American Bankruptcy Institute

Final Report of the ABI Commission on Consumer Bankruptcy

THE ABI COMMISSION ON CONSUMER BANKRUPTCY

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2017~2019

FINAL REPORT AND RECOMMENDATIONS

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Founded on Capitol Hill in 1982, the American Bankruptcy Institute (ABI) is the only multi-disciplinary, nonpartisan organization devoted to the advancement of jurisprudence related to problems of insolvency. The ABI membership includes more than 13,000 attorneys, bankers, judges, accountants, professors, turnaround specialists and other bankruptcy professionals, providing a forum for the exchange of ideas and information. ABI was founded to provide Congress with unbiased testimony and research on insolvency issues. For further information, contact ABI.

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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 the 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 Judge 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 that 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 cases . . . ." 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, whereas 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 website, 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, 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 a unanimous vote 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.

Reporter's Note

This report ends two and a half years of work that began when Judge Eugene Wedoff approached me about serving as the reporter for a new ABI commission that intended to study the consumer bankruptcy system and make recommendations for reform. The process was full of respectful debate among some of the leading consumer bankruptcy professionals in the country. The Commission and committee sessions were a master class in bankruptcy law that often challenged my typing skills to keep up with the conversation. It has been an honor to serve as the Commission's reporter.

The Commission was structured in a way to encourage consensus recommendations that represented the views of the group rather than individuals. Putting limitations on the reporter's role was part of this structure. I had no formal say in the Commission's recommendations but rather assisted the Commission and its committees in assembling the information they needed to make decisions. As reporter, it was inescapable that I would have the primary responsibility for writing the explanations that accompany each of the report's recommendations. In drafting, I used the words of the committee and Commission material to the extent it was possible to do so. After each explanation was drafted, it went through several rounds of review in a process always supervised by the Commission co-chairs. Just as the report does not necessarily represent the views of individual commissioners or committee members, it also does not necessarily represent the views of the reporter.

This report would not have been possible without the work of many persons. All who were involved in the process can attest that the report illustrates the axiom that many hands make light work. I am appreciative to everyone who helped, and at the risk of omission, I wanted to especially thank a few by name.

Judges William Brown and Elizabeth Perris guided the Commission from start to finish with good cheer, steady hands, and sound judgment. Even when the demands of life pulled in other directions, they were always available when needed for a consultation about the Commission. One of the things for which I will ever be appreciative is the opportunity to come to know both of them better.

The Commission was an important initiative in Judge Eugene Wedoff's ABI presidency and would not have happened without him. I appreciated Judge Wedoff's engagement throughout the process on matters large and small, always accompanied by his willingness to roll up his sleeves and help whenever something needed to get done. The ABI's executive director, Sam Gerdano, provided wise counsel and support. Everything always ran smoothly because of the ABI's excellent staff and their work.

Once the narratives were finished, Judge Randy Dunn did careful line edits of each one. It was a lot of work and time. Judge Dunn found and corrected many of my mistakes, but any that remain are on me. His ability to spot a missing comma in a string citation is uncanny.

The University of Illinois College of Law and its dean, Vikram Amar, supported my work as the Commission reporter. At the University of Illinois, my outstanding faculty assistant, Sally Cook, helped schedule meetings and provided other support for the Commission's work.

Most importantly, I want to thank my wife, Patti Lawless, for putting up with me during the Commission process. It was a lot of travel and a lot of time. Now, I should be around more, which I hope she thinks is a good thing.

Robert M. Lawless
Champaign, Illinois
February 2019

Citation and Style Conventions

The report follows the conventions of the *Chicago Manual of Style* (17th ed. 2017) and *A Uniform System of Citation* (20th ed. 2015) (i.e., the "Bluebook"), with two modifications. First, unless otherwise noted, a reference to a section refers to the Bankruptcy Code, title 11 of the United States Code, and a reference to a rule refers to the Federal Rules of Bankruptcy Procedure. Second, any statute or rule citation that does not include the year of publication of the volume in which the item appears should be understood as a citation to the version of the statute or rule in effect at the time the report was written, February 2019.

I. 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 five-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 (ten 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 the 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).

Scope of the Problem. Student loan debt is one of the most significant economic problems facing the United States. According to Federal Reserve data, outstanding student loan debt has tripled since 2006, from under $500 billion to over $1.5 trillion today.[1] In 2003, both credit card and auto loan indebtedness were several times the amount of student loan debt, but now student loan debt greatly exceeds both.[2] Among all types of household debt, student loans have the highest delinquency rate.[3] The most recent data show 10.9% of student loans as 90+ days delinquent,[4] and various reports suggest that the true default rate is higher because government figures look only at defaults in the first three years after graduation.[5]

Student loan overindebtedness causes overall economic activity to decline and constrains the post-college options that students have. Academic studies have associated student debt with (1) lower earnings of college graduates,[6] (2) lower levels of homeownership,[7] (3) lower automobile purchases,[8] (4) higher household financial distress,[9] (5) lower probability of students choosing public-service careers,[10] (6) poorer psychological functioning,[11] (7) delayed marriage,[12] and (8) lower probability of continuing education through graduate school.[13] Student loan debt thus affects not only those who owe the loans but also has consequences that ripple through our communities and our nation.

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

2 *See* Federal Reserve Bank of New York, Quarterly Report on Household Debt and Credit (2018:Q2), at 3 (Aug. 2018) https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2018Q2.pdf.

3 *See id.* at 12-14.

4 *Id*. at 1.

5 *See* Kristen Blagg, "Underwater on Student Debt," (Aug. 2018) (https://www.urban.org/research/publication/underwater-student-debt/view/full_report); Ben Miller, "Getting Repayment Rates Right," Center for American Progress (July 10, 2018) https://www.americanprogress.org/issues/education-postsecondary/reports/2018/07/10/453199/getting-repayment-rates-right/; Judith Scott-Clayton, "The Looming Student Debt Crisis Is Worse Than We Thought," Economic Studies at Brookings (Jan. 10, 2018), https://www.brookings.edu/wp-content/uploads/2018/01/scott-clayton-report.pdf.

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

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

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

9 *See* Jesse Bricker & Jeffrey Thompson, *Does Education Loan Debt Influence Household Financial Distress? An Assessment Using the 2007-2009 Survey of Consumer Finances Panel*, 34 Contemp. Econ. Pol'y 660 (2016).

10 *See* Erica Field, *Educational Debt Burden and Career Choice: Evidence from a Financial Aid Experiment at NYU Law School*, 1 Am. Econ. J.: Applied Econ. 1 (2009); Jesse Rothstein & Cecilia Elena Rouse, *Constrained After College: Student Loans and Early-Career Occupational Choices*, 95 J. Pub. Econ. 149 (2011).

11 *See* Katrina M. Walsemann, Gilbert C. Gee & Danielle Gentile, *Sick of Our Loans: Student Borrowing and the Mental Health of Young Adults in the United States*, 124 Social Sci. & Med. 85 (2015).

12 *See* Dora Gicheva, *Student Loans or Marriage? A Look at the Highly Educated*, 53 Econ. Educ. Rev. 207 (2016).

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

History. Congress first excepted student loans from the bankruptcy discharge in the Education Amendments of 1976.[14] A debtor in bankruptcy could discharge a student loan after five years had passed since the beginning of the repayment period, not counting any period during which repayment had been suspended. Before the end of the five-year period, a debtor could discharge a student loan only upon a showing of undue hardship to the debtor or the debtor's dependents. To be excepted from the discharge, the student loan had to be (1) from certain financial institutions like a bank, a state agency, an institution of higher education, or a vocational school, and (2) insured by the federal government, a state government, or a nonprofit private institution. This amendment went into effect on September 30, 1977.[15]

When Congress enacted the Bankruptcy Code in 1978, section 523(a)(8) retained the basic rule that a student loan was freely dischargeable after five years and dischargeable before that time upon a showing of undue hardship.[16] There were a few changes. The nondischargeability provision applied to any debt to a "governmental unit, or a nonprofit institution of higher education, for an educational loan." Gone was the requirement that the loan be insured, although because at the time most every student loan was insured, the change made little practical difference. The Bankruptcy Code framed the undue-hardship standard as whether there was an undue hardship on the debtor *and* the debtor's dependents, arguably a change from the previous rule that required a showing of undue hardship either as to the debtor *or* the debtor's dependents. The Bankruptcy Code now measured the running of the five-year period as beginning when the student loan "first became due" and did not toll the running of the period during any time payment was suspended. Finally, and most importantly, student loans were dischargeable in chapter 13 through its "superdischarge" (presuming the loan was "provided for by the plan").[17]

The next major legal development happened not through a legislative enactment but through decisional law. Marie Brunner graduated in 1982 with a master's degree in social work and $9,000 in student loans. Less than a year later, she filed bankruptcy. The bankruptcy court allowed a discharge, finding undue hardship in Ms. Brunner's "shaky finances and her unsuccessful efforts to find work following her graduation."[18] The Second Circuit rejected Ms. Brunner's attempt to get an early discharge of her student debt. In doing so, the Second Circuit announced what has become the widely accepted *Brunner* test to define undue hardship:

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

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14 Pub. L. No. 94-482, § 127, 90 Stat. 2081, 2141 (adding section 439A to the Higher Education Act of 1965).

