AMERICAN BANKRUPTCY INSTITUTE

2019 Midwest Regional Bankruptcy Seminar

ABI Consumer Commission Final Report — Committee on Chapter 13

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CONCURRENT SESSION

2019

Final Report of the ABI Commission on Consumer Bankruptcy

Excerpt

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AMERICAN BANKRUPTCY INSTITUTE

2017~2019

FINAL REPORT AND RECOMMENDATIONS

Final Report of the American Bankruptcy Institute's Commission on Consumer Bankruptcy

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The Final Report of the ABI Commission on Consumer Bankruptcy for improvements to the consumer bankruptcy system was made public on April 11, 2019. The full report is available free by download from the American Bankruptcy Institute's website, www.abi.org. The following materials from the Report explain the creation and charge of the Commission, as well as its procedures in deliberating and reaching consensus on its recommendations. Summaries of the recommendations are included, which are found in the bold boxes of the full Report, and reference should be made to that Report for discussion and reasons for the Commission's recommendations. Reprinting and use of this material in this seminar is by permission of the American Bankruptcy Institute.

Acknowledgements

The Commission on Consumer Bankruptcy received funding from the Endowment for Education of the National Conference of Bankruptcy Judges and the H.N. Schnelling Endowment Fund of the American Bankruptcy Institute. The American Bankruptcy Institute provided the Commission with staff assistance. The Commission thanks these organizations for their support. The report does not represent the views of its funders or the American Bankruptcy Institute.

The Commission thanks the fifty-one persons who served either on the Commission or one of its committees. The Commission appreciates the technical assistance and institutional perspectives of the two government officials who served ex-officio. The Commission is also grateful to all of the persons who spoke at our public meetings or who wrote to us with comments about needed reforms in the consumer bankruptcy system. Finally, the Commission extends a special appreciation to Ed Flynn, a consultant with the ABI who provided several quantitative analyses to the Commission to inform its discussions.

Foreword

A. Commission Creation & Charge

Creation. The Bankruptcy Code is over forty years old. Its last major amendments, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, are fourteen years old. Changes in the bankruptcy law come slowly. Changes in American society have happened rapidly during those years.

According to Federal Reserve and Census data, the country's population increased by 46% during the past 40 years, while, after adjusting for inflation, mortgage debt grew by 238%, and consumer credit grew by 256%. In 1978, the median home price was $218,000 in inflation-adjusted dollars (or $58,300 in 1978 dollars) as compared to $325,000 in 2018.

Even since the 2005 amendments, there have been large social and economic shifts. For one, the country experienced one of its deepest financial crises in the Great Recession. The Affordable Care Act brought massive changes in health-care finance. As a symbol of how Americans' use of technology has rapidly shifted, consider that, in 2005, Blockbuster Video was only one year past its peak employment level, and video stores have all but disappeared in 2019. In 2005, the most prevalent mobile devices were keypad-based flip phones. Student loan debt was small enough that it was not part of the Federal Reserve's monthly statistical release of consumer debt. The first release of Bitcoin was still four years into the future. The whole financial technology or "fintech" industry had yet to develop.

The amount of debt Americans hold has increased, how they incur that debt has changed, and the types of problems that debt can create have evolved. The technological changes also have transformed how Americans find information about their legal options and professional services available to them. These same technologies have changed how bankruptcy professionals work and how courts operate.

Shortly before he became president-elect of the ABI in April 2016, Judge Eugene Wedoff approached Samuel Gerdano, ABI's executive director, about the possibility of ABI sponsoring a commission on consumer bankruptcy to propose reforms. The model for such a commission would be the ABI's successful Commission to Study the Reform of Chapter 11. The ABI convened an exploratory committee to consider the idea, and that committee— composed of Wedoff and Gerdano as well as Judge William Brown, Ariane Holtschlag, Richardo Kilpatrick, Professor Lois Lupica, and Ronald Peterson, met two months later.

The exploratory committee concluded both that an examination of consumer bankruptcy was timely and that ABI was in the best position to advance it. The committee also determined the project should be limited to a consideration of discrete issues arising in consumer bankruptcy cases under chapters 7 and 13, culminating with a set of findings and recommendations much like those produced by the chapter 11 commission. To advance the project, the exploratory committee proposed a commission composed of skillful bankruptcy professionals representing all major constituencies affected by bankruptcy, who would work toward consensus rather than seeing their roles primarily as advocates for an interest group. The exploratory committee

discussed several examples of issues that the commission might address, including student loan debt, regulation and compensation of professionals, exemption law, and the effectiveness of chapter 13. The committee proposed that the commission be headed by two retired bankruptcy judges as co-chairs and that its initial work be conducted through supporting committees of professionals with relevant experience for the issues treated by the committees. Finally, the exploratory committee noted the need for the project to be supported by a well-qualified reporter.

Based on the exploratory committee's recommendations, the ABI contacted a number of individuals to determine their willingness to serve on the proposed commission. Judges William Brown and Elizabeth Perris agreed that they would serve as the commission's co-chairs, and Professor Robert Lawless agreed to serve as reporter. With these individuals identified as the potential project leaders, Judge Wedoff presented on behalf of the exploratory committee a formal proposal for creation of the commission to ABI's Executive Committee in December 2016. It was unanimously adopted. Between then and the first meeting of what became the ABI Commission on Consumer Bankruptcy in April 2017 and consistent with the board's instructions, the leadership team completed the Commission's membership.

Charge and Scope of Work. The resolution of the ABI board of directors creating the Commission stated:

> The Commission is charged with recommending improvements to the consumer bankruptcy system that can be implemented within its existing structure. These changes might include amendments to the Bankruptcy Code, changes to the Federal Rules of Bankruptcy Procedure, administrative rules or actions, recommendations on proper interpretations of existing law, and other best practices that judges, trustees, and lawyers can implement.

The Commission took its charge seriously and emphasized a pragmatic, problem-solving approach. Legislative change can take years, if it comes at all. Although it did not avoid recommendations for statutory amendments, the Commission proposed, where possible, solutions that could be implemented through the bankruptcy rules; through best interpretations of the existing statutes; through actions by other governmental actors such as the Administrative Office of U.S. Courts or the U.S. Trustee Program; or through the efforts of private organizations of bankruptcy professionals, like the ABI and other associations.

Caveats. Statutory drafting is a difficult, time-consuming task. Soon after its formation, the Commission decided that it did not have the resources or time to engage in statutory drafting. In a number of places, the Commission's recommendations suggest or imply specific language that might go into a statute, but readers should understand all of these instances as examples rather than as the Commission's recommendation of specific language in any statutory amendment.

All of the Commission's actions should be understood as applying only to consumer bankruptcy, consistent with its charge to consider "improvements in the consumer bankruptcy system." Thus, each recommendation should be read as if it began with the qualifier "In consumer

cass . . . ." The Commission takes no position whatsoever on whether its recommendations should be adopted in nonconsumer cases.

Finally, by "consumer," the Commission does not mean the term in the same strict sense of the statutory definition for "consumer debt" in section 101(8) – incurred "primarily for a personal, family, or household purpose." The Commission also does not mean "consumer" as a synonym for "individual." For example, some individual chapter 11 cases might be considered consumer cases where others might not. Although the distinction between a consumer case and a nonconsumer case is clear at the extremes, the distinction blurs in the middle. Consistent with its position on not drafting statutory language, the Commission decided it would leave the line-drawing on the scope of its recommendations to the legislative process.

B. Commission Procedures

Topic list. The Commission first needed to create a list of the topics it would study. The Commission cast a wide net and gathered suggestions from multiple sources. The principal work of generating topics went to the three committees, each of which came up with many ideas for areas of consumer bankruptcy in need of study. Through its web site, the Commission also solicited public suggestions of topics. Most of the 131 written submissions the Commission received suggested topics for consideration. In addition, the Commission and its three committees conducted six public meetings at which a total of seventy-two speakers addressed areas of the bankruptcy system potentially in need of reform.

The Commission co-chairs and reporter drafted the initial topic list and then revised it after consultation with the committees. The Commission divided the topic list into roughly equal workloads for the three committees. As the Commission work proceeded, new topics were added to the list as appeared appropriate.

Not every topic suggested to the Commission made it on the list for study. Topics that went outside the Commission charge of "recommending improvements to the consumer bankruptcy system that can be implemented within its existing structure" were excluded. The Commission also was mindful that it could not possibly address every issue facing the consumer bankruptcy system and prioritized topics that affected more people.

