, and a minimal benefit to the bankruptcy estate with minimal distributions to the creditors. It was never my intent that debtors who wanted to keep their homes and could afford to do so, would lose their homes through short sales by trustees.

This happens because in judicial foreclosure states it is very costly for the mortgage holder to undertake the multi-year process of foreclosure. While I understand the motivation of the mortgage holder or servicer, it is disappointing to see trustees selling homes that debtors might want to keep for some extended period of time before the foreclosure sale occurs for little benefit to the bankruptcy estate.

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However, the Proposal overreaches. As aforesaid, many carve-outs are done with commercial properties and very expensive homes that can result in extremely large carve-outs and even create surplus estates. I have done a number of these with carve-outs of several hundred thousand dollars each. Whether the debtor claims a wild card exemption or homestead exemption or something else, the debtor will lose the property quickly to foreclosure in a non-judicial foreclosure state. The process of allowing the carve-out and sale by the trustee actually extends (potentially for many additional months) the period of time in which the debtor can occupy the property or benefit from it.

Accordingly, I would propose that any limiting Proposal be restricted just to homesteads with a value of less than $225,000 (with that figure indexed). This would eliminate all of these disappointing short sales of inexpensive homes for virtually no benefit to the estate.

Attachment – "The Art of the Carve-Out" by Neil C. Gordon

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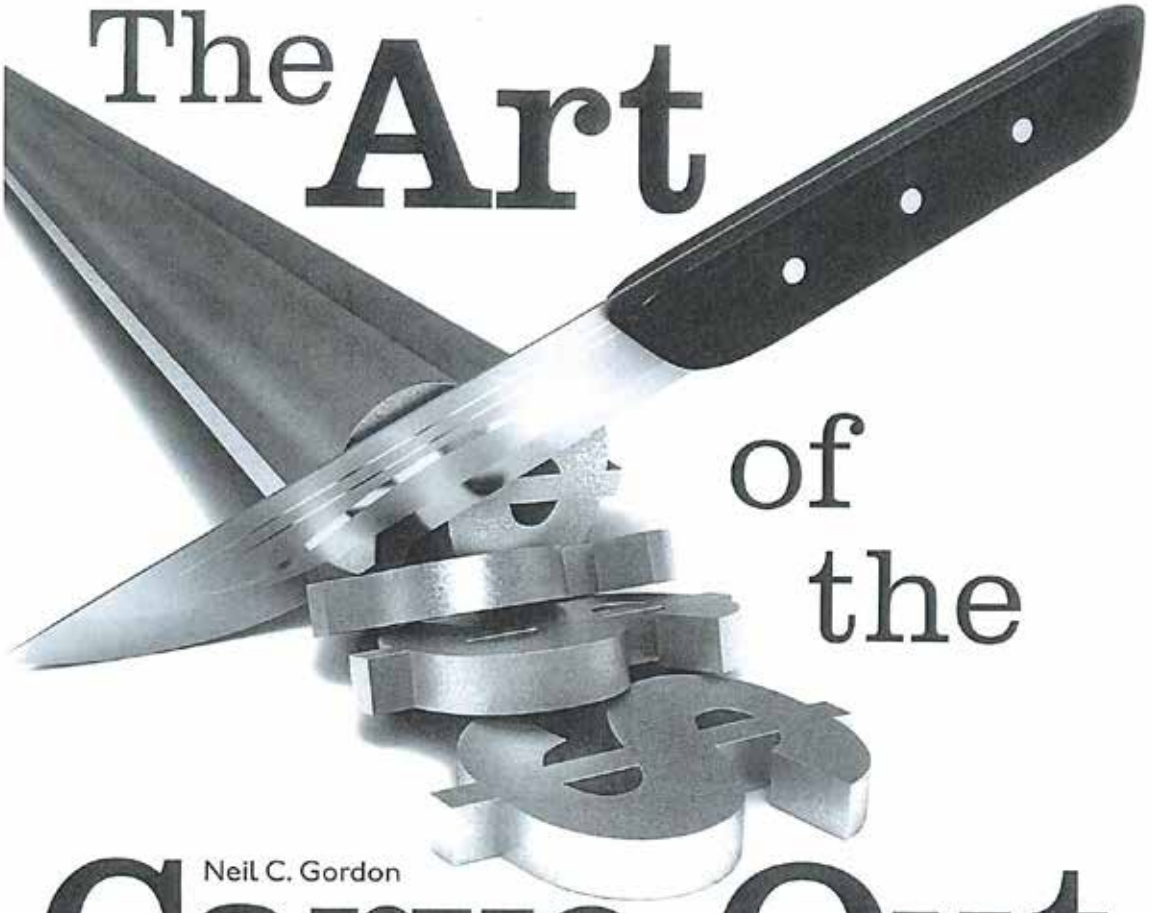

The Art of the Carve-Out

Neil C. Gordon

INTRODUCTION TO CARVE-OUTS

Normally, the cost of administering a bankruptcy estate is borne by the estate itself and not by secured creditors. *In re Trim-X Inc.*, 695 F.2d 296, 301 (7th Cir. 1982). However, the Bankruptcy Code does not prohibit agreements whereby a secured creditor voluntarily agrees to pay professionals, or others, out of the proceeds of its collateral. *Official Unsecured Creditors' Committee v. Stern (In re SPM Mfg. Corp.)*, 984 F.2d 1305, 1313 (1st Cir. 1992). Such an agreement is commonly referred to as a "carve-out."

No carve-out exists unless ordered, or approved by the court with the consent of the affected secured creditor. *In re California Webbing Industries, Inc.*, 370 B.R. 480, 486 (Bankr. D. R.I. 2007). There is no reference in the Bankruptcy Code to "carve-outs," and there is no established form for a carve-out agreement. Therefore, it can mean different things to different people. Through evolution, these agreements have come to include terms such as: (a) the amount being set aside; (b) how the funds should be applied; and (c) whether the funds' continued availability is dependent on the occurrence or non-occurrence of a specific event. *Id.* at 483. *See, e.g., Harvis Trien & Buck, P.C. v. Fed. Home Loan Mortgage Corp. (In re Blackwood Assoc.)*, 153 F.3d 61, 65 (2nd Cir. 1998) (bankruptcy court rejects carve-out agreement because the agreement fails to specify the amount to be set aside, and payment is not conditioned on a specific event or occurrence). Unless a carve-out agreement is clearly reached and the terms are clear as well, a court is likely to find no agreement was ever reached absent the consent of the lender.