15 *See* Alan M. Ahart, *Discharging Student Loans in Bankruptcy*, 52 Am. Bankr. L.J. 201, 202-03 (1978).

16 Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 109(e), 92 Stat. 2549, 2591.

17 *See id.* § 1328(a)(2) (discharging all debts provided for by a chapter 13 plan except for debts specified in § 523(a)(5)).

18 Brunner v. New York State Higher Educ. Serv. Corp. *(In re* Brunner*)*, 46 B.R. 752 (S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987).

(3) the debtor has made good faith efforts to repay the loans.[19]

The Second Circuit noted that there was no evidence that Ms. Brunner's "current inability to find any work will extend for a significant portion of the loan repayment period. She is not disabled, nor elderly. . . . No evidence was presented indicating a total foreclosure of job prospects in her area of training."[20] With the congressional judgment at the time of *Brunner* that a debtor could freely get a discharge for student loans after five years, a strict "undue hardship" standard was understandable.

Congress next acted in 1990, lengthening the period before a student loan became freely dischargeable from five years to seven years after it first became due.[21] In a separate statute, Congress also removed student loans from chapter 13's "superdischarge," meaning debtors now could not freely obtain an early discharge of a student loan in either chapter 7 or chapter 13.[22]

The most significant development for the treatment of student loans in bankruptcy occurred in 1998 when Congress eliminated the time period after which student loans became freely dischargeable.[23] The rule now became that student loans were nondischargeable at any time unless the debtor made a showing of undue hardship. By this time, however, a substantial body of case law had developed, primarily using the *Brunner* test, that defined what a debtor must show to establish undue hardship. The courts had developed this case law under the prior statutory structure but now began applying it in the different context of nondischargeability without a time limit.

In 2005, Congress again added to the definition of student debt that could not be discharged in bankruptcy. For the first time, even private educational loans became nondischargeable in bankruptcy.[24]

Underlying the legal developments has been a belief that student loans have different characteristics from other types of debts that merit exception from the bankruptcy discharge. First, educational lending often enables increased earning power and supposes graduates will use that earning power to repay the loan. Having a procedure that allows graduates to walk away from that debt, especially soon after graduation, particularly increases the moral hazard risk from nonpayment in ways that are not present for other types of debt. Second and relatedly, it offends a sense of fairness to allow nonpayment of a debt

19 Brunner v. New York State Higher Educ. Serv. Corp. *(In re* Brunner*)*, 831 F.2d 395 (2d Cir. 1987).

20 *Id.* at 396-97.

21 *See* Crime Control Act of 1990, Pub L. No. 101-647, § 3621, 104 Stat. 4789, 4965. Congress also added "an educational benefit overpayment" and "an obligation to repay funds received as an educational benefit, scholarship or stipend" to the types of student loan debts excepted from the bankruptcy discharge. *Id.* 4964-65.

22 *See* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3007(b)(1), 104 Stat. 1388, 1388-28. This provision was originally set to expire in 1996, *id.* § 3008, 104 Stat. at 1388-29, but was made permanent in 1994, *see* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 501(d)(38)(A), 108 Stat. 4106, 4147.

23 *See* Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1581, 1837.

24 *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 23, 59. The definition, codified at § 523(a)(8)(B), refers to any educational loan that is a "qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986," a category that includes educational loans made by private entities regardless of whether they have a governmental or nonprofit insurance guaranty.

that enabled a higher income.[25] Third, nondischargeability of student loans may be important to protect the solvency of the governmental student loan program.[26]

Retention of Nondischargeability. The Commission weighed the reasons for student loan nondischargeability against the problems that massive amounts of student loan debt are creating for American households today. The Commission considered but rejected the notion of making student loans freely dischargeable like any other debt, concluding that the rationales supporting nondischargeability remain valid. Funding of sources for educational lending is essential to the system of higher education, and increased earnings resulting from higher education will often allow a student to repay loans that are initially quite large. If reasonably applied,[27] *Brunner*'s three-factor undue-hardship standard can allow appropriate bankruptcy relief during a period when discharge of student loans is not otherwise available. The Commission's recommendations are intended as a package and represent a practical, middle-ground approach that will provide meaningful changes while respecting the traditional protections for student loans.

Statutory Amendments — Return to the Seven-year Rule. The centerpiece of the Commission's recommendation is to return to the pre-1998 rule that allowed student loans to be discharged after seven years from the time they first became payable. Before seven years, student loans would be dischargeable only upon a finding of undue hardship. The rationales for nondischargeability lose their force after a student loan has been outstanding for a significant time. If a debtor cannot obtain sufficiently lucrative employment to repay a student loan that has long been outstanding, it is unlikely the debtor's circumstances will change to allow significant repayment of the student loan. For loans that have been long outstanding and have become delinquent, it is more likely that the overhang of substantial student loan debt will prevent the debtor from engaging in productive economic activity, diminishing the debtor's contribution to the community, such as by establishing a household and supporting the tax base.

The Commission considered different time periods after which a student loan could be freely discharged. Some commissioners thought five years or less might be appropriate, while others believed much longer time periods were appropriate. Drawing on the experience from the pre-1998 law, the Commission decided a seven-year period best balanced the need for payment and the need to encourage economic activity by the debtor. A seven-year period is 70% of the initial ten-year repayment period for a student loan.

Statutory Amendments — No Protection for Nongovernmental Loans. The Commission recommends that only student loans made, insured, or guaranteed by a governmental unit receive any protection from discharge. Governmental student loan programs advance the public policy of making higher education widely available and generally must make their loans available to anyone who qualifies, without regard to underwriting criteria. When making student loans, the government cannot choose only the most creditworthy borrowers. Failure to repay these loans can threaten the viability of government student loan programs.

25 *See, e.g.*, T.I. Federal Credit Union v. DelBonis, 72 F.3d 921, 936 (1st Cir. 1995) ("It is undisputed that Section 523(a)(8) was enacted to prevent abuses in student loan programs."); *In re* Pelkowski, 990 F.2d 737, 742-43 (3d Cir. 1993) (citing House floor statements).

26 *See, e.g., Pelkowski*, 990 F.2d at 743 (citing House floor statements).

27 *See infra* notes 43-53 and accompanying text.

In contrast, private student loans are underwritten in a similar fashion to other unsecured debt, and the interest rates charged on the loans can reflect the risk of loss associated with these obligations. As with any participant in a consumer lending market, private student lenders may require co-signers and security to protect their loans. BAPCPA added private student lenders to those protected from discharge. Academic research, however, suggests that this change did not lead to lower interest rates for student borrowers[28] and was not necessary given the lack of strategic default in the private student loan market before BAPCPA.[29] The Commission therefore recommends that Congress should return section 523 to its pre-2005 state where private student loans did not receive any dischargeability exception.

Statutory Amendments — Protecting Nonstudent Debtors. The Commission also recommends that section 523(a)(8) should limit nondischargeability to student loans owed by the student who benefitted from the loan, rather than by third parties. Third parties — guarantors or suppliers of collateral — would not have benefitted from the loans, and if they are otherwise in need of bankruptcy relief, they should not have their discharge impaired by their support of the student who did benefit.