Committees. The three committees were the front line for consideration of each topic. The Commission provided the committees with the Committee Operating Procedures (see Appendix D), which provided ethical guidelines, confidentiality rules, and an encouragement to work by consensus. Generally, the committees could choose how to structure themselves and the procedures that worked best for each committee.

After receiving the topic list, the committees broke the topics into smaller subtopics and assigned these subtopics to working groups within the committee. The working group's task was to develop a report for the committee to consider. The committee then would discuss the report at a meeting. The committee either would make a final decision on the working group's report or refer the matter back to the working group for revising the report in light of the committee's discussion and for more consideration at a future meeting.

The three committees met a total of forty-five times. Each committee had one in-person meeting. The rest of the meetings were conducted telephonically. After each committee meeting, the Commission's reporter circulated meeting notes that the committee chair had approved and that contained a record of the meeting. Thus, all committee members always knew what was discussed and decided at each meeting. The committees completed their work between March and May of 2018.

An affirmative committee vote was not a prerequisite to the Commission's consideration of a topic. The Commission's reporter prepared forty-nine cover memoranda that relayed the three committees' actions to the Commission. Each of these cover memoranda detailed the committee's action and included any opposing viewpoints. A few topics arose for the first time at the Commission level at a stage where the committee processes already had concluded. These topics obviously did not have the benefit of committee action or a cover memorandum from the reporter.

Commission. The Commission itself met twenty-eight times, including six in-person meetings and twenty-two telephonic meetings. The first Commission meeting occurred in April 2017 and was an organizational meeting at which the Commission adopted bylaws (see Appendix C). At the rest of its meetings, the Commission discussed whatever committee actions that the co-chairs had identified, in a previously circulated agenda, for Commission consideration.

The Commission discussed each committee recommendation separately. Sometimes, the Commission then asked the committee or a working group of commissioners to revise the committee's recommendation considering the Commission's discussions. These revised proposals then came back to the Commission later. For both in-person and telephonic meetings, the Commission used meeting software so all commissioners could see the precise wording of any recommendation on which the Commission might vote.

In accordance with the Commission bylaws, no recommendation was considered approved unless it carried a two-thirds majority of the commissioners present and voting at a meeting. (A commissioner who abstained from voting was not counted as present.) When the Commission discussion suggested there was no opposition to a recommendation, the co-chairs would ask if any commissioner would like a vote. On these occasions, if no one asked for a vote, the Commission considered the recommendation adopted by unanimous consent.

During its meetings, the Commission had the benefit of advice from its ex-officio members. Ex-officio members could comment on any matter before the Commission and received all Commission communications. Ex-officio members had no vote at the Commission meetings. The Commission had two ex-officio members who were 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 before the Commission.

After each meeting, the Commission's reporter circulated meeting notes that the co-chairs had approved and that recorded the Commission's actions. Each commissioner also had access to a cloud storage space in which the reporter stored these notes and other Commission and

committee materials. Throughout the process, commissioners thus always had access to whatever information they might need about the Commission's work. The Commission finished its review of the committees' actions in December 2018.

Report Drafting and Final Approval. After the Commission had approved a recommendation, the reporter finalized the recommendation's language and prepared a narrative discussing the Commission's reasoning. The reporter then made the proposed recommendation and draft narrative available electronically to the commissioners for a minimum of three weeks. The commissioners could leave edits and remarks for the reporter and others to review. The reporter and co-chairs together considered the commissioners' edits and remarks and finalized the recommendation and narrative.

The reporter then made the final draft available electronically to all commissioners. The Commission then approved the final draft as a whole by **[XXXPlaceholderXXX]** and instructed the reporter to transmit the report to the ABI for printing and distribution.

In issuing its final report, the Commission considers itself to have spoken as a law-reform group. The report and its recommendations do not necessarily represent the views of any individual. Readers of the report should not understand membership on the Commission or its committees as endorsement of any particular recommendation. The Commission worked toward consensus whenever possible, but consensus was not always possible. The Commission's discussions were respectful, professional, scholarly, and robust. The Commission structured itself so its final report would be the product of an iterative and deliberative process in which many different ideas were heard and considered. The recommendations that follow result from that process. It is likely no one will agree with all of them, but together, they represent the Commission's collective professional judgment about the best ways to improve the consumer bankruptcy system for all its stakeholders.

Chapter 1

Effectuating the Fresh Start

A. Discharge and Dischargeability

§ 1.01 Student Loans

(a) Bankruptcy Code Amendments.

(1) Section 523(a)(8) should except from discharge only student loans that

(A) were made, insured, or guaranteed by a governmental unit,
(B) were incurred for the debtor's own education, and
(C) absent a showing of undue hardship, first became payable less than seven years before the bankruptcy case was filed, regardless of any suspension of payments.

(2) Section 507(a) should have a new, eleventh priority for claims excepted from discharge under § 523(a)(8).

(3) Section 1322(a) should allow the plan to provide for less than full payment of all amounts owed for a claim entitled to the student-loan priority only if the plan provides that all of the debtor's projected disposable income for a 5-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

(4) Section 1322(b)(10) should provide that it does not apply to priority unsecured debts.

(b) Promulgation and Interpretation of Regulations. Through regulations or interpretive guidance, the Department of Education should provide the following with respect to governmental student loans:

(1) 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:

(A) 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.

(B) Poverty-based guidelines.

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

(ii) 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.

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

(3) 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.

(c) Best Interpretation of Current Law.

(1) Standard for Dischargeability.

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

(i) 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,

(ii) 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

(iii) 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 whether to appeal by the Department of Education, any guaranty agency, eligible lender, or holder of a federal student loan, and any agent of these parties.

(2) Treatment of Nondischargeable Student Loans in Chapter 13.

(A) Section 1322(b)(1) should be interpreted to allow separate classification and payment of nondischargeable student loans at a higher dividend than other general unsecured claims as long as the other unsecured claims are paid at least as much as is required under the best interest test of § 1325(a)(4), including cases where the best interest test would not require any payment.

(B) If precedent requires rejection of the recommendation in subparagraph (A) and a higher payment of nondischargeable student loans is held not to be generally available under § 1322(b)(1), courts should use the following best interpretations:

(i) If another person is liable for payment of a nondischargeable student loan, § 1322(b)(1) should be interpreted to allow a plan to provide for its payment at a higher rate than other general unsecured claims, as long as the other unsecured claims are paid at least as much as is required under the best interest test of § 1325(a)(4), including cases where the best interest test would not require any payment;

(ii) Section 1322(b)(5), providing for cure and maintenance of long-term unsecured claims, should be interpreted to apply to student loans; and

(iii) Section 1322(b)(10), disallowing payment of interest on nondischargeable debts, should be interpreted as not applying to claims being treated under § 1322(b)(5).

See the full Report for discussion of the reasons for these recommendations.

§ 1.02 Remedies for Discharge Violation

(a) Individuals should have a private right of action for a violation of section 524.

(b) Debtors and creditors should be allowed (but not required) to seek a bankruptcy court ruling on an expedited basis to determine whether the discharge injunction applies to a particular action. Such a ruling would be sought through motion practice rather than through an adversary proceeding for a declaratory judgment. Nothing in this recommendation is intended to change the requirements for reaffirmation or to allow circumvention of the reaffirmation rules.

See the full Report for discussion of the reasons for these recommendations.

§ 1.03 Dischargeability of Homeowners Association (HOA) Fees

- **The Bankruptcy Code should allow the discharge of postpetition condominium fees and assessments only when the debtor (i) specifies an intent to surrender the property and (ii) does not retain possession or actively occupy or use the property.**
- **The best interpretation of the current statute is that postpetition HOA fees are discharged in a chapter 13 case under § 1328(a).**

See the full Report for discussion of the reassons for these recommendations.

§ 1.04 Definition of a Tax Return for Purposes of Nondischargeability

(a) For purposes of section 523(a)(1) and absent unusual circumstances, a "return" is a tax filing that satisfies the requirements of applicable nonbankruptcy law and is made before the date on which the IRS or other taxing authority assesses the relevant taxes. ***See In re Hindenlang*****, 164 F.3d 1029 (6th Cir. 1999).**

(1) Thus, the due date for the return is not relevant to whether the requirements of applicable nonbankruptcy law are met. So long as the tax filing is made before assessment, the filing can be a "return."

