



AMERICAN
BANKRUPTCY
INSTITUTE

2019 Hon. Steven W. Rhodes Consumer Bankruptcy Conference

ABI's Commission on Consumer Bankruptcy

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Selected Recommendations
From the Final Report of the Commission

Discussion at the
Hon. Steven W. Rhodes
Consumer Bankruptcy Conference
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The ABI Commission on Consumer Bankruptcy

We'll discuss two aspects of the Commission's work in this session—

- first, the Commission's background, and
- second, several of the Commission's recommendations, affecting practice in both Chapter 7 and Chapter 13.

Background of the Commission

Why the Commission was formed

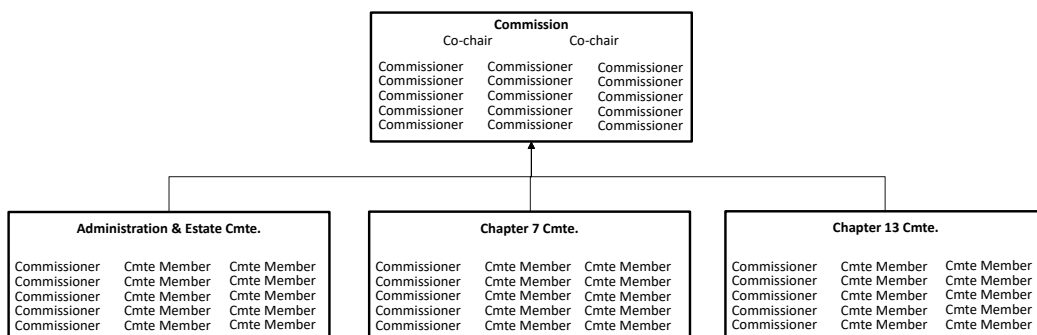
- Over 40 years have passed since the Bankruptcy Code was adopted, and 14 years since the BAPCPA amendments.
- In that time, there have been major changes in
 - the economy,
 - technology,
 - law practice, and
 - the regulatory environment.

The Commission's charge

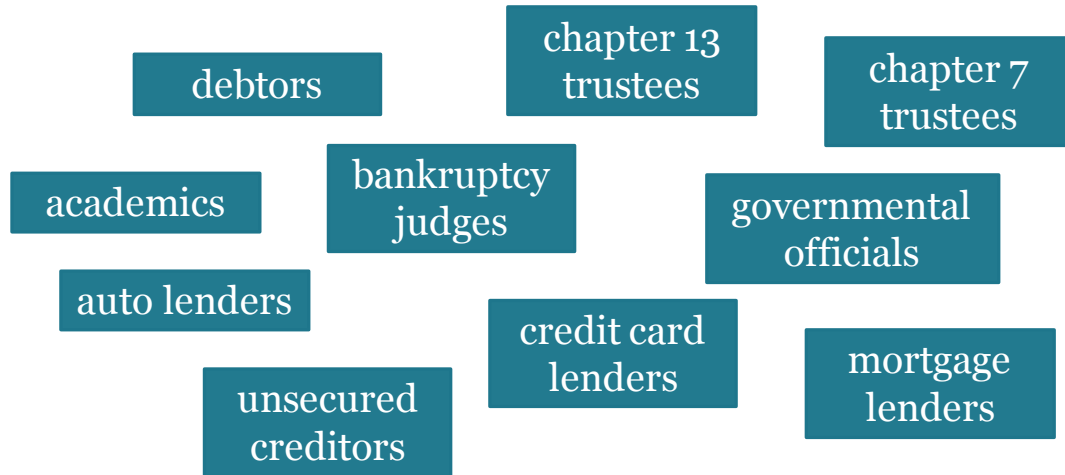
- Research and recommend improvements to the consumer bankruptcy system
- Limit the recommendations to those that can be implemented within the existing structure
- The recommendations may include
 - amendments to the Bankruptcy Code,
 - changes to the Bankruptcy Rule, administrative rules or actions,
 - recommendations on proper interpretations of existing law,
 - other best practices that judges, trustees and lawyers can implement.

The Commission's composition

- Twenty-two commissioners with backgrounds in every area affected by consumer bankruptcy.
- Thirty additional professionals assisting the commissioners by serving on one of three committees:
 - Committee on Case Administration and the Estate
 - Committee on Chapter 7
 - Committee on Chapter 13.