Statutory Amendments — Priority for Student Loan Debt and Treatment in Chapter 13. Loans that are excepted from discharge should be a priority claim under section 507, specifically a new eleventh priority, which would be the lowest bankruptcy priority. Thus, student loans excepted from discharge would be paid after all other priority claims but before general unsecured creditors.

The Commission recommends this priority for two reasons. The first is to further the goal of obtaining payment of governmental student loans, allowing for distribution of a greater share of the estate in a chapter 7 case where there are distributions to creditors.

Second, and more importantly, giving nondischargeable student loans a priority will improve their treatment in a chapter 13 plan. Student loans are general unsecured debts. Although a chapter 13 plan may designate separate classes of unsecured claims, the plan may not "discriminate unfairly" against any class.[30] Some chapter 13 debtors have separately classified their student loan debt to provide for greater payments on the student loan debt as compared to other unsecured debts. Although as discussed below the Commission believes the better interpretation of existing law is that such separate treatment is not "unfair," some courts have found otherwise.[31]

But regardless of whether student loans can be classified separately as nonpriority claims, a plan can separately classify a priority claim. As *Collier* explains, "there can be no doubt that a plan may separately classify priority claims."[32] A priority reflects a congressional judgment that the type of claim merits

28 Alexei Alexandrov & Dalié Jiménez, *Lessons from Bankruptcy Reform in the Private Student Loan Market*, 11 Harv. L. & Pol'y Rev. 175 (2017).

29 *See* Rajeev Darolia & Dubravka Ritter, *Strategic Default Among Private Student Loan Debtors: Evidence from Bankruptcy Reform* (2017), https://ssrn.com/abstract=3064662.

30 11 U.S.C. § 1322(b)(1).

31 *See infra* notes 54-58 and accompanying text.

32 8 Collier on Bankruptcy ¶ 1322.05 (16th ed. Richard Levin & Henry Sommer eds.).

payment before other general unsecured claims. Carrying through that priority into the chapter 13 plan not only furthers the policy goal of repayment of federally backed student loans but also helps further the debtor's fresh start by reducing the amount of nondischargeable debt that will remain after the chapter 13 case ends.

Section 1322(a)(2) requires that any priority debt be paid in full through the chapter 13 plan. Section 1322(a)(4) excepts domestic support obligations owed to a governmental unit from the payment-in-full requirement because many debtors might owe a large enough amount of domestic support debt to a government unit that it would be impossible to pay the debt in full during the three- to five-year life of a chapter 13 plan.[33] Nondischargeable student debt similarly can be large, and in conjunction with giving student loan debt a priority, the Commission recommends a coordinating amendment to section 1322(a)(4) to except priority student loan debt from the payment-in-full requirement.

Finally, section 1322(b)(10) prohibits payment of interest on nondischargeable unsecured claims unless all claims are paid in full. This rule conflicts with section 1322(b)(5), which allows for curing and maintaining current payments on loans for which the last payment is due after the end of the plan. To maintain the current payment requires payment of the interest on it, meaning a debtor cannot comply with both section 1322(b)(5) and (b)(10) in regard to interest payments on long-term nondischargeable debts where the last payment is scheduled for after the plan completion date (like student loans). Congress should make conforming amendments to section 1322(b)(10), which would mean eliminating the exception clause (i.e., all the language that currently appears in 1322(b)(10) after the phrase "except that").

Regulatory Changes — Bright-Line Rules.[34] Repayment of federal student loans is in the best financial interest of the federal government. To further this purpose, the Department of Education has sensibly adopted programs that promote the responsible repayment of student loans.

The current options used by the Department of Education have not always proven to be the most sensible, cost-effective manner of addressing collection processes for student loan borrowers who have filed for bankruptcy. Costly and inefficient litigation has both caused the federal government to incur substantial costs in the bankruptcy collection process with little recovery and has left bankrupt borrowers without effective relief. It is in the interest of the federal government and borrowers that the government use a more cost-effective approach for collection from student loan borrowers who have filed bankruptcy cases. Having clear, objective bright-line rules would reduce the costs of undue-hardship litigation for the borrowers, the creditors, and the courts, while encouraging the debtors who genuinely need bankruptcy relief (and their attorneys) to seek it.

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33 *Id.* ¶ 1322.05[5].

34 The Commission released its recommendations on regulatory changes for student loan debt in a letter that responded to Department of Education, Request for Information on Evaluating Undue Hardship Claims in Adversary Actions Seeking Student Loan Discharge in Bankruptcy Proceedings, 83 Fed. Reg. 7460 (Feb. 21, 2018). The Commission's letter can be found at https://www.regulations.gov/document?D=ED-2017-OPE-0085-0378.

Our recommendations suggest two sets of bright-line rules,[35] one built around federal Social Security and veterans disability benefits and the other based on the federal poverty guidelines. Both require the borrower to have undergone eligibility screening by a federal administrative agency. More importantly, both indicate borrowers highly likely to be in severe financial distress and therefore highly likely to be incurring undue hardship. The Commission recommends that the Department of Education through regulations or interpretive guidance provide that student loan creditors should not oppose the dischargeability of student loans of persons (i) who are eligible for Social Security or veterans disability benefits or (ii) who fall below certain poverty-level thresholds.

To be eligible for disability benefits under the Social Security Act, an individual must have an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."[36] Veterans disability benefits require either a 100% disability rating or a showing that includes the inability to hold "substantial gainful employment," a threshold interpreted to mean an inability to earn more than the federal poverty guidelines.[37]

Our second set of guidelines are built around the federal poverty guidelines. The most recently revised federal poverty guidelines are:[38]

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

We suggest two thresholds. First, any borrower whose household income averages less than 175% of the national poverty guidelines — currently $21,245 for a household of one — for the seven years before a bankruptcy filing be considered to have undue hardship. We recommend increasing the figure to 200% of the national poverty guidelines at the time of a bankruptcy filing in two situations: retirees on fixed incomes, and persons providing support for an elderly, chronically ill, or disabled household or family member.

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

36 42 U.S.C. § 423(d)(1).

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

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

Determinations of disability by the Department of Veterans Affairs or the Social Security Administration can serve as grounds for an administrative forgiveness of student loan debt,[39] but that does not eliminate the need for judicial alternatives in bankruptcy. A borrower may have reasons for filing bankruptcy that include but are not limited to student loan debt. A judicial remedy also sometimes can help solve problems that an administrative remedy might not, such as tax liability from the discharged debt. The administrative and judicial remedies can be equally effective. Just as there is no reason for the Department of Education's guidelines to deprive a borrower of an administrative remedy when an equally effective judicial remedy is available, there is no reason to deprive the borrower of the judicial remedy because an administrative remedy is available, especially when the judicial remedy can address other debt and legal issues the borrower might be facing. The Department of Education should respect the choice the borrower makes in addressing debt problems.

Regulatory Changes — Avoiding Unnecessary Costs. Current regulations require a determination of whether "the expected costs of opposing the discharge petition would exceed one-third of the total amount owed."[40] If so, the discharge petition should not be opposed. Despite the regulation's directive, it is the sense of the Commission that student loan collectors have often vigorously litigated student loan discharge proceedings regardless of the costs and benefits of the litigation.

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

Regulatory Changes — Alternative Repayment Plans. Regulations also should be considered to address how chapter 13 bankruptcy interacts with the student-loan repayment programs. The Department of Education already is authorized to accept alternative minimum payments from borrowers under "exceptional circumstances."[41] The safeguards built into the confirmation of a chapter 13 plan set out statutory requirements more stringent than the Department of Education's income-driven repayment plans, including a liquidation analysis that is not otherwise considered by the Department of Education. These safeguards should suffice for determining the amount necessary for an alternative repayment.

Also, outside of bankruptcy, borrowers can generally only cure a default on a student loan either through consolidation of their loans or rehabilitation.[42] Section 1322(b)(5), however, allows a chapter 13 plan to "provide for the curing of any default within a reasonable time and maintenance of payments while the

39 *See* 34 C.F.R. §§ 685.212(b), 685.213.

40 *Id.* § 682.402(i)(1)(iii).

41 *Id.* § 685.208(l)(1).