(2) A corollary principle is that filing before the filing deadline is not an "applicable filing requirement" for purposes of the statute (i.e., whether a document is a return under applicable nonbankruptcy law).

(b) A "return" includes a filing prepared pursuant to 26 U.S.C. § 6020(a) or a similar state or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal. It does not include a substitute for a return made pursuant to 26 U.S.C. § 6020(b) or a similar state or local law.

(c) Congress should amend section 523 to clarify its application consistent with the recommendations of subsections (a) and (b). The Commission also believes subsections (a) and (b) are the best interpretation of the existing statutory language.

See the full Report for discussion of the reasons for these recommendations.

B. Judicial Estoppel

§ 1.05 Judicial Estoppel

(a) When a debtor is under a duty to disclose a cause of action in a bankruptcy case and fails to do so, judicial estoppel is appropriate to prevent the debtor from gaining an unfair advantage through inconsistent statements in a bankruptcy case and other litigation.

(b) The debtor's failure to disclose a cause of action is not alone grounds to apply judicial estoppel. Courts should consider whether the debtor's failure to disclose led to an unfair advantage using a totality of the circumstances approach that includes the following nonexhaustive list of factors:

- **Did the debtor have actual knowledge of the claim?**
- **Did the debtor tell his or her bankruptcy attorney about the claim before filing the bankruptcy disclosures?**
- **What were the circumstances under which the omitted claim was discovered?**
- **Did the debtor correct the disclosures, and what were the circumstances of the correction?**
- **How long was the claim omitted from the bankruptcy schedules?**
- **What was the amount of the omitted claim?**
- **What was the distribution to creditors?**
- **Do the circumstances suggest the debtor would have understood the bankruptcy schedules to require disclosure of all causes of actions?**
- **Did the debtor identify other lawsuits to which the debtor was a party?**
- **Did the bankruptcy court take any action after the omission was discovered?**
- **Were the trustee or creditors aware of the civil lawsuit or claim before the debtor amended the disclosures?**

(c) The determination that a debtor's claim is subject to judicial estoppel as to the debtor should not prejudice the chapter 7 trustee's right to administer the claim for the benefit of the estate.

C. Ensuring Access to Meaningful Exemptions

§ 1.06 Trustee's Sale of Exempt Property

(a) Regardless of whether the debtor has any equity in the property, the current Bankruptcy Code is best understood as preventing a trustee from selling fully encumbered property unless the debtor consents or the debtor receives the full value of any exemption in the encumbered property. Although this result is the best interpretation of the existing Bankruptcy Code, Congress should enact a clarifying amendment to the Bankruptcy Code to make this result clear.

(b) The U.S. Trustee Program should continue to enforce the recommendation in subsection (a) by opposing bankruptcy trustees from selling fully encumbered assets absent specifically defined circumstances, which would not include cases in which the trustee's portion of the sales proceeds exceeds the portion available for distribution to unsecured creditors.

See the full Report for discussion of the reasons for these recommendations.

§ 1.07 Postpetition Changes in Value

(a) An individual debtor should be able to file a motion to compel abandonment without paying a filing fee.

(b) The Federal Rules of Bankruptcy Procedure should provide that if no interested party files an objection and request for hearing within fourteen days after a chapter 7 trustee files a no asset report, any estate interest in property of the debtor scheduled under section 521(a)(1) will be deemed abandoned. The section 341(a) notice should set forth the effect of the chapter 7 trustee's filing of a no asset report, the right to object and request a hearing within fourteen days, and the resulting abandonment if no objection and request for hearing is filed.

See the full Report for discussion of the reasons for these recommendations.

§ 1.08 Exemptions for Debtors Who Move States

(a) Section 522(b) of the Bankruptcy Code should provide that in the bankruptcy case of a debtor whose state of domicile changed during the 730 days preceding the bankruptcy filing –

(1) the exemption law of the debtor's current state of domicile applies, except that the amount of any homestead exemption in that law is capped by the amount of the homestead exemption in the debtor's applicable prior exemption law, and

(2) the applicable prior exemption law is that of the debtor's state of domicile for the greatest part of the 730 days preceding the filing of the bankruptcy case.

(b) If Congress does not amend the Bankruptcy Code consistent with the recommendation in subsection (a), courts should interpret the paragraph following section 522(b)(3)(C) to allow a debtor to elect the federal exemptions if the debtor is denied one or more exemptions otherwise available under the applicable state exemption law either because the debtor is not a resident of that state or because the exemptible property is not located in that state.

See the full Report for discussion of the reasons for these recommendations.

§ 1.09 Increase of Wild-Card Exemption for Households with Dependents

Congress should amend 11 U.S.C. § 522(d)(5) to provide

(a) that the debtor's current wild-card exemption (an exemption of the debtor's aggregate interest in any property, not to exceed in value $1,325) is increased by $1,000 for each dependent of the debtor,

(b) that the current additional wild-card exemption of up to $11,850 in any unused portion of the homestead exemption set out in § 522(d)(1) is increased by $1,000 for each dependent of the debtor, and

(c) that the increased exemptions based on a particular dependent may not be claimed by more than one debtor.

§ 1.10 Increase in Federal Homestead Exemption

Congress should enact a one-time increase in the federal homestead exemption to $42,500.

See the full Report for discussion of the reasons for these recommendations.

Chapter 2

Improving Creditor Certainty and Lowering Costs

§ 2.01 Protection of Interests in Collateral Repossessed Prepetition

(a) Section 362(a)(3) should be amended to expressly require the return of estate property to the party entitled to possession of estate property under the Bankruptcy Code.

(b) A new paragraph should be added to section 362(b), providing

(1) that any estate property held by a creditor and subject to a potential loss of value due to accident, casualty, or theft may be retained by a creditor holding the property unless the party entitled to possession under the Bankruptcy Code provides proof of insurance or other security sufficient to protect the creditor against such loss of value;

(2) that if the creditor's interest in estate property is a statutory lien dependent upon possession by the creditor, then, in addition to the requirement of protection of value set out above, upon transfer of the property to the appropriate party (A) the property shall be deemed to be continuously subject to a lien, equivalent in amount and priority to the creditor's statutory lien, (B) such lien shall be effective during and after the debtor's case, and (C) if the debtor retains possession of the property after the case is closed, the creditor shall have a right of replevin or other right to recover the property, and upon recovery, the creditor's statutory lien shall be restored as if there had been no break in possession; and

(3) that these provisions are without prejudice to a creditor's right to retain the collateral while promptly seeking annulment of the automatic stay based on a lack of adequate protection, on bad faith, or on other unusual circumstances.

(c) A new subsection should be added to section 542, providing that a creditor holding property of the debtor or the estate secured by a consumer debt shall, upon demand by the party entitled to the property under this title, deliver the property to that party, except as provided in the new paragraph added to section 362(b), set out above.

(d) The new subsection to section 542 should be added to the exceptions in Federal Rule of Bankruptcy Procedure 7001(1), so that the appropriate party may enforce such right by motion. A party entitled to possession may seek only turnover rather than the imposition of sanctions for violation of the automatic stay; the new subsection would allow turnover to be pursued by motion rather than by adversary proceeding.

See the full Report for discussion of the reasons for these recommendations.

§ 2.02 Definition of "Surrender"

(a) Courts should interpret "surrender of property" to mean that a debtor (i) relinquishes the property; (ii) cannot impede a trustee or a secured creditor from taking possession of, or foreclosing its interest in, the property in accordance with nonbankruptcy law and subject to any defenses that might be available under nonbankruptcy law; and (iii) must make the property available to the trustee or secured creditor. Surrender does not require immediate physical delivery of property to another.

(b) To clarify the law, Congress should add a statutory definition to the Bankruptcy Code incorporating these elements.

See the full Report for discussion of the reasons for these recommendations.

§ 2.03 Statement of Intention – Deadlines and Consequences

(a) Statutory harmonization.

(1) Congress should harmonize the inconsistent deadlines and resolve ambiguities in the actions required by the debtor in sections 362(h), 521(a)(2)(B), and 521(a)(6).

(A) Congress should continue to require a chapter 7 debtor, within thirty days of the petition date, to file a statement of intention regarding debts secured by property of the estate.

(B) Congress should require debtors to file a reaffirmation agreement or redemption motion within sixty days after the meeting of creditors is scheduled and, in the event of a redemption, to pay any redemption price within fourteen days after entry of the order approving the redemption.