Although there are some similarities and overlap, a carve-out is distinguishable from a surcharge under 11 U.S.C. § 506(c)[1] or a

tax lien subordination under 11 U.S.C. § 724(b),[2] neither of which requires any advance consent of the affected lien holder. In addition, neither a surcharge nor a tax lien subordination is designed to provide any benefit to general unsecured creditors, except to the extent administrative expenses are reduced thereby.

Generally, a chapter 7 or chapter 11 trustee will try to use a carve-out for the benefit of the entire bankruptcy estate (as opposed to professionals only) to create or increase the value available to the estate. This generally is done with a focus on a particular property or properties in which a mortgage holder gives up to the estate a certain amount of its lien position upon a sale of the property or properties, by giving to the estate a set percentage, dollar amount, or combination of the two. It can also apply to a sale of all of the assets of the debtor business. Unlike the § 506(c) surcharge, a carve-out is not necessarily tied to the "reasonable, necessary costs and expenses of preserving, or disposing of such property....." It is essentially a wide-open negotiation.

Because of the recent decline in property values nationally, many mortgages and liens, particularly junior mortgages, are under-secured or unsecured. Even some first mortgages or other first lien positions are under-secured. Junior mortgage holders are often not willing to risk additional capital to protect their position from a foreclosure by a senior mortgage lender. Thus, they will simply write off the position and receive nothing. This presents an opportunity for the bankruptcy trustee to negotiate a carve-out.

As will be seen by the examples below (which represent actual cases administered by the author), the trustee needs to be extremely selective in choosing an appropriate case for a carve-out. "Historically, 95 percent of Chapter 7 cases are no-asset cases, meaning that, most of the time Chapter 7 trustees collect $60 for their efforts – the same fee they've been collecting since 1994. Meanwhile, the BAPCPA's provision that allows the court to waive the filing fee for qualified Chapter 7 debtors ..... means that trustees sometimes receive no compensation at all."[3] So trustees do not want to spend an inordinate amount of time attempting to obtain a carve-out in a low-probability scenario because such time will be uncompensated.[4] Additionally, trustees today are overwhelmed by the uncompensated requirements imposed upon them by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") and the diminished number of asset cases generated thereunder.[5] Accordingly, trustees must work as efficiently as possible to identify and act on carve-out opportunities.

The most common opportunities for carve-outs would be with mortgage holders, judgment lien holders and the Internal Revenue Service ("IRS"), although other liens (e.g., landlord liens) provide opportunities as well. Carve-outs are also obtainable out of a debtor's exemption rights.

An often overlooked area for a carve-out in both chapter 7 and chapter 11 cases concerns the commission payable to real estate agents and business brokers. This can constitute a stand-alone carve-out or a smaller carve-out within the framework of a larger carve-out with the holder of the lien on the asset(s) being sold. This is not the same as simply negotiating a reduction in the commission. If the property has no equity, a reduced commission benefits only the lien holder. If the property has slight equity, a reduced commission benefits only the individual debtor on his or her claimed exemption in the property.[6] Instead, the trustee should negotiate a carve-out where the broker or agent charges the full commission but agrees to a carve-out whereby a portion of the commission (typically 2-3%) is allocated to the bankruptcy estate. Both portions of the commission (whether paid to the bankruptcy estate or the broker) will be treated as a cost of the sale and will not be paid toward either the debtor's exemption or the lien holder's payoff. This is essentially a gift to the estate and not to the lien holder or debtor.

An often overlooked area for a carve-out in both chapter 7 and chapter 11 cases concerns the commission payable to real estate agents and business brokers.

As the trustee attempts to assess the appropriate case to attempt a carve-out, certain principals should be understood or uniformly applied. Lien holders will not be interested in doing a carve-out on a debt that the debtor has reaffirmed. If the junior mortgage lien is held by the same lender that holds the senior mortgage lien, there will be no interest in doing a carve-out, since the same lender will be doing the credit bid at the foreclosure sale. Once a lien holder is represented by a high-volume mortgage attorney, it is unlikely that any positive result will be obtained. Even with lenders with whom the author has repeatedly negotiated carve-outs, no positive response is obtained in other cases where the same lender is represented by a high-volume mortgage attorney. Those attorneys have a disincentive to see such a deal accomplished. They stand to earn fees from the lender for the following three areas of representation: (1) obtaining stay relief in the bankruptcy case, (2) the foreclosure process and sale, and (3) conducting the closing on a sale out of the lender's REO portfolio. A sale by the trustee will eliminate at least two of those fees. While this may simply be a coincidence, the author has never accomplished a single carve-out where a high-volume mortgage attorney is involved.[7] Of course, if the lender is unrepresented, it is a telltale sign that the lender has possibly written off the loan and is not expecting to receive anything, thereby providing a negotiating opportunity for the trustee.

...the trustee needs to be extremely selective in choosing an appropriate case for a carve-out.

While there are an endless number of potential carve-out categories, for purposes of this article, the author will focus on carve-outs with the IRS, junior mortgage holders, senior mortgage holders, and debtors (with respect to their exemptions).

continued on page 11

About the Author

Neil C. Gordon is the former Chair of the Bankruptcy Law Section of the Atlanta Bar Association, the current vice-president of the National Association of Bankruptcy Trustees, and a Fellow of the American College of Bankruptcy. He co-authors quarterly the *NABTalk* column "In Brief."

IRS LIEN CARVE-OUTS

The IRS procedure to foreclose a lien is expensive, time-consuming, and cumbersome. For this reason, the IRS frequently will not take action to actually enforce or foreclose its lien against a debtor's property.[8] If there would be realizable equity in a property but for an IRS lien, the Trustee should negotiate a carve-out with the IRS so the property can be sold and both the estate and the IRS can benefit.