42 *Id.* §§ 685.211(f), 685.220.

case is pending on any unsecured claim . . . on which the last payment is due after the date on which the final payment under the plan is due." Section 1322(b)(5) should be interpreted to apply to the cure and maintenance of student loan payments, and the Department of Education should accept this treatment under chapter 13 plans, both to increase student loan payments and avoid unnecessary collection costs.

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

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

Best Interpretation — Section 523(a)(8). As discussed above,[43] many courts have interpreted the undue-hardship standard using a three-factor test known as the *Brunner* test.[44] The Commission believes the widely accepted *Brunner* test can be an appropriate standard for determining undue hardship, balancing consideration of the debtor's present ability to pay student loan indebtedness, the debtor's future ability to make the loan payments, and the debtor's good faith in connection with the loan. However, as pointed out by the Seventh Circuit, the "glosses" that some decisions have added to the *Brunner* test do not always track the language of the statute itself:

> The district judge did not doubt that [the debtor] has paid as much as she could during the 11 years since receiving the educational loans. Instead the judge concluded that good faith entails commitment to future efforts to repay. Yet, if this is so, no educational loan ever could be discharged, because it is always possible to pay in the future should prospects improve. Section 523(a)(8) does not forbid discharge, however; an unpaid educational loan is not treated the same as a debt incurred through crime or fraud. The statutory language is that a discharge is possible when payment would cause an "undue hardship." It is important not to allow judicial glosses, such as the language in . . . *Brunner*, to supersede the statute itself.[45]

43 *See supra* notes 18-20 and accompanying text.

44 The Eighth Circuit uses a "totality of the circumstances" test. *See* Long v. Educational Credit Mgmt. Corp., 322 F.3d 549 (8th Cir. 2003). The Commission's recommendations apply to whichever judicial test is used.

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

For example, the second of these *Brunner* factors has often been described as requiring the debtor to establish a "certainty of hopelessness" regarding payment of the student loan sought to be discharged.[46]

Because of the *Brunner* test's strictness, seemingly dire financial circumstances sometimes are not enough to constitute "undue hardship." For example, in *In re Oyler,* a pastor who was married with three dependent children claimed that repayment of his $40,000 in student loans would be an undue hardship. The pastor suffered from a medical condition that had caused four retinal detachments, but the family had no health insurance.[47] Although his annual income was less than $10,000 and well below the poverty line for a family of five, the court of appeals ruled the student loan could not be discharged because the debtor had not sought the highest paid possible work for which he was qualified.[48] With such strict judicial case law, few debtors have sought to discharge student loans in bankruptcy.[49]

The Commission recommends that courts properly understand the *Brunner* test by hewing closely to the statute, as appropriate judicial interpretive techniques require. Section 523(a)(8) directs the court to consider "the debt" and not some different contract the debtor and creditor might have made under different circumstances. Thus, the court should consider whether the debtor can repay within the contractual term of the loan, which is typically ten years. The statutory language suggests other interpretive guideposts for what constitutes "undue hardship" under section 523(a)(8):

> (a) Courts should determine the degree of hardship based on the contractual terms of the loan itself, rather than alternatives offered by the creditor, such as federal income-based repayment plans.[50]
>
> (b) Undue hardship should be found if repayment of the loan according to its terms would prevent the debtor from paying reasonable living expenses, rather than requiring living at a poverty level.[51]
>
> (c) The factual determinations required by *Brunner* should be subject to the ordinary evidentiary burden, preponderance of the evidence. The debtor should not be required to prove that future repayment of the student loan is certain to be hopeless.[52]

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

47 *Oyler*, 397 F.3d at 384.

48 *Id.* at 386.

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

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

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

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

(d) The fact-findings of a bankruptcy court on the *Brunner* factors should be recognized as entitled to deference on appeal, and reversible only for clear error.[53]

Because the open-ended nature of the *Brunner* inquiry cannot account for all situations that might arise, the Commission recommends a best interpretation of the third *Brunner* factor that incorporates the concept of bad faith. The court should deny discharge to a student loan only where the debtor has acted in bad faith in failing to make loan payments before filing bankruptcy.

Best Interpretation — Section 1322 and Chapter 13 Plans. As discussed above, the Commission has recommended a statutory amendment to give nondischargeable student loans a priority in bankruptcy. With a priority, nondischargeable student loans clearly could be classified separately from other unsecured debt and treated differently under the chapter 13 plan.[54] Although such treatment might discriminate among classes, it would not run afoul of section 1322(b)(1)'s prohibition against *unfair* discrimination, as the priority would itself be a reason for the separate classification.

If Congress does not amend the Bankruptcy Code to give nondischargeable student loans a priority, the Commission believes the best interpretation of section 1322(b)(1) still allows separate classification of student loans. Unsecured creditors always are protected by section 1325(a)(4)'s best-interest test, which ensures they receive at least as much under the chapter 13 plan as they would have received had the debtor filed under chapter 7.

Like priorities, nondischargeability represents a congressional judgment that a debt merits special treatment. In the context of student loans, the nondischargeability provision also furthers the protection of the public fisc and the solvency of student loan programs. Allowing separate classification promotes repayment of student loans and indeed directly furthers the congressional reasons behind nondischargeability. It is not unreasonable to prefer a student loan in the chapter 13 plan. Allowing separate classification also lets the debtor pay down a nondischargeable debt and promotes the debtor's fresh start.

Only the most wooden interpretive methods ignore the context of their times. The Commission found persuasive Judge Berger's explanation in *In re Engen*[55] of why the context of student loans is different today than it was when the nondischargeability rules first came into effect:

> Student loans are different because unlike other nondischargeable debts, it is not the debtor's misconduct in acquiring the loans that supports nondischargeability. . . . [T]he idea that student loans are nondischargeable to avoid fraud and a free ride is inaccurate.

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

54 *See supra* note 32 and accompanying text. Section 1322(a)(3) requires the same treatment of claims within a class. Therefore, if a debtor wishes to provide a different payment for student loans, a separate classification would be necessary.

55 561 B.R. 523 (Bankr. D. Kan. 2016).

> The Code already contains ample provisions to address fraud and debtors are allowed to keep other services or property acquired on unsecured credit. Further . . . student loans are unlike other types of § 523(a) debt where the dischargeability rationale is based on society's interest in preventing mischievous debtors from usurping prior bad acts.
>
> Student loans are also different because Congress has an interest in protecting the fiscal health of the federal student loan program. In furtherance of this goal, the government has enormous collection powers on federal student loans.
>
> Further, "[u]nlike any other type of debt, there is no statute of limitations. The government can pursue borrowers to the grave." . . . Conversely, the Internal Revenue Service generally may only pursue collection on assessed taxes "within 10 years after the assessment of the tax."
>
> Originally, the federal student loans were "intended as a program of last resort for college students seeking to finance their educations." . . . Now, "[n]o longer can the average student from the lower middle classes hope to enter and exit a postsecondary institution with a valuable degree without, to some extent, participating in the guaranteed student loan program." . . .
>
> As of June 30, 2016, outstanding student loan debt reached $1.259 trillion and comprised ten percent of household debt—ahead of credit card debt at six percent and automobile debt at nine percent. To place this aggregate student loan balance in perspective, it exceeds the annual gross domestic product of all but the 11 largest economies in the world, including the economies of Russia, Spain and Mexico. . . . The massive shift of the skyrocketing costs of college education to the middle class over the last three decades has replaced the decreased government subsidization of public colleges and universities. It is accurate to classify student loan debt as singular in identity since borrowers are in effect compensating for the reduced tax revenue allocated to post-secondary education.[56]

The Commission recognizes that precedent may bind some lower courts to hold that separate classification and a higher payment to student loans are not generally available. The Commission believes the appropriate court should reconsider any such precedent. But even where separate classification is not generally available, current law should be interpreted to permit higher payments in two situations:

> 1. Where a party other than the debtor is liable on the student loan, such as by co-signing or guaranteeing the debt, section 1322(b)(1) expressly allows treatment different from other unsecured claims. This provision is applicable on its face to co-signed or guaranteed student loans.[57]

56 *Id.* at 545-48 (citations omitted).

57 *See In re* Russell, 503 B.R. 788, 798 (Bankr. S.D. Ohio 2013) (allowing greater payment of co-signed student loans, observing that "a disparity—even a large one—between the dividend paid on such claims and the dividend paid on other unsecured claims does not itself constitute unfair discrimination").