(2) The debtor's failure to act should not prejudice the bankruptcy trustee and should not result in the affected property being removed from the bankruptcy estate. The phrase "such personal property shall no longer be property of the estate" should be eliminated in section 362(h) and in the final paragraph of section 521(a)(6).

(b) Rules amendment. In the absence of a statutory amendment, Federal Rule of Bankruptcy Procedure 6008 should be amended to set a deadline for the filing of a motion for redemption thirty days after the first date set for the meeting of creditors and to require that the redemption payment be made within fourteen days after entry of an order authorizing the redemption, all unless the court orders otherwise.

See the full Report for discussion of the reasons for these recommendations.

§ 2.04 Reaffirmation Improvements

(a) The Advisory Committee on Rules of Bankruptcy Procedure should propose an official form for reaffirmation agreements.

(b) The Federal Rules of Bankruptcy Procedure should require that rescission of a reaffirmation agreement be in writing.

(1) The Advisory Committee should

(A) propose a recommended form for rescission of a reaffirmation agreement, separate from the reaffirmation agreement form,

(B) should make that recommended form available as a director's form, and

(C) where the form reaffirmation agreement gives the notice of the right of rescission, provide the URL where the director's form may be downloaded.

(2) Use of the recommended rescission form should not be mandatory.

(c) Postpetition communications.

(1) Creditors should be able, when authorized by the debtor, (A) to communicate with the debtor about reaffirmation without violating the automatic stay, and (B) under limited circumstances, to send periodic statements in a uniform manner to the debtor.

(2) The authorization for sending such communications should be included as an option in an amended official form for the debtor's statement of intention.

(3) Except for cases already subject to an existing regulation such as Regulation Z under the Truth in Lending Act (12 CFR § 1026.41(e)(5), (f)), Congress should specifically allow postpetition communications authorized in the proposed amended statement of intention and predischarge communications regarding reaffirmation, through

(A) an exception to the stay under section 362(b),

(B) a "safe harbor" for discussions with the debtor similar to section 365(p)(2)(C), or

(C) similar language in section 524(j).

(d) Congress should amend the Bankruptcy Code to specify whether a chapter 7 debtor who assumes a lease agreement must comply with the reaffirmation requirements of section 524.

(e) If Congress decides that a lease assumption does not require reaffirmation under section 524, then section 365(p) should provide that

(1) an assumption of a lease of personal property must be filed with the court, and

(2) a lessor who does not file a notice of assumption of a lease of personal property before the case is closed cannot later enforce the lease against an individual debtor.

See the full Report for discussion of the reasons for these recommendations.

§ 2.05 Repeat Filers

(a) Section 109(g) Changes.

(1) Section 109(g) should provide that the order of dismissal of a case may include a restriction of the debtor's eligibility for a subsequent case. The court may impose this restriction after notice and a hearing on motion of a party in interest or on the court's own motion, on a finding of cause, which may include:

(A) willful failure of the debtor to:

(i) abide by orders of the court or

(ii) propose a plan required under sections 1129, 1225, or 1325 in good faith and not by any means forbidden by law;

(B) willful and substantial default by the debtor with respect to a term of a confirmed plan;

(C) repetitive dismissed bankruptcy filings;

(D) willful failure of the debtor to appear before the court in proper prosecution of the case; or

(E) other abuse of the provisions of this title, apart from a finding of abuse under section 707(b).

(2) The period of ineligibility for a subsequent case should extend for 180 days from the date of the entry of the court's order unless the court orders otherwise, but the period of ineligibility may extend for a period longer than 180 days only upon a finding of substantial abuse and in no event may exceed 720 days.

(3) The period of ineligibility may be decreased based upon a showing of changed circumstances or for good cause shown, after notice and a hearing.

(4) The current language in section 109(g)(2), prohibiting a debtor from filing if the debtor requested and obtained the voluntary dismissal of a case following the filing of a request for relief from the automatic stay, should be repealed.

(b) Section 349(a) Changes. Section 349(a) should provide that the dismissal of a case does not bar the discharge, in a later case, of debts that were dischargeable in the case dismissed, except as provided in sections 523, 727, 1141, 1228, and 1328; nor does the dismissal of a case prejudice the debtor with regard to the filing of a subsequent petition, except as provided in section 109(g) as amended pursuant to subsection (a).

(c) Section 362(c) Changes.

(1) Section 362(c)(3), which provides for termination of the automatic stay in a case filed within one year of the dismissal of a single bankruptcy case of the debtor, should be repealed in its entirety.

(2) Section 362(c)(4), which provides for the stay not going into effect in a case filed within one year of the dismissal of two or more bankruptcy cases of the debtor, should be retained.

See the full Report for discussion of the reasons for these recommendations.

§ 2.06 Defining and Valuing the Principal Residence, Timing Issues

(a) The appropriate date for determining whether a claim is secured by a debtor's principal residence is the petition date.

(b) The value of the debtor's principal residence should be determined as of the petition date. In a case converted to chapter 7, courts should interpret section 348(f)(1)(B) to mean there has not been a binding valuation of the debtor's principal residence.

See the full Report for discussion of the reasons for these recommendations.

§ 2.07 Improvements to Federal Rule of Bankruptcy Procedure 3002.1 – Payment Change Notices and Notices of Final Cure

(a) Payment Change Notices. Federal Rule of Bankruptcy Procedure 3002.1(b) should be amended to:

(1) specify the effective date of any payment change when the creditor fails to timely file the required notice of payment change, and

(2) require that payment change notices for home equity lines of credit (HELOCs) be filed and served annually rather than monthly, provided that the

§ 2.07 continued on next page

monthly payment amount does not increase or decrease by more than $10 in any single month.

(b) Reverse Mortgages. FRBP 3002.1 should be amended to clarify that reverse mortgages are subject to the requirements of FRBP 3002.1 except for the payment change notice requirements in FRBP 3002.1(b).

(c) Notices of Final Cure.

(1) The requirement of a notice of final cure payment under Federal Rule of Bankruptcy Procedure 3002.1(f) should be amended to:

(A) change the current notice process to a motion practice under Federal Rules of Bankruptcy Procedure 9013 and 9014,

(B) require the motions to include a warning that a creditor may be sanctioned for failing to respond, and

(C) add a midcase status review.

(2) Federal Rule of Bankruptcy Procedure 3002.1(g) should be amended to:

(A) indicate clearly that the creditor's statement is mandatory and must include (i) the principal balance owed; (ii) the date when the next installment payment is due; (iii) the amount of the next installment payment, separately identifying the amount due for principal, interest, mortgage insurance and escrow, as applicable; and (iv) the amount, if any, held in a suspense account, unapplied funds account or any similar account;

(B) add a means for the debtor or trustee to object to the creditor's statement and request a hearing; and

(C) provide that an objection commences a contested matter.

(3) Federal Rule of Bankruptcy Procedure 3002.1(h) should be amended to allow the court to enter an order determining the status of the mortgage claim that includes all of the same information as in the proposed amendment to subsection (g).

(4) Federal Rule of Bankruptcy Procedure 3001.1(i) should be amended to allow the debtor or trustee to file a motion to compel a creditor's statement and for appropriate sanctions. If the motion is granted, the court should be required to order the mortgage creditor to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees, unless the circumstances make such an award

§ 2.07 continued on next page

unjust. The failure of the mortgage creditor to obey a motion to compel a statement should be treated as contempt of court.

Appendix to Section
2.07

Formally, the Commission voted to approve the recommendations that appear at the beginning of this section. At the time of the vote, the Commission had before it specific amendatory language to Federal Rule of Bankruptcy Procedure 3002.1 that would implement the Commission's recommendations. Because of the technical nature of these recommendations, the Commission decided that it would be helpful to include the amendatory language as an appendix to this discussion of the recommendations.

Rule 3002.1 Notice Relating to Claims Secured by Security Interest in the Debtor

* * * *

(b) NOTICE OF PAYMENT CHANGES; OBJECTION

(1) *Notice*. Except as provided in paragraph (3), the holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest-rate or escrow- account adjustment, no later than 21 days before a payment in the new amount is due.

(2) If the holder of the claim fails to timely file and serve the notice required by paragraph (1), the following shall apply:

(A) *Payment Increase*: In the event that the holder of a claim files and serves a Notice of Payment Change that reflects an increase in the total new payment amount without providing the required 21 days' notice, then the payment change shall be effective on the first payment due date that is at least 21 days from the filing date of the Notice of Payment Change.