Typically, the property will have no equity beyond the mortgage, IRS liens, and other liens, meaning that the debtor's exemption rights will not come into play. If a debtor tries to argue that their exemption attaches nonetheless, there is no case law in support of that position.[9] What follows here, and below, are examples of cases in which the author successfully negotiated a carve-out for the benefit of the estate being liquidated.

Case History No. 1 (dollar realization plus percentage):

- Debtor is sole owner of the property
- Property value: $200,000
- Mortgage(s): $100,000
- IRS lien against property: $250,000
- **Carve-out:** Trustee opposes stay relief or reimposes stay, sells the property, and the bankruptcy estate retains the first $10,000 of the net sale proceeds, with the balance split equally between the IRS and the bankruptcy estate
- Property sells for $200,000
- Less:
  - RE commission: $12,000
  - Property taxes: $3,000
  - Mortgage payoff: $100,000
  - Transfer taxes and other costs: $1,000
  - Net sale proceeds: $84,000
- **Result:** Estate gets $47,000 ($10,000 + $37,000); IRS gets $37,000

(Note that if the realtor had agreed to a separate carve-out of two percent of the commission for the bankruptcy estate, the IRS still would have received the same $37,000, but the bankruptcy estate would have received an additional $4,000, bringing its total to $51,000.)

Case History No. 2 (dollar realization plus percentage): Same facts as #1 except –

- Debtor co-owns the property with a non-debtor spouse
- IRS lien is against spouse's interest only
- Debtor claims a homestead exemption or other property exemption of $10,000
- **Carve-out:** Trustee will oppose stay relief or reimpose stay, sell the property, and do the following:
  - Pay first $10,000 of net sale proceeds to the estate
  - Divide balance 50/50 with spouse's one-half paid to the spouse subject to the IRS lien (meaning essentially it is paid directly to the IRS)
  - Debtor's one-half is paid to the bankruptcy estate subject to debtor's exemption rights
- Sale proceeds of $84,000
- **Result:** $47,000 is paid to the Trustee (first $10,000 + $37,000), subject to debtor's $10,000 exemption, and the estate nets $37,000; $37,000 is paid to the IRS on spouse's behalf

Case History No. 3 (percentage only):

- IRS has a $1.1 million lien on all assets of the debtor
- The assets are worth $300,000 on a going concern basis and only about 10-15% of that amount on a liquidation basis
- **Carve-out:** Trustee will obtain court authority to operate the business[10] and will sell the assets in return for a carve-out of 30% of the gross sale proceeds on behalf of the estate
- Assets sold for $300,000 – direct sale, no broker
- **Result:** IRS receives $210,000 and bankruptcy estate receives $90,000; Trustee commission is $18,250[11]

SECOND MORTGAGE CARVE-OUTS

Generally, when a senior mortgage is large and the holder seeks stay relief to proceed with foreclosure, the junior mortgagee is unwilling to protect itself due to the lack of clear equity above the senior mortgage position (for fear of throwing good money after bad). Instead, the senior mortgagee proceeds with foreclosure, credit bids its payoff, and junior liens are wiped out.

The trustee can change this into a win-win situation by negotiating a carve-out with the junior mortgagee. This would require the trustee to oppose any stay relief motion filed by the senior mortgagee or seek reimposition of the stay if the stay relief motion has already been granted, sell the property, pay off the senior liens, and preserve value for the estate according to whatever terms are negotiated.

Case History No. 1 (percentage only):

- Property value: $400,000
- First mortgage payoff: $320,000
- Second mortgage payoff: $100,000
- **Carve-out:** Trustee re-imposes the stay on first mortgagee, sells the property, and divides the net sale proceeds equally with the second mortgage holder
- Property sells for $396,500
- Less:
  - First mortgage payoff: $312,000
  - Real estate commission: $23,790
  - Taxes: $3,500
  - Other costs: $1,000
- **Result:** Estate receives $28,105, being one-half of the net sale proceeds, and the second mortgage holder receives the same amount

Case History No. 2 (dollar realization plus percentage):

- Property value: $500,000

- First mortgage payoff: $420,000
- Second mortgage payoff: $185,000
- **Carve-out:** Trustee obtains reimposition of the stay against the first mortgagee, sells the property, and of the net sale proceeds gets the first $20,000 for the bankruptcy estate and splits the balance equally with the second mortgagee
- Property sells for $490,000.00
- Less:
  - First mortgage payoff: $420,000
  - Real estate commission: $30,000
  - Taxes: $5,000
  - Other costs: $1,000
- **Result:** Estate receives $27,000 (first $20,000 + one-half of $14,000 balance), and second mortgagee receives $7,000 (but would have received zero dollars if foreclosed)

Variation No. 3 (percentage only – not actually employed by the author):

- Same facts but a straight 50/50 split is negotiated as the carve-out
- **Result:** $34,000 of net sale proceeds would be divided equally, with $17,000 paid to the bankruptcy estate and $17,000 paid to the second mortgagee

Variation No. 4 (subsequent balance – not actually employed by the author):

- Same facts except the second mortgagee gets the first $10,000 and the estate gets the rest
- **Result:** $34,000 of net sale proceeds would be divided $10,000 to the second mortgagee and $24,000 to the estate (a lot of risk is placed on the trustee in this type of carve-out because if the property had sold for $460,000 or it took a long time to sell it and the first mortgage had grown considerably, the estate would have received little to nothing)

Variation No. 5 (do not pursue):

- Property value: $150,000
- First mortgage: $120,000
- Second mortgage: $50,000
- **Result:** In this scenario there is insufficient value to justify wasting the time attempting to negotiate a carve-out. By the time costs of sale are taken into consideration and some division of the equity above the first mortgage allocated to the second mortgage, there is very little left for the bankruptcy estate; at the same time, the estate bears a lot of risk and the trustee may have to spend a great amount of time trying to market and sell the property as the first mortgage balance continues to grow. Also, the tighter the situation, such as this scenario, the more likely the first mortgagee will be pressing for stay relief, forcing the trustee into court repeatedly before the property can be sold and resulting in all benefit, if any, going to the professionals and none to unsecured creditors.