Professional Experience of Commissioners and Committee Members



Ideas for Commission Recommendations

- The Commission received 131 written submissions that included ideas for areas of study
- The Commission and its committees held 6 public meetings in conjunction meetings of organizations of bankruptcy professionals
- The Commission and its committees conducted their own research

Final Report

- Proposed Commission recommendations had to be approved by a two-thirds majority of the voting commissioners.
- The final report sets out 48 approved recommendations with a discussion of the background and reasoning behind each, divided into five areas:
 - Effectuating the Fresh Start
 - Improving Creditor Certainty
 - Facilitating Effective Access
 - Making Chapter 13 Work
 - Systems Issues

Final Report

- The full report is available at <https://consumercommission.abi.org/commission-report>
- We'll first discuss several of the recommendations affecting Chapter 7 practice.
- Next, we'll discuss recommendations affecting Chapter 13—both general practice and treatment of specific claims.

Recommendations

—Affecting Chapter 7 practice

1. § 1.01—Student Loans

The Commissions' recommendations for the treatment of student loan debt are in four areas:

- Code amendments
- Best interpretation of Bankruptcy Code
- Recommendations for DOJ administrative process
- Chapter 13 plan provisions (will be covered later)

1. § 1.01—Student Loans

Basic Code amendment:

Student loans should be dischargeable under § 523(a)(8), regardless of the degree of hardship they impose, if they were

- made by a nongovernmental entity (private loans),
- incurred by a person other than the one receiving the education, *or*
- first payable more than seven years before the bankruptcy.

1. § 1.01—Student Loans

Changes to interpretation of existing law:

- Under the *Brunner* test, “undue hardship” should be found if
 - the debtor cannot currently pay,
 - will not be able to pay during loan term, and
 - has not failed to act in good faith.
- Findings should be made on a preponderance of the evidence.
- Appellate review: the determination of undue hardship should be treated as a finding of fact.

1. § 1.01—Student Loans

Administrative procedures:

The Department of Education, through regulations or interpretive guidance, should provide that student loan creditors

- should not oppose the discharge of student loans owed by anyone (i) eligible for Social Security or veterans disability benefits or (ii) falling below certain poverty-level thresholds, and
- should accept and evaluate the borrower's evidence without reference to formal guidelines such as court discovery rules.

2. § 2.02—Definition of “Surrender”

- Wherever it appears in the Code, “surrender property” should be interpreted to mean that the debtor must
 - relinquish the property,
 - not impede trustee or creditor from taking it, and
 - make the property available.
- Surrender does not require physical delivery.
- Debtor may still assert non-bankruptcy defenses.
- This recommendation is not an endorsement of forced-vesting.

3. § 2.03—Statement of Intention— Deadlines and Consequences; Amendments to §§ 521 and 362

- An individual debtor should continue to have 30 days from filing the petition to submit a statement of intention for all property of the estate that secures a debt.
- The debtor should be required to submit a filing that exercises that intent within 60 days after the first date set for the meeting of creditors.
- If the debtor opts for reaffirmation, the filing would be a reaffirmation agreement; if the debtor opts for redemption, the filing would be a motion to authorize the redemption.

3. § 2.03—Statement of Intention— Deadlines and Consequences; Amendments to §§ 521 and 362

- If the debtor has opted to redeem the collateral, the debtor must pay the redemption price within fourteen days of an order authorizing the redemption.
- Failure by the debtor to comply with these deadlines results in termination of the automatic stay, but not removal of property from the estate.
- Rule 6008 should be amended to set out these recommended deadlines.

4. § 3.01—Chapter 7 Attorney's Fees

- Allow post-petition payment for pre-petition services.
- Consider alternative mechanisms for collection of unpaid fees:
 - delay discharge to allow collection of attorney fees, or
 - except fees from discharge, with judicial oversight.
- Consider other measures to reduce the cost of legal representation:
 - create easy online data input forms;
 - increase pro-bono representation, with government assistance;
 - reduce filing fee for low-income debtors;
 - allow video attendance at 341 meetings.

5. § 3.02—Unbundling Legal Services

- Bankruptcy courts should adopt local rules that address unbundling.
- The rules should specify 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.

6. § 3.04—Attorney Competency; Addressing Lawyer Misconduct

- Well-established rules of professional conduct govern bankruptcy cases; these disciplinary tools should be vigorously enforced.
- Local committees should form to investigate and resolve complaints against attorneys.
- Disciplinary orders should be published.
- Attorneys should receive enhanced fees for being board certified or demonstrated skill in the bankruptcy field, 11 U.S.C. § 330(a)(3)(F).