2. Where the last payment on an unsecured claim is due after the date on which the final payment under the plan is due, section 1322(b)(5) allows a chapter 13 plan to cure any default in payments of the claim and maintain current payments. This provision should be interpreted as fully applicable to student loans.[58]

Because section 1322(b)(10), by prohibiting payment of interest on nondischargeable unsecured claims in the absence of full payment of all claims, conflicts with § 1322(b)(5), it should be held inapplicable to student loan claims being treated through cure and maintenance.[59]

§ 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.

Background. Formally, the bankruptcy discharge is a short, declaratory order stating in its entirety, "IT IS ORDERED: A discharge under 11 U.S.C. § . . . is granted to," followed by the name of the debtor, the date, and the judge's signature.[60] Section 524 provides the enforcement mechanism for this order, stating that a discharge "operates as an injunction" against lawsuits or any acts to collect a prepetition liability of the debtor.

Section 524 has its origins in *Local Loan Co. v. Hunt*, where the Supreme Court ruled that a court could enjoin a creditor from its postbankruptcy attempts to enforce a wage assignment where the creditor claimed that state law treated the wage assignment as a lien not affected by the bankruptcy case.[61] The debtor was entitled to an injunction "to secure or preserve the fruits and advantages" of the discharge decree in the bankruptcy case.[62] Over the years, the courts split as to when a *Local Loan* injunction was appropriate, leading to a 1970 codification of the discharge injunction.[63] When Congress enacted the Bankruptcy Code eight years later, it retained this codification in what is now section 524.[64]

58 *See In re* Truss, 404 B.R. 329, 332 (Bankr. E.D. Wis. 2009).

59 *See In re* Brown, 500 B.R. 255, 269 (Bankr. S.D. Ga. 2013).

60 Mandatory official forms provide the language for the discharge order. *See* Official Bankruptcy Forms 318, 3180F, 3180FH, 3180R1, 3180W, 3180WH.

61 292 U.S. 234 (1934).

62 *Id.* at 239.

63 *See* Pub. L. No. 91-467, 84 Stat. 990 (1970). *See generally* Vern C. Countryman, *The New Dischargeability Law*, 45 Am. Bankr. L.J. 1 (1971) (summarizing the "dischargeability law" of 1970).

64 *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 101, 92 Stat. 2549, 2592-93.

Under current law, there are difficulties in both enforcing the discharge injunction and in determining its scope. Section 524 remains a court injunction, just one that is issued in most individual bankruptcy cases. Court injunctions are enforced through contempt proceedings, and the discharge injunction is no exception.[65] Of the four circuit courts to address the issue, three have held that there is no private right of action to enforce the discharge injunction.[66] Thus, the discharge injunction stands in contrast to the automatic stay. Although contempt is also an appropriate remedy for a violation of the automatic stay,[67] section 362(k) gives an individual injured by a willful violation of the stay a right of action to recover actual damages, including costs and attorneys' fees, and punitive damages in appropriate circumstances.

From the creditor's perspective, section 524's broad principles for the discharge can create uncertainty as to whether particular acts cross the line. Creditors acting in good faith are likely simply to avoid negotiations altogether rather than risk sanctions for violating the discharge injunction in a "gray area." For example, some home loan lenders will not approve postdischarge loan modifications without a reaffirmation of the debt because of the uncertainty as to whether the discharge injunction applies to such a loan modification. This problem can be particularly acute where the reasons for a loan modification do not arise until after the discharge is entered, precluding the use of a standard reaffirmation mechanism.

Recommendations. The Commission recommends an amendment to section 524 to create a private right of action for violations of the discharge injunction. The amendment should parallel section 362(k) in terms of the creditor's conduct required for a violation and the remedies available. Although contempt is currently available to remedy discharge violations, contempt might impose a higher evidentiary burden to prove the knowledge needed for a violation.[68] A private right of action would give debtors a greater ability to protect the discharge the Bankruptcy Code gives them.

The private right of action for discharge violations would also make bankruptcy practice more consistent. Upon filing, the debtor gains the protection of the automatic stay and section 362(k)'s private right of action to enforce that protection. When the court grants a discharge, the automatic stay terminates,[69] and the debtor's protections are transferred to the discharge injunction. Providing a private right of action for violations of the discharge injunction would clarify and simplify the case law and provide a single, consistent approach to enforcing the automatic stay and the discharge injunction. There is no

65 *See, e.g.*, Walls v. Wells Fargo Bank, 276 F.3d 502, 507 (9th Cir. 2002) ("[C]ontempt is the appropriate remedy and no further remedy is necessary" for a violation of the discharge injunction.); *In re* Nassoko, 405 B.R. 515, 520 (Bankr. S.D.N.Y. 2009) ("There is no serious question that a violation of the discharge provided in § 524(a)(2) is punishable by contempt."). The Commission takes no position on the scope of the authority of a non-Article III bankruptcy judge to punish contempt of court.

66 *Compare* Walls v. Wells Fargo Bank, 276 F.3d 502, 507 (9th Cir. 2002); Cox v. Zale Delaware, Inc., 239 F.3d 910 (7th Cir. 2001); Pertuso v. Ford Motor Credit Co., 233 F.3d 417 (6th Cir. 2000) *with* Bessette v. Avco Fin. Servs., 230 F.3d 439 (1st Cir. 2009). *See also* Alderwoods Group, Inc. v. Garcia, 682 F.3d 958 (11th Cir. 2012) (holding no cause of action existed to allow enforcement of another court's bankruptcy discharge); Joubert v. ABN AMRO Mtg. Co. (*In re* Joubert), 411 F.3d 452 (3d Cir. 2005) (finding no private right of action under section 105).

67 *See* 3 Collier on Bankruptcy, *supra* note 32, at ¶ 362.12[2] (discussing the principle that violations of the automatic stay are punishable as contempt of court).

68 At the time of this writing, the Supreme Court had granted certiorari on the issue of whether a creditor's good-faith belief the discharge injunction does not apply precludes a finding of civil contempt for a violation of section 524. *See* Lorenzen v. Taggart (*In re* Taggart), 888 F.3d 438 (9th Cir. 2018), *cert. granted*, 2019 WL 98543 (2019). The Commission's recommendations do not depend on the Supreme Court's resolution of this case.

69 11 U.S.C. § 362(c)(2)(C).

reason for the discharge injunction to be enforced less vigorously than the automatic stay. Indeed, the debtor's need for postdischarge protection is heightened in some ways as compared to the protection extended during the pendency of the case. During the case, the U.S. Trustee, the case trustee, and the creditors all have a duty or incentive to monitor closely for stay violations, but they will have little or no involvement in what happens to the debtor after the case is closed.

The Commission also believes that mechanisms should be instituted to allow parties to seek a "comfort order" to clarify the reach of the discharge injunction. The Federal Rules of Bankruptcy Procedure should provide that a party can seek such an order as a contested matter under rule 9014 rather than as an action for a declaratory judgment that would require a longer and more expensive adversary proceeding under section 7001. Although typically it would be a creditor taking the initiative, the right to seek a comfort order should not be limited to creditors because debtors may sometimes find it beneficial to obtain such an order to facilitate negotiations with a recalcitrant creditor.

The Commission has made separate recommendations regarding reaffirmations and loan modifications that have provisions in those contexts to clarify the extent creditors may act,[70] but these recommendations are only in two specific contexts that, by themselves, do not fix the uncertainty for creditors about the scope of the discharge injunction.

The bankruptcy law should create a general ability to get a comfort order about whether the discharge injunction would apply to any particular action that a party has been engaging in or intends to take in the future. Given the wide variety of parties and transactions that come into bankruptcy, it is impossible to specify all of the circumstances under which a party might want to seek such an order. A party should not have to guess whether its interpretation of the necessarily broad language of section 524 will comport with the views of a bankruptcy judge who later will interpret that language.

By making this recommendation, the Commission intends no changes to the customary rules in section 524 for a debtor's reaffirmation of an otherwise dischargeable debt. A court should deny a request for a comfort order that is an attempt to circumvent these rules. Of course, the usual tools courts have to police frivolous or unmerited litigation positions would apply to a request for a comfort order the same as with regard to any other court filing.