Variation No. 6 (do not pursue):

- Same facts as any of the above examples, except first and second mortgages are held by the same lender
- **Result:** Do not bother to attempt to negotiate a carve-out because the lender can always foreclose the senior mortgage and take the property back; it has very little incentive to work out anything on its junior position

Variation No. 7 (do not pursue):

- Same facts as any of the above examples, except Debtor is reaffirming on the mortgages
- **Result:** Do not bother attempting a carve-out as the lender has no incentive to give up anything and will not consider a carve-out

Variation No. 8 (do not pursue):

- Same facts as any of the above examples, except the junior mortgage holder is represented by a high-volume law firm
- **Result:** The author recommends against pursuing; however, if there is a trustee who successfully obtains a carve-out with such an attorney, the author would like to hear from you

FIRST MORTGAGE CARVE-OUTS

Successfully negotiating a carve-out with the first mortgagee is not likely to happen very often in a typical residential, single-family property. However, when the property at issue is a commercial property or an extremely expensive residential property, the lender will generally have a special assets officer or other specialist in charge of the account who can actually make a reasoned decision on behalf of the lender.

This type of carve-out is usually successful when the lender has a specific amount it is able to accept below its payoff (typically because the loan has already been written down to that extent) and the trustee believes that the property can be sold for an amount in excess of that minimum plus costs of sale. In this type of carve-out, there can be a lot of risk to the trustee because of the amount of work involved and time pressures that are usually imposed by the senior lender, but the payoff can be big, justifying the risk in the appropriate case.

Case History No. 1 (dollar realization):

- Debtor is sole member of an LLC
- The LLC owns a small commercial property
- The only debt of the LLC is the mortgage on that property of $1.2 million
- Trustee values the property at $1.25 to $1.3 million and has been contacted by a potential buyer
- Trustee is able to administer the LLC's asset as property of the bankruptcy estate[12]
- **Carve-out:** Lender agrees to accept $1,050,000 if trustee can close a sale of the property within 120 days and tender that amount; estate gets any excess
- Trustee succeeds in selling within 120 days
- Sale price: $1,250,000 (Trustee could have gotten more if time was not such a punitive factor.)

- Less:
  - First mortgage: $1,050,000
  - RE commission: $75,000
  - Taxes: $7,000
- **Result:** Estate retains $118,000; debtor's creditors paid in full; and trustee commission is $60,750[13]

Case History No. 2 (fixed percentage):

- Debtor is an LLC which owns a small commercial property
- There are three mortgages on the property in the following order of priority: $2.9 million, $180,000 and $100,000; the value is likely insufficient to fully pay off the first mortgage
- Trustee opposes the stay relief motion of the first mortgagee, forcing it to divulge its recent appraised value ... $2 million
- **Carve-out:** Trustee negotiates with the first mortgagee for the estate to receive 10% of the gross sale proceeds, inclusive of the real estate commission of 6%
- **Carve-out #2:** The sole realtor in the transaction agrees to a separate carve-out whereby half of the of the realtor's 6% commission will go to the bankruptcy estate
- Trustee has received numerous offers under $2 million but has finally negotiated with an adjoining property owner for a sale price of $2.635 million; junior lien holders consent to the sale because otherwise they would receive nothing in the foreclosure sale of the senior lien holder; under these facts, they both have an opportunity to receive a meaningful distribution as an unsecured creditor
- **Result:** Bankruptcy estate gets a total of 7% of the gross sale proceeds, or $184,450; and trustee's maximum commission would be $102,300[14]

EXEMPTION CARVE-OUT

Often the debtors cannot afford to retain and pay for their homestead and intend to surrender it. If the lender forecloses, rarely are there any excess proceeds available to pay the debtor on the exemption claim. Most debtors recognize that working with the trustee can preserve a chance at receiving some exemption funds. The trustee on the other hand is not willing to accept all of the risks without some tangible reward. Therefore, a carve-out can generally be negotiated where debtor agrees to a reduced exemption or to accept a percentage of the net sale proceeds up to an agreed amount of exemption value. Additionally, the debtor will be unable to oppose stay relief (successfully) without the trustee taking an interest in the property. If the trustee works a carve-out with the debtor on the debtor's exemption claim, the court will usually allow the trustee some time to attempt a sale of the property. That also can benefit the debtor in affording the debtor more time to relocate.

Some trustees document these arrangements by having the debtor amend their scheduled exemptions "with prejudice" and maintain separate documentation that is otherwise unfiled with the court to reflect the agreement. Other trustees have the debtor actually sign an agreement regarding the carve-out at the meeting of creditors.[15]

Debtor and Trustee can reach any type of agreement. The debtor can agree to accept the first $X and waive the balance of the exemption; the debtor can agree to split the exemption equally with the trustee; the debtor can agree that the trustee receives the first $X of the exemption to cover the trustee's estimated costs with some division of the balance of the exemption; or the parties can agree to any other form of carve-out.

CONCLUSION

The foregoing case histories and variations are merely examples of carve-outs that can be achieved to benefit the bankruptcy estate. However, the trustee should not assume an inordinate amount of risk unless the potential rewards are considerable. The trustee must identify the appropriate case to attempt a carve-out, or the trustee will find that much time has been wasted chasing a carve-out with a party who is not interested in such an arrangement, or which does not benefit the estate.

As the real estate market continues its downward trend, more and more properties are losing value and are worth less than the amount of the mortgage indebtedness. Many times the value will fall even below the payoff of the first mortgage. When that is the case, the trustee should not waste time negotiating carve-outs with junior mortgage holders, the IRS, or the debtor. Accordingly, the trustee needs to determine the property's value and obtain accurate payoff information before expending the time and effort needed to successfully achieve a carve-out that will actually benefit the bankruptcy estate. On the other hand, because so many second mortgage holders are now writing off their position, they understand that any money received from the trustee is better than the zero amount available when the senior mortgagee forecloses, making them more open to carve-out suggestions by the trustee and giving the trustee more leverage in the negotiation.