7. § 3.05—Stand-in Counsel

- Rules governing stand-in (“appearance”) counsel should be adopted to ensure competent, efficient, and ethical representation bankruptcy clients.
- Rule 9010 should be amended to require notices of appearance to include any limitation on representation.
- Courts should minimize the need for stand-in counsel by allowing
 - video and telephonic hearings,
 - negative notice procedures,
 - consent dockets.

8. § 3.06—Credit Counseling; Financial Management Course

- Prepetition credit counseling should be eliminated.
- The requirement of a financial management course for a chapter 7 discharge should be eliminated.
- The requirement of a financial management course for a chapter 13 discharge should be retained, with further study of its effectiveness.
- The Fair Credit Reporting Act should require the reporting of a debtor's successful completion of a financial management course.

9. § 3.08—Application of the Means Test in Converted Cases

- The means test should apply in cases converted from chapter 13 to chapter 7.
- 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.

10. § 3.09—Document Production Requests by Bankruptcy Trustees

- The Commission received reports of trustee document requests going beyond the requirements of the Code and rules.
- To balance trustees' need for additional information in particular cases with the avoidance of unnecessary burdens on debtors, the Commission endorses the "Best Practices for Document Production Requests by Trustees in Consumer Bankruptcy Cases," published by the U.S. Trustee Program.
- The "Best Practices" document should be part of the Handbook for Chapter 7 Trustees.

11. § 3.12—Mental Health Issues in Bankruptcy

The Commission recognized the established link between debt and mental health issues, and recommends—

- Code and rule amendments to protect the privacy of an individual's physical and mental health.
- Adoption of court-based programs 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.
- ABI action within its organization to advance better treatment of mental health issues in bankruptcy.

12. § 5.01—Chapter 7 Trustee Compensation

- Compensation should be increased for trustees to \$120 per case, with the increase in the fee coming from bankruptcy filing and other court fees already paid to the general treasury.
- The “breakpoints” for trustee compensation in asset cases should be changed to allow for greater trustee compensation.

Recommendations

—Affecting general Chapter 13 practice

13. § 3.10—Chapter 13 Debt Limits

- \$3,000,000 total limit—no secured/unsecured distinction
- Adjusted for inflation under § 104
- Clarification for married persons
 - Debt limit are applied to each spouse individually; only joint debts are included for each spouse.
 - Non-filing spouse's individual debts are not added to filing spouse's debt.
 - One spouse may be under the limit, the other not.

14. § 4.06—Conduit Payments

- Would be required unless:
 - The trustee commission would be an undue burden on debtors in the district.
 - The trustee commission would be an undue burden on the debtor in the case.
 - A non-filing co-debtor is making payments.
- Bifurcated commission rates should be permitted.

15. § 3.06—Credit Counseling & Financial Management Course

- Prepetition credit counseling should be eliminated.
- The requirement of a financial management course for a chapter 7 discharge should be eliminated.
- The requirement of a financial management course for a chapter 13 discharge should be retained, with further study of its effectiveness.
- The Fair Credit Reporting Act should require the reporting of a debtor's successful completion of a financial management course.

16. § 4.06—Reserve Fund in Chapter 13

- Chapter 13 debtors should be allowed and encouraged to maintain a reasonable reserve fund
 - to be held by the trustee
 - for *unanticipated* expenses of the debtor.
- The reserve fund should be limited to one month of scheduled expenses.
- The debtor would access the reserve fund after notice and an opportunity for interested parties to object.
- The debtor should be allowed to replenish the reserve fund.

17. § 3.07 Means Test Revisions & Interpretations

- Retain the means test but with these amendments:
 - reduce documentation for below-median income debtors;
 - exclude public assistance, government retirement, and disability benefits from income to level of social security;
 - remove the presumption of abuse if the debtor shows special circumstances, even if the circumstances arose voluntarily; and
 - limit certain statutory expense deductions to the extent actually incurred and necessary for support.

18. § 3.03—Chapter 13 Attorney Fees

- Local rules should provide:
 - for flat fees for work done through confirmation, with regular review of the fee amount, and
 - for “a la carte” fees for post-confirmation work.
- Courts should consider allowing higher fees for certified attorneys.