70 *See* § 2.04 Reaffirmation Improvements; § 4.05 Loan Modification in Chapter 13.

§ 1.03 Dischargeability of Homeowners Association (HOA) Fees

(a) The Bankruptcy Code should allow the discharge of postpetition condominium fees and assessments only when the debtor (1) specifies an intent to surrender the property and (2) does not retain possession or actively occupy or use the property.

(b) The best interpretation of the current statute is that postpetition HOA fees are discharged in a chapter 13 case under § 1328(a).

Background. Homeowners association (HOA) fees can be a significant financial obligation. The Trulia website used census data to estimate that in 2015, the average monthly HOA fee was $331.[71] Months of delinquency can lead to arrearages in the thousands of dollars, a substantial sum for an insolvent debtor already struggling with multiple defaults. Thus, discharging all or a portion of HOA fees can be essential in many consumer bankruptcy cases. At the same time, HOAs rely on these fees to provide services to their members and reasonably expect that homeowners who receive HOA services will pay their fair share for those services. Also, nonpayment of HOA fees can shift the costs of providing those services onto other members of the HOA.

For bankruptcy purposes, there are two ways to understand a homeowner's obligation to pay HOA fees. One way is to see the obligation as arising from a contract that the homeowner entered into prepetition. Under this view, the obligation to pay all past and future HOA fees arises from a prepetition contract and, while unpaid fees can be collected by assessment against the property, the debtor's personal liability is discharged like any other prepetition debt. The other way is to see the HOA fees as a covenant running with the land, with the owner personally obligated to pay HOA fees arising at the time the fees are assessed. Under this second view, while there is a discharge of personal liability for fees that were assessed before the bankruptcy filing, a bankruptcy cannot discharge the obligation to pay HOA fees assessed after the filing date, since they are new, postpetition obligations. There is support in the case law for both views.[72]

In 1994, Congress added section 523(a)(16) to the Bankruptcy Code to address the split in the case law. The original version of section 523(a)(16) adopted a middle-ground approach, making postpetition HOA fees nondischargeable only if they covered a period during which the debtor "physically occupied" or "rented" the dwelling.[73] The debtor's personal liability on prepetition HOA fees remained dischargeable. In 2005, Congress rewrote section 523(a)(16) to eliminate the requirement that the debtor physically occupy or rent the dwelling. As of 2005, all postpetition HOA fees are nondischargeable, regardless of

71 Trulia Research, Attack of the Killer HOA Fees, https://www.trulia.com/research/hoa-fees/ (last visited Dec. 26, 2016).

72 *Compare In re* Rosteck, 899 F.2d 694 (7th Cir. 1990) (allowing discharge of postpetition HOA fees) *with* River Place East Housing Corp. v. Rosenfeld (*In re* Rosenfeld), 23 F.3d 833 (4th Cir. 1994) (holding the bankruptcy discharge does not reach postpetition HOA fees). A discussion of these lines of cases and the later statutory amendments to address the split of authority is available at Ariane Holtschlag, *Assessing § 523(a)(16)*, Am. Bankr. Inst. J., June 2012, at 16.

73 Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 309, 108 Stat. 4106, 4137.

whether the debtor derives any benefit from the property and even if the debtor wants to transfer the property but is unable to do so.

The predicate sentence of section 523, however, states that its exceptions apply only to discharges "under section 727, 1141, 1228(a), 1228(b), or 1328(b)." Section 1328(b) is the chapter 13 "hardship" discharge, which can be granted to a debtor who is unable to complete plan payments. Not mentioned in section 523's predicate sentence are discharges under section 1328(a), which provides for a chapter 13 discharge when a debtor completes payments under the plan. Section 1328(a), which is sometimes referred to as the chapter 13 "superdischarge," does not exclude section 523(a)(16) from its application. Thus, the express statutory language appears to allow a debtor to discharge all postpetition HOA fees after completing a chapter 13 plan.

Recommendation — Statutory Amendment. The current version of section 523(a)(16) leaves the debtor in chapter 7 responsible for postpetition HOA fees even if the debtor no longer occupies the property. This rule can create financial hardship. A debtor whose mortgage exceeds the value of the property will not be able to transfer the property without the secured creditor's consent, and the secured creditor may neither consent nor commence a foreclosure. The result can be "zombie properties" that no one will purchase but on which HOA fees continue to accrue, jeopardizing the debtor's fresh start.

For example, one debtor's condominium was severely damaged in the 2010 Nashville flood. The flooding left the condominium submerged, with water to the ceiling of the first floor. The debtor filed for chapter 7 relief and indicated an intention to surrender the property. The secured creditor, however, elected not to foreclose, leaving the debtor responsible for postpetition HOA fees and facing potential liability for a failure to clean up the property. The result of making HOA fees nondischargeable in a situation like this is that, as the court stated, "victims of natural disasters . . . would lose their homes and be required to continue to pay HOA fees for houses they no longer occupy [and] have surrendered in bankruptcy, but cannot force lenders to accept by deed in lieu of foreclosure or force foreclosure."[74]

Although the example presents a somewhat extreme case, in the experience of the Commission it typifies how section 523(a)(16) can present a barrier to the effective fresh start that the Bankruptcy Code promises. On the other hand, the Commission also believes HOAs have a reasonable expectation that homeowners will pay for services they are using. The Commission therefore recommends amendments that would implement an approach that better balances the interests of HOAs and debtors in both chapter 7 and chapter 13 cases.

Under the Commission's recommendation, a debtor could discharge postpetition HOA fees if the debtor has stated an intention to surrender the property and does not possess, occupy, or otherwise use the property. By expressing an intent to surrender, the debtor has taken all the steps the debtor can take under the Bankruptcy Code to transfer the property.[75] However, if the debtor possesses, occupies,

74 Pigg v. BAC Home Loans Servicing, Inc. (*In re* Pigg), 453 B.R. 728, 733-34 (Bankr. M.D. Tenn. 2011).

75 The Commission has recommended a definition of "surrender." *See* § 2.02 Definition of "Surrender."

or uses the property, the debtor should have liability for the HOA fees, because the HOA is benefitting the debtor. Under the Commission's recommendation, the debtor's rental of the property would be possessing, occupying, or using the property.

Recommendation — Best Interpretation of the Existing Statute. Despite the 1994 and 2005 amendments and the express statutory language they created, some courts have concluded that a chapter 13 discharge under section 1328(a) does not reach HOA fees assessed after the bankruptcy filing.[76] These courts have reasoned the 1994 amendments did not change the fundamental question of whether all HOA fees are prepetition obligations. Under this reasoning, the question remains as to whether HOA fees are covenants that run with the land and, as such, create postpetition contractual obligations that the bankruptcy discharge under section 1328(a) does not reach. Other courts, most notably the Ninth Circuit, have disagreed and find that a chapter 13 discharge under section 1328(a) does reach HOA fees that are assessed postpetition.[77]

The Commission agrees with the Ninth Circuit. If Congress does not amend the Bankruptcy Code as the Commission has recommended, the best interpretation of the existing statute is that the chapter 13 discharge under section 1328(a) covers all postpetition HOA fees. The conclusion flows from the statutory language. The section 523(a)(16) discharge exception is only meaningful if, in its absence, postpetition HOA fees would be dischargeable. The adoption of § 523(a)(16) in 1994 reflected Congress's judgment that HOA fees are — in the absence of an exception — a dischargeable debt arising from a prepetition contract.

Moreover, the statutory language added in 1994 is not easily read as leaving in place any pre-amendment case law that found HOA fees in the nature of covenants that run with the land. The 1994 amendment made postpetition HOA fees nondischargeable if the debtor "physically occupied" or "rented" the property. If the amendment had intended to adopt the case law that HOA fees are covenants that run with the land, these added requirements unnecessarily restricted the scope of the amendment. Congress almost certainly was acting pragmatically to balance the rights of bankruptcy debtors and HOAs. Rather than inferring a motive to wade into a debate on abstract concepts of property law, the best way to effectuate congressional intent on this topic is through implementation of the plain statutory language.