(B) *Payment Decrease*: In the event that the holder of a claim files and serves a Notice of Payment Change that reflects a decrease in the total new payment amount without providing the required 21 days' notice, then the payment change shall be effective as of the later of the Date of the Notice or the date specified in the Notice.

(C) Nothing in subparagraph (A) or (B) shall limit the power of the court to take any of the actions permitted under subdivision (i) for any failure to timely file and serve the notice of payment change.

(3) If the claim arises from a home equity line of credit, the notice of any payment change shall be filed and served on the debtor, debtor's counsel, and the trustee no later than one year after the entry of the order for relief, and not less frequently than annually thereafter.

(A) The annual notice shall state the monthly payment amount due for the month in which the notice is filed. The payment amount shall be effective on the first payment due date that is at least 21 days from the filing date of the annual notice and shall remain effective until a new notice is filed with the court. The holder shall also include in the annual notice a reconciliation amount to account for any over or under payment received during the prior year. This amount shall be accounted for in the first payment due to the holder after the effective date of the notice, and shall be adjusted upward or downward to account for the reconciliation amount.

(B) Notwithstanding subparagraph (A) above, should the monthly payment increase or decrease by more than $10 in any single month, the holder shall file a notice consistent with subdivision (b)(1), and this notice shall be filed and served in addition to the annual notice requirement.

(4) *Objection.* A party in interest who objects to the payment change may file a motion to determine whether the change is required to maintain payments in accordance with § 1322(b)(5) of the Code.

* * * *

(f) MOTION TO DETERMINE STATUS OF MORTGAGE CLAIM.

(1) MANDATORY MOTION TO DETERMINE STATUS OF MORTGAGE CLAIM. Both during the period between 18 and 22 months after the petition date and no later than 45 days after the trustee receives all payments due the trustee under the plan, the trustee shall file and serve on the holder of the claim, the debtor, and debtor's counsel a motion to determine status of mortgage claim. The motion shall be styled as prescribed by the appropriate Official Form. The motion shall inform the holder of its obligation to timely file and serve a response under subdivision (g) and warn that failure to timely respond may be sanctioned under subdivision (i).

(2) PERMISSIVE MOTION TO DETERMINE STATUS OF MORTGAGE CLAIM. The debtor may file the motion required under subdivision (f)(1) of this Rule.

(g) MANDATORY RESPONSE TO MOTION TO DETERMINE STATUS OF MORTGAGE CLAIM; OBJECTION.

(1) Within 28 days after service of the motion under subdivision (f) of this rule, the holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a response indicating (i) that the debtor has paid all amounts required by the plan to be paid to the holder on account of its claim; or (ii) that the debtor is in default of an amount required by the plan to be paid to the holder on account of its claim. The response shall include the following information, current as of the date of the response: the principal balance owed; the date when the next installment payment from the debtor is due; the amount of the next installment payment that is due from the debtor, separately identifying the components of that payment, including the amounts due for principal, interest, mortgage insurance, and taxes, as applicable; and the amount, if any, held in a suspense account, unapplied funds account or any similar account. If the response states the debtor is in default under the plan, the response shall itemize the amount(s) that the holder contends is unpaid as of the date of the response.

(2) The debtor or the trustee shall have 14 days from the date of service of a timely response filed under subdivision (g)(1) within which to file an objection and request a hearing. The filing of an objection commences a contested matter for purposes of Fed. R. Bankr. P. 9014.

(h) ORDER DETERMINING STATUS OF MORTGAGE CLAIM.

(1) If the holder of the claim fails to timely respond under subdivision (g)(1), the trustee shall submit and, without further hearing, the court may enter an order declaring as of the date of the motion that the debtor is current on all payments required by the plan with respect to the debtor's obligations to the holder, including all escrow amounts, and that all postpetition legal fees, expenses and charges imposed by the holder are satisfied in full.

(2) If the holder timely responds under subdivision (g)(1) and no objection is filed under subdivision (g)(2), the trustee shall submit and without further hearing the court may enter an order determining that the amounts stated in the holder's response filed under subdivision (g)(1) reflect the status of the claim as of the date of the filing of the holder's response.

(3) If an objection is filed under subdivision (g)(2), the court shall, after notice and hearing, determine the status of the mortgage claim and enter an appropriate order.

(4)

(A) An order entered under subdivision (h)(2) or (h)(3) shall include the following information, current as of the date of the holder's response under subdivision (h)(2) or such other date as the court may determine: the principal balance owed; the date when the next installment payment from the debtor is due; the amount of the next installment payment that is due from the debtor, separately identifying the components of that payment, including the amounts due for principal, interest, mortgage insurance, and taxes, as applicable; and the amount, if any, held in a suspense account, unapplied funds account or any similar account.

(B) An order entered under subdivision (h)(1) may include any of the information described in paragraph (A) as may be appropriate.

(i) FAILURE TO NOTICE OR RESPOND.

(1) If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:

(A) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or harmless; or

(B) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

(2) If the holder of the claim fails to timely respond under subdivision (g)(1), in addition to any action the court may take under subdivisions (h)(1) and (i)(1), the debtor or the trustee may move to compel a response and for appropriate sanctions.

(A) If the motion is granted—or if the response is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the holder to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(B) If the court orders the holder to file a response under subdivision (g)(1) and the holder fails to obey, the failure may be treated as contempt of court. In addition to any order the court enters as a sanction for contempt, the court must order the holder to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

§ 2.08 Denial of Exemption for Knowing and Fraudulent Concealment

Section 522 of the Code should provide that a court may deny an exemption in any property that the debtor has knowingly and fraudulently concealed.

See the full Report for discussion of the reasons for these recommendations.

Chapter 3
Faciliating Effective Access to Bankruptcy
A. Paying for Bankruptcy

§ 3.01 Chapter 7 Attorney's Fees

(a) The dischargeability of prepetition attorney's fees in chapter 7 hinders access to the bankruptcy system and access to justice. Congress and all stakeholders to the bankruptcy system should take steps to lower barriers to access, including:

(1) consistent with Commission recommendation [XXXPlaceholderXXX], creating easy-to-understand online data input forms that would generate asset and liability compilations that could be reviewed by a bankruptcy professional to make preparation of schedules less time consuming;

(2) increasing provision of pro bono bankruptcy representation for low-income debtors;

(3) reducing filing fees for low-income debtors, even if represented by paid counsel;

(4) allowing video attendance at § 341 meetings and scheduling these meetings outside of regular working hours, with safeguards assuring that the named debtor is the one appearing; and

(5) providing low-income debtors' legal representation through a governmental office, akin to public defenders' offices.

(b) Congress should amend the Bankruptcy Code to allow postpetition payment for attorney services rendered prepetition. Different mechanisms have different costs and benefits. The Commission believes two mechanisms merit consideration:

§ 3.01 continued on next page

(1) Excepting fee agreements from the automatic stay and delaying the discharge of fees for a period of time such as six months with other coordinating amendments to the Bankruptcy Code to ensure no change to other creditors' access to their collateral during the delay.

(2) Making prepetition attorney's fees nondischargeable in a chapter 7 with judicial review of the fee agreement.

See the full Report for discussion of the reasons for these recommendations.

§ 3.02 Unbundling of Legal Services

Bankruptcy courts should adopt local rules that address unbundling, specifying what services a lawyer may and may not exclude from the legal representation being provided. The courts should ensure that these local rules are consistent with applicable rules of professional responsibility.

See the full Report for discussion of the reasons for these recommendations.

§ 3.03 Presumptively Reasonable Attorney's Fees in Chapter 13s

(a) In chapter 13 cases, courts should adopt presumptively reasonable flat fees that cover typical attorney work until confirmation.

(b) Courts should adopt an "a la carte" fee structure for work performed after confirmation.

(c) Courts should consider consumer bankruptcy specialist certification as a factor in setting presumptively reasonable fees.

(d) Courts should review presumptively reasonable fees on a regular basis to determine whether they are promoting the goals of efficiency, a qualified bar, the diligent practice of law, and fairness to debtors.

See the full Report for discussion of the reasons for these recommendations.

B. Attorney Roles & Responsibilities

§ 3.04 Attorney Competency & Remedying Lawyer Misconduct

(a) Individuals and organizations with enforcement and disciplinary responsibility for attorneys in bankruptcy – including individual attorneys, case trustees, bankruptcy judges, the Office of the United States Trustee, state bar disciplinary committees, and United States Attorneys – should diligently and vigorously employ the many tools available to address attorney misbehavior.