19. § 3.04—Attorney Competence & Lawyer Misconduct

- Well-established rules of professional conduct governing bankruptcy cases and disciplinary tools should be vigorously enforced.
- Local committees should form to investigate and resolve complaints against attorneys.
- Disciplinary orders should be published.
- Attorneys should receive enhanced fees for being board certified or demonstrated skill in the bankruptcy field, 11 U.S.C. § 330(a)(3)(F).

20. § 1.02—Remedies for Discharge Violations

- Amend the Code to provide a private right of action.
- Amend the Bankruptcy Rules to allow for an expedited determination of whether an action violates the discharge injunction,
 - using motion practice rather than adversaries,
 - with standing for both debtor and creditor,
 - commenced either before or after the creditor action has taken place.

21. §2.05—Repeat Filers:

§ 109(g): Ineligibility

- The order of dismissal (in a first case) should be limited to prohibiting a new filing 180 days, but that period may be:
 - extended up to 720 days for substantial abuse or
 - reduced based on changed circumstances and good faith.

21. §2.05—Repeat Filers:

- Grounds for the limit on refiling:
 - willful failure of debtor to abide by court orders or propose a plan in good faith,
 - willful and substantial default,
 - repetitive dismissed bankruptcies,
 - willful failure to appear, or
 - any abuse of Title 11 other than 707(b), the means test,
 - **but not** a new case after voluntary dismissal after a stay motion (§ 109(g)(2) would be deleted).

22. §2.05—Repeat Filers:

§ 349: Dismissal of a case

- should not bar discharge in a subsequent case of dischargeable debts except as otherwise expressly provided in the Code, such as in § 727, and
- should not prejudice the Debtor with regard to refiling, except as set forth in § 109(g).

§ 362(c): Automatic stay

- § 362(c)(3), making the stay in effect for only 30 days, should be entirely repealed.
- The content of § 362(c)(4) should be retained.

23. § 4.01—Racial Justice

Bankruptcy professionals should

- recognize empirical evidence of racial disparity in filing Chapter 13 and obtaining discharge,
- encourage equal access to justice by all professionals,
- encourage education and training, and
- collect information on race and ethnicity.

Recommendations

—Affecting particular Chapter 13 claims

24. § 1.01—Student Loans

The amending and interpreting § 523(a)(8) were discussed earlier, in connection with Chapter 7 practice.

Recommendations particularly important in Chapter 13:

- Add an eleventh priority to § 507(a) for these loans, without requiring payment in full beyond a five-year plan but allowing payment of interest.
- Interpret § 1322(b)(1) to allow preferential payment of the loans, subject only to the best interest test.
- Interpret § 1322(b)(5) to allow cure and maintenance.
- Interpret § 1322(b)(10) as inapplicable to these loans.

25. § 2.07 Notices of Payment Changes and Final Cure

Amend Rule 3002.1 to—

- delay increases in mortgage payments until the mortgagee gives timely notice, but make decreases effective regardless of notice delays;
- require notice of changes in HELOCs annually unless the change is more than \$10 in a given month;
- provide for motion practice and effective sanctions in connection with mortgagee failures to provide required responses to notices of final cure; and
- provide for mid-case reports on status of mortgage payments.

26. § 2.06 Defining and Valuing the Debtor's Principal Residence: Timing Issues

- Whether property is the debtor's principal residence should be determined as of the filing date rather than the time of the loan.
- The value of a claim secured by the residence should also be determined as of the filing date rather than the time of confirmation, allowing greater certainty for debtors proposing a chapter 13 plan and reducing the need for evidentiary hearings on postconfirmation changes in value.

27. § 4.04—Underwater Mortgages

- §§ 1322(b)(8) and 1325(a)(5)(B) should be interpreted as allowing payment of a mortgage claim by transferring the property to the principal mortgagee.
- To meet the good-faith requirement of § 1325(a)(3), the mortgagee should have the alternative of consenting to a free and clear sale of the property under § 363(f)(2).
- Reasonable time should be given for the mortgagee's choice between receiving the property or consenting to sale and for the debtor to effect transfer or sale.
- Although correct under current law, this procedure should be detailed in the Bankruptcy Rules or specified in Code amendments.

Next Steps

The Commission's Final Report needs to come to the attention of legislators, judges, regulators, and other policymakers.

Anyone interested in a better consumer bankruptcy system can help in these efforts.



Recommendations for Chapter 7
From the Final Report of the Commission

Discussion at the
ABI Midwest Regional Bankruptcy Seminar
August 20-21, 2019