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76 *See, e.g.*, Foster v. Double R Ranch Assoc. (*In re* Foster), 435 B.R. 650 (B.A.P. 9th Cir. 2010); *In re* Montalvo, 546 B.R. 880 (Bankr. M.D. Fla. 2016); Otter Creek Homeowners Assoc. v. Davenport (*In re* Davenport), 534 B.R. 1 (Bankr. E.D. Ark. 2015).

77 *See, e.g.*, Goudelock v. Sixty-01 Assoc. of Apartment Owners, 895 F.3d 633 (9th Cir. 2018); *In re* Coonfield, 517 B.R. 239 (Bankr. E.D. Wash. 2014); *In re* Colon, 465 B.R. 657 (Bankr. D. Utah 2011).

§ 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.

Background. Section 523(a)(1) excepts from discharge a number of tax debts. The first exception is for taxes that are given a payment priority under section 507(a)(8),[78] which has its own timing rules tied to the date for filing a return. One of its priorities, making the debt nondischargeable under section 523(a)(1), is for income taxes requiring a tax return that were due during the three years before the bankruptcy filing. [79] The second discharge exception in section 523(a)(1) applies to tax debt for which a required return (i) was not filed or (ii) was filed after the due date and within two years of the bankruptcy filing date.[80] Under these rules, income tax debts generally lose their priority and their nondischargeability three years after a return was due unless the debtor failed to file a "return" or filed a late "return" within two years of the bankruptcy filing.

In 1998, the Sixth Circuit's *Hindenlang* decision adopted a four-part test to define a "return" for purposes of section 523(a)(1).[81] Under this test, a filing is a "return" if it (1) purports to be a return, (2) is executed under penalty of perjury, (3) contains sufficient data to allow calculation of tax, and (4) represents an honest and reasonable attempt to satisfy the requirements of the tax law.[82]

78 *See* 11 U.S.C. § 523(a)(1)(A).

79 *See id.* § 507(a)(8)(A). This subparagraph also gives a priority to income taxes for which an assessment was made during the 240 days before the bankruptcy, or for which an assessment could be made after the commencement of the bankruptcy case.

80 *See* 11 U.S.C. § 523(a)(1)(B).

81 United States v. Hindenlang (*In re* Hindenlang), 164 F.3d 1029 (6th Cir. 1999).

82 *See id.* at 1033-34. The four-factor test in *Hindenlang* originates with *Beard v. Commissioner*, 82 T.C. 766 (1984), which had adopted the test in a nonbankruptcy setting. Because *Hindenlang* applied the test in the bankruptcy context, the Commission will refer to the four factors as the "*Hindenlang* test."

Understanding the issues that followed *Hindenlang* requires some knowledge about IRS procedures dealing with a taxpayer who does not file a tax return. Section 6020(a) of the Internal Revenue Code allows the IRS to prepare a return for a taxpayer's signature if the taxpayer provides all of the necessary information for filing a return.[83] A section 6020(a) document would, absent unusual circumstances, qualify as a "return" under *Hindenlang*. Section 6020(b), on the other hand, authorizes the IRS to prepare a substitute for a return (SFR). The IRS prepares an SFR with only the information available to the IRS from its records, which primarily show income but not deductions. For this reason, an SFR typically will show higher taxes due than the "true" amount might be, and a taxpayer thus usually has a strong incentive to file the taxpayer's own return even after the IRS issues an SFR.

The question arose as to whether a taxpayer who filed a post-SFR, post-assessment document has filed a "return" within the meaning of section 523(a)(1). In *Hindenlang* itself, the court adopted the IRS's position and rejected the debtor's argument that his post-assessment 1040 form was a "return" for purposes of section 523(a)(1). Such a document was not an honest and reasonable attempt to comply with the tax laws because it had no tax law purpose.[84] Because the *Hindenlang* debtor had not filed a "return," the taxes were nondischargeable. A court consensus emerged adopting the IRS's position as articulated in *Hindenlang*, namely that filing before the assessment date was necessary for a document to qualify as a "return" and that filings after the assessment date were rarely, if ever, a "return" within the meaning of section 523(a)(1).[85]

In 2005,[86] Congress added an unnumbered paragraph at the bottom of section 523(a) in an attempt to provide a definition of what a "return" is:

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

The Commission will follow the convention of referring to this unnumbered paragraph as "section 523(a)*."

Section 523(a)* has caused more confusion than clarity: what are "applicable filing requirements?" Specifically, do these requirements include a strict timeliness component such that a late-filed document has not complied with "applicable filing requirements" and therefore cannot be a "return" within the meaning of the statute? Because a strict timeliness component would hold that a document filed even the day after the deadline is not a "return," this issue is sometimes referred to as the "one-day-late rule."

83 *See* 26 U.S.C. § 6020(a).

84 *See* 164 F.3d at 1034-35.

85 *See, e.g.*, *In re* Payne, 431 F.3d 1055 (7th Cir. 2005); Moroney v. United States (*In re* Moroney), 352 F.3d 902 (4th Cir. 2003); United States v. Hatton (*In re* Hatton), 220 F.3d 1057 (9th Cir. 2000).

86 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 714, 119 Stat. 23, 128-29.

Under the "one-day-late rule," the *Hindenlang* factors become relevant only where the putative "return" was filed prior to the tax filing deadline for the return.

After the 2005 amendments, the IRS settled on the view that the language in section 523(a)* was meant to incorporate the *Hindenlang* rule using the assessment date as a cutoff. The IRS position, as reflected in court filings,[87] is that the taxpayer may discharge taxes if the taxpayer filed a document satisfying the *Hindenlang* test in time to assist with the proper assessment of the debt. By the express terms of section 523(a)*, such a document can include a document prepared by the IRS under section 6020(a) of the Internal Revenue Code before assessment. Under the IRS's reading of section 523(a)*, documents filed after the assessment date continue to fail the *Hindenlang* test as not "an honest and reasonable attempt to satisfy the requirements of the tax law."

Some state taxing authorities have adopted the more literal reading of section 523(a)* and asserted that "applicable filing requirements" include the timeliness of the return. The First Circuit, Fifth Circuit, and Tenth Circuit have agreed.[88] This reading leads to the "one-day-late rule," under which a document filed at any time after the tax deadline is not a "return." Not all courts have agreed, and a deep circuit split has emerged.[89] In a Ninth Circuit case, the court used the *Hindenlang* test because "both parties and several of our sister circuits" agreed it applied, thereby judging a late-filed document under the four-factor test rather than concluding that the late-filed "return" absolutely barred discharge of a tax debt.[90] The Fourth Circuit has applied the *Hindenlang* test without discussion of the "one-day-late rule."[91] In cases raising the issue, the Third Circuit and the Eleventh Circuit did not reach the question of whether the 2005 amendments instituted a "one-day-late rule" because the filed documents were post-assessment and thus failed *Hindenlang*.[92]

Recommendation. The Commission believes that section 523(a)* was not intended to create a "one-day-late rule." Most importantly, the "one-day-late rule" would largely eviscerate section 523(a)(1)(B)(ii), which makes discharge available for a late "return" filed more than two years before the bankruptcy filing.[93] If documents filed after a tax deadline are not a "return," section 523(a)(1)(B)(ii) has no purpose. Also, the title in the section of the public law enacting section 523(a)* says it addresses "Income Tax

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87 *See* Giacchi v. IRS (*In re* Giacchi), 856 F.3d 244, 247 (3d Cir. 2017) ("The government notes that this approach, called the 'one-day-late rule,' fails to harmonize provisions of § 523 that contemplate some late-filed forms are 'returns.'").

88 *See* Fahey v. Mass. Dep't of Revenue (*In re* Fahey), 779 F.3d 1 (1st Cir. 2015); Mallo v. IRS (*In re* Mallo), 774 F.3d 1313 (10th Cir. 2014); McCoy v. Miss. State Tax Comm'n (*In re* McCoy), 666 F.3d 924 (5th Cir. 2012). The dissent in the First Circuit opinion pointed out that while timeliness may be a filing requirement for tax returns, it did not appear to be a requirement for a document to be a return under the applicable state law. *Fahey*, 779 F.3d at 12 ("More importantly though, even if we assume, as the majority does, . . . timely filing is generally a necessary component of a 'return' under Massachusetts tax law. . . ."). The First Circuit dissent therefore presented a different "literal" reading of section 523(a)*: timeliness must be a filing requirement that is applicable to the definition of a return under nonbankruptcy law, not the mere filing of a return.