(b) Increased enforcement of existing rules carries with it at least two burdens: an increased workload on those enforcing the rules and the conflict inherent in bankruptcy judges simultaneously undertaking the roles of investigator, prosecutor, hearing officer, and final arbiter. These burdens can be at least partially addressed by the formation of committees or other bodies at the local level charged with investigating and resolving complaints against offending attorneys. These bodies could be staffed by judges, local attorneys, or a combination of the two.

(c) Any such local bodies, and the procedures governing them, should be approved by the relevant bankruptcy and district courts and should be adopted as local rules. Some districts have already implemented such systems. In smaller districts, the extension of existing cooperation regarding caseloads among adjacent districts should be extended to include assistance in addressing improper behavior.

(d) In addition to the sting of sanctions, courts and other entities should also employ incentives to practice ethically. In this regard, one incentive should be consistently awarding enhanced fees to professionals who are "board certified or [who have] otherwise . . . demonstrated skill and experience in the bankruptcy field," as authorized by 11 U.S.C. § 330(a)(3)(E). This enhancement should be implemented by local court rules, which

§ 3.04 continued on next page

should provide details encouraging compliance, such as permitting defined enhancements when the representation is by a firm in which some, but not all, of the attorneys have been board certified.

(e) As a disincentive to practice incompetently, bankruptcy courts should docket all disciplinary orders in such a way that all such orders can be searched and found by interested parties, including the public, the press, and governmental agencies such as state bar disciplinary authorities. In particular, the Administrative Office of the United States Courts should monitor disciplinary filings and include in its annual report a summary of all disciplinary orders. This summary should not only indicate the types of discipline or sanctions ordered but should also note and tabulate whether the entity disciplined was a debtor, creditor, trustee, governmental agency, or an attorney (with the affiliation of the attorney also noted).

See the full Report for discussion of the reasons for these recommendations.

§ 3.05 Stand-in Counsel

(a) Stand-in counsel, sometimes called "appearance counsel," is an attorney engaged by a party's attorney to appear in a matter on behalf of the party but who does not have authority to act on behalf of the party in any way other than ministerial.

(b) Bankruptcy courts, the U.S. Trustee Program, and state licensing authorities should adopt rules with best practices related to stand-in counsel that ensure the competent, efficient, and ethical representation of clients in bankruptcy matters.

(c) Federal Rule of Bankruptcy Procedure 9010 should require a notice of appearance to disclose any limitation allowed by law on the attorney's representation of the party.

(d) Bankruptcy courts should adopt local rules permitting video and telephonic hearings to ensure the best use of court resources, reduction of expenses, and the timely and efficient resolution of disputes.

(e) When appropriate, bankruptcy courts should develop and permit practitioners to utilize negative notice procedures to reduce the necessity for counsel and litigants to appear at hearings on uncontested matters. Bankruptcy courts should develop consent dockets to minimize the amount of time an attorney needs to spend in the courtroom.

See the full Report for discussion of the reasons for these recommendations.

C. Lowering Barriers to Access

§ 3.06 Credit Counseling and Financial Management Course

(a) Congress should eliminate the prepetition credit counseling requirement as a qualification to be a debtor in section 109(h).

(b) Congress should eliminate the financial management course requirement as a condition of discharge in chapter 7 proceedings.

(c) Congress should amend the Fair Credit Reporting Act to provide an entry on a consumer's report related to their bankruptcy case that identifies the consumer's completion of a postdischarge financial management course.

See the full Report for discussion of the reasons for these recommendations.

§ 3.07 Means Test Revisions & Interpretations

(a) Reducing documentation requirements.

(1) The Bankruptcy Code should allow below-median income debtors to provide documentation of income as follows:

(A) one or more payment advices, issued within 90 days before the petition date, showing the debtor's year-to-date income;

(B) a tax return or transcript for the calendar year preceding the year the petition is filed;

(C) a W-2 form issued by each employer for the tax year preceding the year the petition is filed; or

(D) other evidence of income received within 60 days before the petition date.

(2) The Bankruptcy Code should allow below-median income debtors to establish their safe-harbor status from the means test by providing the documentation in paragraph (1), without being required to calculate current monthly income (CMI).

(b) Excluding public assistance, government retirement, and disability benefits.

(1) The Bankruptcy Code should allow public retirement and disability benefits provided under government programs comparable to Social Security – including those for veterans, railroad workers, and state and federal civil servants – to be excluded from the CMI calculation in the same way that benefits received under the Social Security Act are excluded.

(2) The Bankruptcy Code should provide that the exclusion of public retirement and disability benefits from CMI for any debtor should be in the

§ 3.07 continued on next page

amount of the debtor's actual retirement or disability benefits capped by the maximum allowed Social Security benefit.

(3) The courts should interpret the calculation of CMI under existing law to exclude unemployment benefits that are "received under" the Social Security Act. Congress also should pass a clarifying amendment excluding such benefits.

(c) Interpreting "special circumstances" under the means test. Courts should interpret section 707(b)(2)(B)(i) to permit the debtor to establish special circumstances for purposes of rebutting the presumption of abuse even if the obligation at issue was incurred voluntarily. Congress also should pass a clarifying amendment to the same effect.

(d) Calculating reductions from current monthly income (CMI).

(1) The courts should interpret section 707(b) as follows in calculating the debtor's monthly expenses:

(A) For categories of expenses specified in the National Standards, deductions from CMI should be the amounts in the National Standards adopted by the Internal Revenue Service for its collection financial standards irrespective of the actual expenses incurred by a debtor.

(B) For categories of expenses specified in the Local Standards, deductions from CMI should be the debtor's actual expenses for transportation and housing capped by the amounts in the Local Standards as adopted by the Internal Revenue Service.

(2) Courts should interpret the calculation of the amounts "scheduled as contractually due" to secured creditors which may be deducted from a debtor's CMI pursuant to section 707(b)(2)(A)(iii) as limited to payments to secured creditors whose claims are secured by property that is reasonably necessary for the maintenance and support of the debtor and the debtor's dependents.

(3) Congress should pass clarifying amendments to make the statutory language consistent with the recommended interpretations of existing law in paragraphs (1) and (2).

See the full Report for discussion of the reasons for these recommendations.

§ 3.08 Application of Means Test in Converted Cases

The means test should apply in cases converted from chapter 13 to chapter 7. Furthermore, courts should apply the means test as of the date of the original filing. If the debtor would have been eligible for chapter 7 on the date of the original filing, the debtor passes the means test for purposes of conversion. These results are not only the best interpretation of existing law but also sound policy that Congress should clarify as part of any statutory amendment.

See the full Report for discussion of the reasons for these recommendations.

§ 3.09 Document Production Requests by Bankruptcy Trustees

(a) The Commission endorses the "Best Practices for Document Production Requests by Trustees in Consumer Bankruptcy Cases."

(b) The "Best Practices" document should be part of the Handbook for Chapter 7 Trustees.

See the full Report for discussion of the reasons for these recommendations.

§ 3.10 Chapter 13 Debt Limits

(a) Congress should amend section 109(e) to provide that an individual is eligible for chapter 13 if the individual has less than $3,000,000 in total noncontingent, liquidated debts, eliminating the distinction between secured and unsecured debts. The new debt limit should continue to be adjusted for inflation according to section 104(a).

(b) In the case of married persons, Congress should amend section 109(e) so the following rules clearly apply:

(1) If only one spouse files, the debts of the nonfiling spouse that are not the liability of the filing spouse should not count against the filing spouse's debt limit. Debts of the filing spouse thus should not be aggregated with the debts of a nonfiling spouse.

(2) If both spouses file, each should have the benefit of the debt limit. Debts owed by both spouses are counted against each spouse's limit.

See the full Report for discussion of the reasons for these recommendations.

§ 3.11 Translation Services

(a) 28 USC § 1827(d) should allow bankruptcy courts to provide translation services to all parties, to specify that such services may be provided through telephonic as well as in-person interpreters, and to authorize the use of appropriated funds for these purposes. The law should clarify that a court may use nonappropriated funds to translate written materials.

(b) The judiciary should commission translations of the bankruptcy forms, without requiring compliance with standard formatting. Third-party interface systems should use these translations to print two copies of each filing: one in English that looks like the current form and a second copy in the alternative language used by the filer. Both copies could be filed with the court, if desired.