The more a trustee works in the area of carve-outs, the more efficient he or she will become in selecting potential candidates for a carve-out and successfully implementing them.

Footnotes:

[1] Section 506(c) provides: "The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property."

[2] Section 724(b) provides in pertinent part: "(b) Property in which the estate has an interest and that is subject to a lien that is not avoidable under this title (other than to the extent that there is a properly perfected unavoidable tax lien arising in connection with an ad valorem tax on real or personal property of the estate) and that secures an allowed claim for a tax, or proceeds of such property, shall be distributed – (1) first to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is senior to such tax lien; (2) second to any holder of a claim of a kind specified in section 507(a)(1) (except that such expenses, other than claims for wages, salaries, or commissions that arise after the date of the filing of the petition, shall be limited to expenses incurred under chapter 7 of this title and shall not include expenses incurred under chapter 11 of this title), 507(a)(2), 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, to the extent of the amount of such allowed tax claim that is secured by such tax lien....."

[4] *See* "GAO: BAPCPA Increases Trustee Workload, But Not Pay," Bankruptcy Court Decisions, Vol. 50, No. 7 (August 12, 2008).

[5] 11 U.S.C. § 326(a). It provides: "In a case under chapter 7 or 11, the court may allow reasonable compensation under section 330 of this title of the trustee for the trustee's services, payable after the trustee renders such services, not to exceed 25 percent on the first $5,000 or less, 10 percent on any amount in excess of $5,000 but not in excess of $50,000, 5 percent on any amount in excess of $50,000 but not in excess of $1,000,000, and reasonable compensation not to exceed 3 percent of such moneys in excess of $1,000,000, upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims."

[6] *See* "BAO: BAPCPA Increases Trustee Workload, But Not Pay," Bankruptcy Court Decisions, Vol. 50, No. 7 (August 12, 2008).

[7] *See* 11 U.S.C. §§ 522(d)(1) and (d)(5) for the applicable federal exemptions available to an individual debtor for homestead or other real estate. Under 11 U.S.C. § 522(b), states may opt-out of the federal exemption scheme or allow individual debtors to elect which set of exemptions, state or federal, to apply. The result has been widely divergent exemption amounts available to individual debtors from state to state.

[8] *See, e.g.*, "Couple Lose Home, But May Yet Win—Feds Seek Sanctions, Say Countrywide Abused Bankruptcy Laws," Atlanta Journal-Constitution (March 30, 2008), quoting Howard Rothbloom, an Atlanta debtor's attorney, as follows: "The regular course of conduct for these lenders is to do it wrong." That is the author's view of the high-volume counsel to these lenders as well.

[9] *See* http://www.IRS.gov/irm/part5/index.html. See sections 5.10 and 5.11. Note the distinction between tax levy and judicial sale.

[10] *See, e.g., In re Moyer*, 39 B.R. 211 (Bankr. N.D. Ga. 1984).

[11] *See* 11 U.S.C. § 721. This code section provides: "The court may authorize the trustee to operate the business of the debtor for a limited period, if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate."

[12] *See* 11 U.S.C. § 326(a).

[13] *See, e.g., In re Albright*, 291 B.R. 538 (Bankr. D. Col. 2003).

[14] *See* 11 U.S.C. § 326(a). Not in every carve-out will it be possible to claim the maximum commission due to the economics of the case and the desire to still make a meaningful distribution to the general unsecured creditors. However, the maximum commission was sought, awarded, and paid in this example.

[15] *See* 11 U.S.C. § 326(a), which provides the sliding scale formula for determining a trustees' maximum commission.

[16] Pursuant to 11 U.S.C. § 341(a), a meeting of creditors is conducted in every bankruptcy case filed under title 11.

Policy for Approving the Filing of Amicus Briefs by NABT

Creation of Amicus Committee

Each year, the President will select an amicus committee, consisting of not less than three, nor more than five members of the Association. The committee shall include at least one member of the current board of directors, and shall also include the current contributing editor of NABTalk who is responsible for the recent case articles.

Requests for an amicus brief:

An amicus brief may be requested in any case by any member of NABT. The request shall be made to the chairman of the amicus committee, who will then circulate the request to all members of the committee. Each request shall not be considered unless it contains the following information:

1. The style of the case, and the state, district, and circuit involved
2. The name of the trustee involved
3. A brief description of the underlying facts of the case
4. The legal issue to be briefed by NABT
5. The national significance of this issue to all trustees
6. The name and address of the person who will be preparing the brief
7. The nature and amount of any fees or expenses which will be requested from NABT
8. The timetable for the filing of briefs

Consideration by the Committee:

The amicus committee shall consider all proper requests as soon as practicable, and may schedule conference calls to consider any request. The committee will make one of three recommendations to the President as follows:

1. Approve the request and recommend the filing of a brief. In this case the President has the option of approving the request (which shall operate as an approval by NABT for the filing of the brief pursuant to the terms contained in the request), or vetoing the recommendation (in which case the matter will be put on the agenda for the next full board meeting)
2. Recommend that NABT decline to intervene in the case. In this case, the amicus will not be approved unless the full board, on motion made by any director, votes to approve the filing of a brief.
3. Recommend that the full board consider the matter at the next board meeting.

Factors to be Considered by the Committee:

In its consideration of each request, the amicus committee shall consider, among all relevant factors, including (but not limited to) the following:

1. Whether the requesting party is a member in good standing with NABT
2. Whether the issue involved is legal, or whether it is fact-sensitive
3. Whether the pleadings are "clean" and whether there are any procedural impediments to a determination of the legal issue
4. Whether the legal issue is of national significance to all trustees
5. Whether the decision will hinge on state law, or other matters which may only be relevant to trustees in certain districts
6. Whether the fees and costs being requested are an appropriate expense for the Association. (If the budget does not provide for expenditures for filing amicus briefs, the committee shall consult with the treasurer before acting on any request which involves the payment of fees or expenses.)

Reports to the Board:

The Committee will make a report to the full board at each board meeting concerning all requests made and considered since the previous meeting.