See the full Report for discussion of the reasons for these recommendations.

§ 3.12 Mental Health Issues in Bankruptcy

(a) Section 107 should include a new paragraph (b)(3): "(b) On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may . . . (3) protect an individual with respect to information regarding the individual's physical and mental health." The Advisory Committee on Rules of Bankruptcy Procedure should propose a similar amendment to conform rule 9018.

(b) The Advisory Committee on Rules of Bankruptcy Procedure should propose an amendment to rule 9037(a) to require redaction of information regarding both mental and physical health.

(c) Judicial districts should adopt the Eastern District of North Carolina program to provide pro bono or reduced-cost referrals for: (a) debtors needing mental health assistance in matters such as student loan dischargeability or hardship discharge and (b) parties in need of mental-health counseling.

(d) The ABI should take effective action within the organization to advance the interests of better treatment of mental-health issues in bankruptcy and better physical and mental health for bankruptcy professionals.

See the full Report for discussion of the reasons for these recommendations.

Chapter 4
Making Chapter 13 Work for All Stakeholders

A. Chapter 13 Practice

§ 4.01 Racial Justice in Bankruptcy

(a) The empirical evidence establishes that African American bankruptcy debtors are both disproportionately more likely to file chapter 13 cases than debtors of other races and disproportionately less likely to obtain a discharge.

(b) All professionals working in the bankruptcy system should strive to ensure that all persons have equal access to justice. Nothing beyond the applicable legal standards should affect a person's access to the bankruptcy system. No one should experience disparate treatment based on any nonlegal factor, including race, color, religion, sex, pregnancy, disability, national origin, ancestry, marital status, sexual orientation, or gender identity.

(c) Insolvency organizations should develop and widely disseminate educational and training programs that can help bankruptcy professionals reduce implicit racial bias.

(d) Congress should amend 28 U.S.C. § 159 to require both the collection of race and ethnicity information on the petition and the dissemination of that information by the director of the Administrative Office of U.S. Courts.

(e) In the absence of congressional action, both the Advisory Committee on Rules of Bankruptcy Procedure and the Administrative Office of U.S. Courts should consider the feasibility and practicality of collecting race and ethnicity information about bankruptcy filers through official bankruptcy forms, with appropriate privacy protections.

See the full Report for discussion of the reasons for these recommendations.

§ 4.02 Nonuniform Court Practices

(a) Uniform practices reduce costs and facilitate access to justice for all parties. Courts should adopt local rules, standing orders, and practices that promote uniformity within the district and across the nation.

(b) In multi-judge districts, judges should confer to reduce differences in courtroom procedures.

(c) The ABI should work with the U.S. Trustee Program, the Federal Judicial Center, and other professional associations to promote uniformity in the bankruptcy system.

See the full Report for discussion of the reasons for these recommendations.

B. Chapter 13 Plans

§ 4.03 Reserve Fund in Chapter 13 Cases

(a) Statutory and Rules Amendments for a Reserve Fund.

(1) Section 1322(b) should allow a plan to provide –

(A) for contributions from the debtor to a reserve fund held by the trustee for the payment of nonrecurring necessary expenses of the debtor, with the amount of the fund limited, in the absence of unusual circumstances, to one month of the debtor's scheduled expenses; and

(B) for restoration of the fund by additional debtor contributions to the extent of any disbursements from the fund.

(2) Section 1325(b)(2)-(3) should allow a deduction from disposable income for contributions to a reserve fund under § 1322(b).

(3) The Federal Rules of Bankruptcy Procedure should provide –

(A) that to access the reserve fund the debtor shall file a notice setting out the funds reasonably needed to address a nonrecurring necessary expense, and

(B) that the trustee shall disburse the requested funds to the debtor fourteen days after filing of the debtor's notice in the absence of objection from the trustee or an unsecured creditor.

(4) Changes to the Official Forms and Local Forms.

(A) The official form for determining disposable income for an "above median" debtor should include a deduction for contributions to create a reserve fund.

(B) The official form for chapter 13 plans should include a separate paragraph for contributions from the debtor to a reserve fund.

(C) The Federal Rules of Bankruptcy Procedure should require that a local form include a separate paragraph for contributions from the debtor to a reserve fund.

§ 4.03 is continued on next page.

(b) Best Interpretation of Current Law. The current provisions of chapter 13 should be interpreted to allow a debtor's plan to include a nonstandard provision for a reserve fund, held by the trustee, for payment of nonrecurring necessary expenses, subject to the following nonstandard plan provisions:

(1) The reserve fund must be limited to a reasonable amount – one month of the debtor's scheduled expenses in the absence of unusual circumstances.

(2) The debtor may make additional contributions of disposable income to restore any disbursements from the fund.

(3) The trustee will make disbursements from the reserve fund to the debtor on notice setting out a reasonable amount needed to address a nonrecurring necessary expense, with the payment made in 14 days of the filing of the notice in the absence of objection from the trustee or an unsecured creditor.

(4) If the debtor's income is equal to or below the median specified in section 1325(b)(3), any contributions of disposable income remaining in the fund at the time the case terminates will be returned to the debtor.

(5) If the debtor's income is above the median specified in section 1325(b)(3), any contributions of disposable income remaining in the fund at the time the case terminates will be paid on unsecured claims.

See the full Report for discussion of the reasons for these recommendations.

§ 4.04 Chapter 13 Transfer of Debtor's Principal Residence Subject to an Underwater Mortgage

Federal Rule of Bankruptcy Procedure 6004 should provide that if a debtor seeks to satisfy a claim secured by the debtor's principal residence pursuant to section 1325(a)(5)(B) by conveying the property to the holder of the first-priority mortgage lien or selling the property free and clear of liens:

(a) the plan must provide the holder with sixty days from confirmation of the plan to review and respond to the proposed treatment of the mortgage;

(b) if the holder accepts a direct transfer, the debtor must issue a deed to the holder within fourteen days of the holder's acceptance of this option; and

(c) if the holder rejects a direct transfer, then within fourteen days of the holder's rejection, the debtor must file and serve in accordance with Federal Rule of Bankruptcy Procedure 9014 a motion to sell the property pursuant to section 363(f),

(1) providing that the sale is to take place no later than ninety days after notice of the motion and

(2) specifying that any interests attaching to the property with a higher priority than those of the holder of the first priority mortgage will be paid no more than they would have received under applicable nonbankruptcy law had the property been subject to a foreclosure sale or deed in lieu of foreclosure at the same sale price.

See the full Report for discussion of the reasons for these recommendations.

§ 4.05 Loan Modifications in Chapter 13

(a) The Commission supports the use of loan modification in bankruptcy proceedings. Loan modification programs vary widely from district to district. There should be more uniformity, and that uniformity could be encouraged through the bankruptcy rulemaking process.

(b) Courts should not delay confirmation of a chapter 13 plan because there is a pending loan modification. Instead, the terms of a successful mortgage modification should be incorporated into an amended plan that is approved through the plan modification process under section 1329 and Federal Rule of Bankruptcy Procedure 3015, with appropriate notice. This process also should include amended Official Bankruptcy Forms B106I and B106J if the loan modification changes the monthly mortgage payment by 10% or more.

(c) Attorneys should be encouraged to participate in loan modifications and should be appropriately compensated for their time in the loan modification process. An amended plan incorporating a loan modification should state the amount of fees to which debtor's counsel is entitled because of additional services rendered and how those fees will be paid. The plan also should specify any additional fees, costs, or expenses to which the debtor agrees that the mortgage holder or servicer is entitled.

(d) Because the plan modification process will provide appropriate notice to all parties, a loan modification incorporated into an amended plan does not require a payment change notice that would otherwise be required by Federal Rule of Bankruptcy Procedure 3002.1 because of a change in the mortgage payment or because of the fees, costs, or expenses due the mortgage holder or servicer.

(e) Transparency in the production of documents required for loan modification is vital to the success of loan modification. Too often, loan modifications fail due to a lack of communication between debtors and mortgage servicers, resulting in the other participants in the bankruptcy (debtor's and creditor's attorneys, trustees and the bankruptcy court itself) being unable to determine what problems have arisen and how to resolve them. Loan modification rules should encourage transparency through online portals, the case management and electronic case filing (CM/ECF) system, or through other processes.

See the full Report for discussion of the reasons for these recommendations.