Neil C. Gordon is a partner in the Atlanta office of Arnall Golden Gregory LLP. He served for two years as a law clerk in Atlanta for United States District Court Judge Robert L. Vining, Jr. followed by 36 years in private practice, with the last 33 years being exclusively in the areas of bankruptcy, business reorganization, fraud investigations, and creditors' rights. Mr. Gordon represents trustees and receivers throughout the country, including in Delaware litigation that recently settled for approximately $40 million. Mr. Gordon chaired the Bankruptcy Law Section of the Atlanta Bar Association from 1992 to 1993, and has been a panel trustee since 1994, and also serves as a SEC Receiver. Mr. Gordon was first elected to the Board of the National Association of Bankruptcy Trustees in 2000. He has held every office including President (2011-2012) and for eight years chaired its Amicus Committee. Mr. Gordon has authored or co-authored over 70 scholarly articles and book chapters on bankruptcy law related topics and made over 100 seminar presentations throughout the country. He served for three years ending in April 2015 as the Co-Chair of the ABI's Legislation Committee. He is a Lifetime Member of the ABI and the NABT President's Circle, a Master of the Bench in the W. Homer Drake, Jr., Georgia Bankruptcy American Inns of Court, a Full Member of the National Association of Federal Equity Receivers, and a Fellow of the American College of Bankruptcy.

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Lawless, Robert M

From: Bradley Halberstadt <brad@szjlaw.com>
Sent: Thursday, July 27, 2017 11:50 AM
To: ConsumerCommission@abiworld.org
Subject: Another Chapter 13 Topic for Consideration

There is a troublesome chapter 13 topic dividing the bankruptcy courts that I do not see on your list - the entitlement to an administrative expense claim for damages resulting from the breach of an assumed lease. The 6th Circuit is the only Circuit that has a reported decision (Parmenter) - but the approach by the lower courts is fairly evenly split. In many cases, debtors propose to make lease payments directly to creditors under the assumed lease - but there are often remaining amounts due under the lease during the chapter 13 plan that result from early termination or excess mileage/unpaid payments at maturity. Some courts grant administrative expense claims, some suggest dismissal is appropriate, some suggest it should be collected "outside" the plan, etc. There are questions over whether the remaining liability is discharged, etc. Quite a can of worms……. As long as the patient is on the table, it would be helpful to provide a fix to this problem as well. Let me know if you would like to discuss further. Thanks!

Bradley J. Halberstadt
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Consumer Reform Commission

12/1/17

Bruce A. Harwood (Bankr. D. N.H.)

Re: 60-month "hard stop" for chapter 13 plan duration

Problem: chapter 13 debtors confirm a 60-month plan. Late in the plan term, issues arise rendering completion of payments impossible by month 60, but possible thereafter within a time frame acceptable to the debtors (and perhaps all creditors and the chapter 13 trustee).

But no fewer than three Bankruptcy Code sections prohibit a plan from exceeding 5 years in length:

1322(d)(1)and (2): "the court may not approve payments over a period that is longer than 5 years"

1325(b)(4)(A)(ii), which actually provides that the applicable commitment period shall be "not LESS than 5 years" for above-median debtors, but which is construed to support a 5-year maximum; and

1329(c), which prohibits the court from approving a payment period "that expires after five years after" the time the first payment under the originally confirmed plan was due.

> As an aside, there is a split of authority on when the 5-year period commences. Some courts, including the one circuit court to address the issue, hold that the period commences on the date the first post-confirmation plan payment is due. West v. Costen, 826 F.3d 1376, 1378 (4th Cir. 1987). Others—and I think this is the better view—hold that the period runs from the first date that a debtor is required to make a plan payment, regardless of when the plan (or any amended plan) is confirmed. See e.g. In re Evans, 183 BR 331 (Bankr. S.D. Ga. 1995). The Commission might consider clarifying or resolving this issue by legislative amendment. The fewer statutory uncertainties and ambiguities, the better.

In any event, 5 years is a long time, and many things can happen during the course of a confirmed plan that can affect the debtor's ability to maintain current

payments, including loss or interruption of employment; significant increases in post-petition mortgage payments; changing of mortgage servicers resulting in mortgage payment accounting disputes, or even an increase in the chapter 13 trustee's administrative fee. Most of the time, those events will hopefully occur in time for the debtor to modify the plan under Section 1329 to deal with them prior to the end of the plan term.

Perhaps all too frequently, however, the changes arise too late in the plan term to cure them in the time remaining, given Section 1329(c)'s 5-year limitation. In those instances, inability to cure the defaults within the 5-year term is grounds for dismissal of the case. A significant number of courts hold that the 5-year limitation is a hard stop or a drop-dead date. Those courts rely on the absence of any statutory provision permitting extension of the 5-year term, and the risk of a slippery slope permitting payment extensions to run years beyond the 5-year limitation. See e.g. In re Grant, 428 BR 504 (Bankr. C.D. Ill. 2010). This is perhaps ironic, since the legislative history of chapter 13 suggests that Congress imposed the 5-year limitation to prevent debtors from being forced into "involuntary servitude" for the 7 to 10-year periods that sometimes resulted under the Bankruptcy Act. Id.

The 5-year limitation spurred some creative attempts to circumvent it. In one district, a practice developed where if a debtor defaulted on a plan in say year 2, the payments made up to the default would be recharacterized as a lump sum "contribution" to the plan, so that the lump sum would be considered the first payment, and the 5-year period would run from the date the modified plan was confirmed. The 10th Circuit BAP rejected this device in Christensen v. Black (In re Black), 292 B.R. 693 (10th Cir BAP 2003).