4.06 Conduit Mortgage Payments

(a) The Commission supports conduit payment of mortgage claims. The Commission takes no position on whether conduit payment is beneficial for nonmortgage claims.

(b) Congress should amend the Bankruptcy Code to clarify that conduit payment of mortgage claims is required unless there are compelling reasons for the debtor to make direct payments to the mortgage holder. Examples of compelling reasons include:

(1) The commission a trustee would charge on conduit mortgage payments would cause an unreasonable burden on debtors in that district.

(2) In a particular case, the debtor would not be able to make plan payments because of the trustee c§ ommission.

(3) A nonfiling co-debtor is making the payment.

(d) The U.S. Trustee Program and bankruptcy administrators should facilitate the adoption and use of conduit payment of mortgage claims, including allowing bifurcated commission rates.

(e) Congress should adopt a clarifying amendment to 28 U.S.C. § 586(e) to allow bifurcated commission rates on mortgage payments and other payments in the plan.

See the full Report for discussion of the reasons for these recommendations.

§ 4.07 No Automatic Dismissal When Chapter 13 Plan Payments Are Not Completed Within Sixty Months

If debtor is making monthly chapter 13 plan payments routinely and the remaining balance to be paid under the plan is nominal or an amount that could be paid by the debtor in a reasonable period of time, a bankruptcy court should not dismiss a chapter 13 case because the debtor has not completed making plan payments within sixty months.

§ 4.08 Conflicts Between Proofs of Claim and Chapter 13 Plan Terms

The Federal Rules of Bankruptcy Procedure should provide that, absent an objection and unless the court orders otherwise, the amount in a timely filed proof of claim takes precedence over a contrary amount in a chapter 13 plan with respect to the following:

(a) if the debtor proposes to cure defaults and maintain payments:

(1) the amount necessary to cure any default, and
(2) the amount of the current installment payment;

(b) the total amount of a creditor's claim (including the amount of a creditor's claim subject to lien avoidance under § 522(f)); and
(c) the amount of a secured claim excluded from section 506.

See the full Report for discussion of the reasons for these recommendations.

§ 4.09 Interest Rates in Chapter 13 Plans

In the fifteen years since the decision in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004), courts and lawyers have settled on law and practices about the appropriate rate of interest in a chapter 13 plan. The Commission does not recommend any changes to this body of law.

See the full Report for discussion of the reasons for these recommendations.

§ 4.10 Section 1306 Improvements

In addition to the events already listed, section 1306(a) also should provide that property ceases accumulating in the chapter 13 estate after the debtor completes payments under the plan.

See the full Report for discussion of the reasons for these recommendations.

Chapter 5

Systems Issues

§ 5.01 Chapter 7 Trustee Compensation

(a) Compensation should be increased for trustees to $120, with the increase in the fee coming from bankruptcy filing and other court fees already paid to the general treasury. These bankruptcy filing and other court fees should be placed into a special fund earmarked for trustee compensation.

(b) The "breakpoints" for trustee compensation in asset cases should be changed to allow for more trustee compensation. The first two breakpoints should be increased from 25% of the first $5,000 and 10% of the next $45,000, to 25% of the first $10,000, and 10% of the next $90,000. The 3% per million dollars in excess of $1 million should be increased to 4% per million. The 5% applicable on distributions between $100,000 and $1 million would not change.

See the full Report for discussion of the reasons for these recommendations.

§ 5.02 Chapter 7 Trustee Employment of Professionals

The Federal Rules of Bankruptcy Procedure should require "notice and a hearing" on the trustee's application to employ any professional. Notice should be given to all creditors, the U.S. Trustee, and the debtor.

See the full Report for discussion of the reasons for these recommendations.

§ 5.03 Mediation in Consumer Bankruptcy

(a) Bankruptcy judges should order mediation of appropriate disputes. Bankruptcy judges should not routinely order mediation and should consider the cost of mediating a dispute.

(b) Bankruptcy courts should establish a roster of mediators willing to conduct pro bono mediations in consumer cases and proceedings.

(c) The bankruptcy judge should not serve as the mediator in a matter pending before that judge unless the judge will disqualify himself or herself if the matter does not settle.

(d) The judge presiding over a matter being mediated should have little or no contact with the mediator (whether the mediator is another judge or a lawyer). Any contact that does occur should be with notice to all parties and limited to procedural issues, such as whether the matter has settled and the terms of any settlement.

(e) The bankruptcy judge should not empower the mediator to issue orders. The bankruptcy judge to whom the case is assigned should issue all orders regarding the mediation.

See the full Report for discussion of the reasons for these recommendations.

§ 5.04 Chapter 13 Business Debtor Reporting

(a) Federal Rule of Bankruptcy Procedure 2015 should require the use of a new official form for reporting by chapter 13 debtors engaged in business.

(b) The reporting interval should be quarterly with the report due 21 days after the end of the quarter.

(c) In any particular case, the court may excuse or change the reporting requirement by ordering otherwise.

See the full Report for discussion of the reasons for these recommendations.

§ 5.05 Standardization of Credit Reporting After Bankruptcy

It is the sense of the Commission that standardization of credit reporting in bankruptcy is desirable. Therefore, the Commission recommends that the ABI host a forum on credit reporting with bankruptcy experts, major industry players, advocacy groups, and policy makers. The forum should address problems and promote standardization in credit reporting on bankruptcy cases and should develop best practices. The ABI should invite the Consumer Data Industry Association, the trade organization of the major credit reporting agencies, to the forum.

See the full Report for discussion of the reasons for these recommendations.

§ 5.06 Bankruptcy Forms

(a) There is disagreement in the bankruptcy community about the efficacy of the new bankruptcy forms. The Advisory Committee on Rules of Bankruptcy Procedure should study whether the new forms have accomplished their goals.

(b) The official bankruptcy forms should be data enabled to allow data extraction by trustees, attorneys, and researchers.

(c) The technological challenges of developing software that allows data entry for bankruptcy forms by nonlawyers are immense. The private marketplace – including both for-profit and nonprofit organizations – is the best place to develop electronic methods for the assembly of information relevant to bankruptcy filings. These organizations should continue this development with encouragement from or in consultation with the Administrative Office of U.S. Courts, the Federal Judicial Center, the Advisory Committee on Rules of Bankruptcy Procedure, the U.S. Trustee Program (USTP), and private bankruptcy organizations.

See the full Report for discussion of the reasons for these recommendations.

§ 5.07 Case Management (CM)/Electronic Case Filing (ECF) & Docketing Improvements

(a) The Administrative Office of the U.S. Courts ("AO") should promote uniformity in CM/ECF and docketing practices across the country by adopting and promoting:

(1) a uniform set of naming conventions for pleadings, events and party names,

(2) a uniform format for pleadings and electronic orders,

(3) a uniform procedure for requesting and receiving notice in a bankruptcy case, including situations where the party is not a licensed attorney in the district,

(4) a uniform procedure for removing a party from the list of parties to receive notice in a bankruptcy proceeding, and

(5) a uniform scanning standard for PDF documents, including a uniform document capacity size that is preferably the highest capacity possible.

(b) The AO should discourage districts from mandating the use of electronic proofs of claim (ePOC). The AO also should install security procedures before parties can use the ePOC portal and allow parties to upload a PDF copy of the proof of claim instead of populating the virtual proof of claim form.

See the full Report for discussion of the reasons for these recommendations.

§ 5.08 Notice & Service Issues

(a) Federal Rules of Bankruptcy Procedure 3001(a) and 3001(e) as well as Form B410 (Proof of Claim) should provide (1) that if the creditor filing the claim is a corporation, the creditor must identify an officer, a managing or general agent, or other authorized agent responsible for receiving notices under the Bankruptcy Code; and (2) that if the creditor is a depository institution, it must provide the same information and indicate whether it waives service by certified mail. If rule 3001 is amended in this manner, Federal Rule of Bankruptcy Procedure 3007 should require that objections to claims be served under rule 7004.

(b) A committee note to Federal Rule of Bankruptcy Procedure 7004 should indicate that "delivering a copy of the summons and of the complaint to an officer, a managing partner or general agent, or any other agent" does not require identifying that individual by that person's name.

(c) With appropriate consideration for operational concerns, the Administrative Office of U.S. Courts should provide access to the database of preferred addresses to registrants of the case management/electronic case filing (CM/ECF) system.

See the full Report for discussion of the reasons for these recommendations.