There is one circuit level opinion—issued this year—approving of cure payments made outside the 5-year period: Shovin v. Klaas (In re Klaas), 858 F 3d 820 (3rd Cir. 2017). The Klaas court cobbled together language from Section 1328, which directs a court to issue a discharge if the debtor has completed "all payments under the plan" without expressly requiring that all payments be made within 5 years—though that seems explainable by the fact that Section 1328 applies to plans that perform in fewer than 5 years (e.g. 3 years for below median debtors). The Klaas court developed a series of equitable factors to be applied in

deciding whether to permit a grace period to cure any defaults, including whether the debtor substantially complied with the plan; the feasibility and length of time of the proposed cure, and the degree of prejudice to creditors. In many (if not all) cases, if the debtor proposes such a cure and no creditors object, permitting a cure outside the 5-year window and allowing the debtors the benefit of a confirmed chapter 13 plan would be preferable to dismissal or conversion to chapter 7. But in the age of Law v Siegel, congressional action is perhaps the only way to accomplish that result. Adding an "exceptional circumstances" Klass-type exception to ameliorate the 5-year hard stop dilemma would at least pave the way for those courts who wished to permit flexibility to do so without fear of running afoul of the plain language of the statute. Alternatively, amending the Code to provide for a 4-year plan duration plus up to an additional year if necessary to cure defaults arising post-confirmation, could provide the extra runway that some debtors may need without actually exceeding the 5-year limit applicable under current law.

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May 4, 2017

by email
ConsumerCommission@abiworld.org

Hon. William H. Brown (Ret.)
The ABI Commission on Consumer Bankruptcy

Re: Statement for Consideration
First Public Meeting, May 6, 2017

Dear Judge Brown,

Please submit this Statement to the ABI Commission on Consumer Bankruptcy at the upcoming meeting on May 6, 2017. The following are my comments to the ABI Commission "recommending improvements to the consumer bankruptcy system that can be implemented within its existing structure." These suggestions are mine and not those of any consumer bankruptcy organization. I have practiced consumer bankruptcy, primarily from the debtor side, for most of my 37 years of practice of law. My personal resume is attached hereto as Exhibit "A."

I offer no scientific support below for my views, just my observations after personally filing or overseeing the filing of about 1,200 consumer cases over the past 30 years or so.

The below suggestions are primarily procedural in nature and do not include the big questions such as whether the debtor should be able to modify his

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home loan, and the ridiculous notion of paying the auto loan in full no matter what the auto is worth.

A. Means Test

The means test set forth in section 707(b) should be scrapped entirely.

1. The means test does not accomplish anything. While it purports to determine when a chapter 7 is an abuse, the only cases resulting in dismissal as an abuse under section 707(b) are cases that would have resulted in dismissal under pre-BAPCPA law anyway. But it adds a lot of work to preparing the schedules and giving the proper advice to the prospective debtor.

2. The means test *form* is impossible to complete accurately without a sophisticated computer forms system. This prevents people from filing their own chapter 7 case and send many people to so-called "paid preparers" who have the computer programs.

B. Credit Counseling

The requirement that an individual receive credit counseling before filing any petition should be scrapped. Virtually 100% of the time we file any individual chapter anything, the counseling is completed within hours or even minutes before the petition is filed.

C. Attorney's Fees in Chapter 7

Attorneys should be allowed to collect attorney's fees after the chapter 7 case is filed. Many attorneys would take a smaller down payment if they could collect the remainder of the fees later. This would reduce the number of chapter 13s filed since many chapter 13 cases are "fee only" cases, that is, the only creditor paid postpetition is the attorney. This would also reduce the number of pro per chapter 7s because people would be more likely to find an attorney they could afford.

D. Eligibility Limits in Chapter 13

I have personally filed about 150 individual chapter 11 petitions since the beginning of 2012. My office has been successful in getting a plan confirmed in about half of the cases that are not still pending. I estimate that half of those petitions would have been filed as a chapter 13 except that the client was over the

liability limits for eligibility for chapter 13 and thus filed a chapter 11. The costs in terms of attorney's fees for individual chapter 11s is several times more than chapter 13.

E. Treatment of Student Loans in Chapter 13

Student loans are unsecured debts and are nearly always non-dischargeable. Yet the loan is not a priority and thus may receive only a pro-rata share of the plan payment dedicated to unsecured creditors. The result is that only a portion of the debt is paid under the plan and when the plan is completed, three to five years later, the debtor owes more to the lender than he owed when he filed the case. This is intolerable.

F. Student Loans - Modify the *Brunner* Test

The third factor of the so-called *Brunner* test is that the debtor establish, when trying to show that repayment of the loan will result in substantial hardship to her or her family, that she tried in good faith to repay the loan. The debtor's efforts to repay the loan has nothing to do with whether repayment is a substantial hardship. The Brunner test is out-dated.

Ideally student loans should be dischargeable after a certain number of years, perhaps ten. If the debtor has no assets and his case is not an "abuse," the discharge should include student loans to give the debtor a meaningful chance at rejoining society without the loan collectors calling every day. This should be so at least in chapter 13 cases.

G. Projected Disposable Income in Chapter 13

The means test should not be a measuring stick for determining whether or not a chapter 13 debtor is paying their "net disposable income" into the plan, or as I tell my prospective clients, at least as much as they can afford." It is ridiculous to think that the means test, especially since it begins with the backwards looking "current monthly income." It is my perception that the requirement of using the means test to determine “projected disposable income” is widely ignored.

H. Employment of Special Counsel in Chapter 13

The courts seem to be split about whether special counsel in a chapter 13 case must be “employed” by the chapter 13 estate and/or debtor. That should be clarified.

I. The Automatic Stay in Subsequent Individual Cases

Some judges still take the position that the automatic stay dies 30 days after a second petition is filed within one year – but only as to the estate. I personally agree that that is what the statute says and is the proper reading but that should be clarified. Also, the debtor should be given a little more leeway in asking the court to extend the stay. Our courts are pretty casual about extending the stay but only if there is a hearing within the first 30 days and never after.

J. Converting Cases in Bad Faith

I am among the believers that the right to convert a case from one chapter to another is unconditional except as the specific conditions set forth in the code, i.e, the case hasn't already been converted, the debtor qualifies for the next chapter etc. *Marrama* has caused considerable confusion about the right to convert if the debtor has engaged in "bad faith." (Those words should be stricken from the code and every published case on everything – or Congress should give us a definition.)

K. Exemptions

Clarify who has the burden of proof when objecting to an exemption, the debtor or the objecting party. Clarify whether bad faith (or equitable estoppel) can be a basis for denying the debtor's exemption claim.

L. Using Collateral Estoppel to Prove Non-Dischargeability in the Subsequent Bankruptcy Case

I have been involved in three or four of these issues in the past year. The debtor and creditor fight long and hard in state court and get a lengthy state court ruling. The debtor then files a petition. The state court judgment never seems to say exactly what the bankruptcy court requires to establish that the judgment fits into section 523(a). There should be a totality of the circumstances test or at least some clarity. It is not uncommon that the judgment says at great length that the debtor lied and cheated and stealed, willfully, intentionally, fraudulently etc etc. The bankruptcy judges are requiring (based on court of appeals decisions) that the judgment mimic the words of the bankruptcy code including pegging the amount of damages to the specific conduct that the bankruptcy code says is non-dischargeable. Creditors with these types of judgments are stunned to find out that they must file something with the bankruptcy court much less possibly re-litigate it in bankruptcy court.

As I have said Judge Brown, I would love to be involved in this commission. It is a great idea. Let me know.

Very truly yours,

/s/ M. Jonathan Hayes

Lawless, Robert M

From: Hofmann, Lauren J <lauren.j.hofmann@jpmchase.com>
Sent: Tuesday, August 22, 2017 11:58 AM
To: 'ConsumerCommission@abiworld.org'
Cc: Fox, Avi; Clarke, Nicole M; Franchini, John J
Subject: Comments for ABI Commission on Consumer Bankruptcy
Attachments: ABI Committee topics.pdf

Commissioners and Committee Members - Please consider the following comments as you address the attached list of topics.

Committee On Case Administration and the Estate

Roles and Responsibilities of U.S. Trustee

In addition of the Executive Director providing annual remarks at the NACTT Conference and other forums, suggest issuance of a quarterly information newsletter describing consumer protection activity, recent civil enforcement in consumer matters, criminal enforcement, and go-forward watch items or areas of focus/interest. This would be a high level report that would not provide the same level of detail as the Annual Report of Significant Accomplishments (which provides a look back but not a look forward).

Systems Issues -ePOC

As you are aware, an increasing number of United States Bankruptcy Courts have implemented technology that permits users to prepare and file an electronic POC and certain other related documents via population of a web-based form ("ePOC"). The ePOC/open portal system does not require credentials to complete electronic filing of certain documents – POCs, Amended POCs, Withdrawal of Claims and Rule 3002.1 Claim Supplements. In a few jurisdictions ePOC is mandatory for limited credential filers, in others it is strongly encouraged for all POC filers, and in several others electronic filing is strongly encouraged – with filers having the option to choose between ePOC and the Case Management/Electronic Case Filing system.

The ePOC system requires the filer to complete fields that then populate a virtual POC form in lieu of uploading a PDF copy of the POC. Upon submission, the ePOC system generates a POC containing the information entered that is filed on the claims register for that BK case. The following issues may arise with use of the ePOC system:

- Information may be incorrectly keyed into the system ("fat fingering");
- Truncation of creditor names and information in other fields due to character limitations in ePOC (as well as inability to add additional information outside the blanks – e.g., adding a Vin # to further identify the collateral in the secured claim box) – this may cause confusion or make the POC unclear;
- The value of any quality control review of the hardcopy POC is diminished because the signer/filer must manually enter the information into ePOC instead of uploading the hardcopy POC. Additionally, it is difficult to perform a quality review on the POC created screen by screen in ePOC.

The ePOC technical instructions state - "Do not upload a completed Proof of Claim form as an attachment to this filing". However, many creditors continue to upload a hardcopy POC to avoid, or minimize the risks associated with, the issues noted above. Please consider recommending a change to the ePOC system to permit creditors to forego manual population of the virtual POC form, and instead upload a PDF copy of the POC (similar to Case Management/Electronic Case Filing). *Note – ePOC/open portal does permit upload of a PDF for Withdrawal of Claims and Rule 3002.1 Claim Supplements. Accordingly, the POC upload capability would align with submission of these other documents.

Committees on Chapter 7 and Chapter 13

Surrender (Chapter 7)

Recommend automatic stay relief across all jurisdictions following surrender – eliminate need to file a motion to obtain a comfort order to sell the collateral and apply the sale proceeds.

Credit Reporting and Bankruptcy (Chapter 7 and Chapter 13)

A third-party who is not an obligor on the loan or account may have rights under state law to include the account or collateral in BK. E.g., accounts where a Customer's spouse files BK and they live in a community property state; instances where state law gives a boyfriend/girlfriend living at a property equitable rights even when only the boyfriend is on the mortgage loan. E.g., - John and Becky Smith live in Arizona, a community property state. John has a credit card in his name only. Becky is not on the Card as an obligor or an authorized user. Becky files for Chapter 7 BK protection and includes the John's information on Schedule H, and John's Card on Schedule F. Becky receives a discharge; John receives a "phantom discharge".

Metro II provides Guidance on the following:

How should an account be reported when one borrower filed Bankruptcy Chapter 7 or 11 and the other borrower did not? [Provides specific coding guidance]
and
How should an account be reported when one borrower filed Bankruptcy Chapter 12 or 13 and the other borrower did not? Answer: When a Bankruptcy Chapter 12 or 13 is filed by one borrower and there is also a non-filer associated to the account, both may be protected by an automatic stay. The non-filer may be protected through the completion of the plan. Therefore, the non-filer should be terminated from the account until the plan is completed.

However, there is no express guidance on how to handle the scenario where a third party (not on the account at all as an obligor) includes the account or collateral in his/her BK. The approach in Chapter 13 cases must take into account that the third-party may have the right to cure and maintain and is protected by the stay. Please provide recommendations on handling – ideally recommendations that could be submitted to the Metro II Advisory Committee.

Secured Claim Matters (Chapter 7 and Chapter 13)

Provide recommendations on a best practices approach for determining when to amend a previously filed claims based upon postpetition payments or credits outside the BK process, with specific reference to whether (i) materiality is an appropriate factor (e.g. - $.05 balance reduction on a $300 claim) and (ii) timing is an appropriate consideration (e.g., prior to plan confirmation vs. after plan confirmation; prior to discharge vs. post-discharge).

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