89 One commentator invoked Sherlock Holmes and referred to the circuit-level opinions as a "Moriarty-like orchestration of disarray." Justin C. Valencia, In re Colsen *and the Circuit Court Split Defining a Tax "Return*," Am. Bankr. Inst. J., Jan. 2018, at 34, 76.

90 *See* Smith v. IRS (*In re* Smith), 828 F.3d 1094,1096 (9th Cir. 2016).

91 *See* State of Maryland v. Ciotti (*In re* Ciotti), 638 F.3d 276, 280 (4th Cir. 2011).

92 *See Giacchi*, 856 F.3d at 247-48; Justice v. IRS (*In re* Justice), 817 F.3d 738, 743 (11th Cir. 2016).

93 To be dischargeable, as discussed above, the tax debt also would have to be one for which a return was due more than three years before the bankruptcy filing. *See* 11 U.S.C. §§ 507(a)(8); 523(a)(1).

Returns Prepared by Tax Authorities."[94] The wording of the title thus suggests that the purpose of the amendment was to distinguish, for purposes of section 521(a)(3), between post-assessment SFRs prepared under Internal Revenue Code section 6020(b) that are not "returns" and section 6020(a) returns that are "returns."

The "one-day-late rule" also would make timely filing an absolute prerequisite to the dischargeability of tax debt, which would change decades of bankruptcy law. If Congress had intended such a change, it would have been a simple matter to bar the discharge of returns that were not timely filed. It is unlikely Congress intended three words — "applicable filing requirements" — inserted into an oddly placed definition to work such a change, especially without noting that it was doing so.

Moreover, what became section 523(a)* had its provenance in the proposed Bankruptcy Reform Act of 1998, which was never enacted.[95] Using the same title to describe its reach — "Income tax returns prepared by tax authorities" — section 515, bill H.R. 3150 of the 105th Congress would have added the following language at the end of section 523(a)(1)(B) itself (rather than as a hanging paragraph at the end of the entirety of subsection (a):

> "(iii) for purposes of this subsection, a return-
>
> > "(I) must satisfy the requirements of applicable nonbankruptcy law, and includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or similar State or local law, and
> >
> > "(II) must have been filed in a manner permitted by applicable nonbankruptcy law; . . ."[96]

The accompanying House report said the amendment would only extend "the nondischargeability provisions of section 523(a)(1) to obligations based on income tax returns prepared by tax authorities as well as to certain reports and notices."[97] The language that eventually become enacted into section 523(a)* appears to be a mash-up of this earlier language, substituting the current language of "applicable filing requirements" for "in a manner permitted by applicable nonbankruptcy law" from the 1998 version. "Permitted" does not suggest a temporal requirement; a return filed one day late is still "permitted." It is impossible to rule out the possibility that the language that eventually got enacted reflected an intentional change during the drafting process. The more likely explanation, however, would seem to

94 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 714, 119 Stat. 23, 128.

95 The legislative process that eventually culminated in the 2005 amendments lasted over ten years and involved legislative proposals through successive congressional sessions. The history is detailed in Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 Am. Bankr. L.J. 485 (2005).

96 H.R. Rep. No. 105-540, at 43.

97 *Id.* at 111.

be that the 2005 version was a less-careful rearrangement of earlier language rather than an intention to clandestinely upset years of bankruptcy law through three words in the statute.

The Commission therefore concludes that the relevant requirements for what constitutes a "return" under section 523(a)(1) are set out in *Hindenlang*. So long as a tax filing is made before assessment and absent unusual circumstances, the filing can be a "return." A corollary principle is that filing before any applicable deadline is not, by itself, an "applicable filing requirement" for purposes of the statute. In other words, filing before any applicable deadline is not a requirement that applies to whether a document is a return and is therefore not an "applicable filing requirement" for purposes of the parenthetical in section 523(a)*. Because of the conflicting interpretations over 523(a)*, the best solution would be a congressional amendment that would adopt the *Hindenlang* test. As subsection (b) of the Commission's recommendation makes clear, any such amendment should retain the existing statutory language stating that a filing prepared under section 6020(a) of the Internal Revenue Code can be a "return," but a "return" does not include an SFR prepared under section 6020(b). Until Congress enacts a clarifying amendment, courts should adopt the *Hindenlang* test as the best interpretation of the existing statute.

The Commission takes no position on the proper interpretation and stare decisis effects of the language in the opinions of the First, Fifth, and Tenth Circuits addressing the "one-day late rule." The Commission recognizes that some lower courts may be bound by stare decisis in these three circuits, and state taxing authorities in these three circuits may assert as a matter of stare decisis that the "one-day-late rule" applies to state taxes. The Commission believes, however, that the "one-day-late rule" is not a proper interpretation of section 523(a) and that it reflects poor bankruptcy policy. The Commission encourages all state taxing authorities to follow the lead of the IRS and reject the "one-day-late rule" to advance both sound tax policy and the public interest.

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.

Background. The doctrine of judicial estoppel prevents a litigant from taking a position that is inconsistent with a position the litigant has taken in other litigation. For example, the Supreme Court invoked judicial estoppel in deciding a boundary dispute between the states of Maine and New Hampshire. Having successfully convinced the Supreme Court about the meaning of the phrase "Middle of the River" in a case twenty-five years prior, the state of New Hampshire was judicially estopped from asserting a different meaning in the later case.[98] The Court identified three factors that "typically inform" the decision of whether to apply judicial estoppel. First, whether the party's later position is clearly inconsistent with its earlier position. Second, whether the party succeeded in persuading the court of its earlier position. Third, whether the party asserting the inconsistent position derived an unfair advantage or imposed an unfair detriment on the opposing party.[99] The Supreme Court emphasized that the factors were not "inflexible prerequisites" or "an exhaustive formula."[100]

98 New Hampshire v. Maine, 532 U.S. 742 (2001).

99 *Id.* at 750-51.

100 *Id.* at 751.

There is no consensus about the reasons judicial estoppel exists or the circumstances in which it should apply. Furthermore, the doctrine is in tension with other rules that allow alternative pleading in the same litigation even if the asserted claims or defenses are inconsistent.[101] A leading treatise summarizes the law on judicial estoppel as "confused" and then continues:

> [T]he number of federal appellate decisions grappling with this subject has grown dramatically. . . . The cases tend to cluster around a few salient points, leaving uncertainty in between. Some sense of order can be found by focusing on three major approaches. The narrowest approach precludes inconsistent positions only on a theory akin to equitable estoppel, requiring reliance by a party who would be injured by permitting a change of position. A more open approach, which has become dominant in the federal courts, looks for reliance by an adjudicating tribunal. This approach in turn blends into a still more open-ended approach that, by seeking to prevent a party from "playing fast and loose" with the courts, implies distinctions between seemly and unseemly adversary behavior.[102]

Judicial estoppel has become an important issue for the consumer bankruptcy system.[103] A common scenario begins with a debtor failing to list a prepetition cause of action in the debtor's bankruptcy schedules. Then, after the bankruptcy case is closed, the debtor pursues that cause of action in another court, and the defendant asserts judicial estoppel, claiming that the debtor's failure to list the cause of action in the bankruptcy case was an inconsistent position in prior litigation. In this situation, the court deciding whether judicial estoppel follows from the failure to disclose in the preceding bankruptcy case might be another federal court or a state court. Although the debtor may return to bankruptcy court and reopen the bankruptcy case to add the cause of action, reopening is a discretionary matter.[104] Bankruptcy courts can be reluctant to reopen a case if the effect would be to interfere with ongoing litigation in which a party already has asserted judicial estoppel.[105]

Like the general case law on judicial estoppel, "confused" is an apt description of the case law on the doctrine as applied to bankruptcy matters. Some circuits have case law suggesting a bright-line approach — that a bankruptcy debtor's failure to disclose a cause of action for any reason other than a lack of knowledge about

101 *See* Fed. R. Civ. P. 8(d)(2) ("A party may set out 2 or more statements of a claim or defense alternatively or hypothetically. . . ."); *id.* at 8(d)(3) ("A party may state as many separate claims or defenses as it has, regardless of consistency.").

102 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 4477 (2d ed. 2002).

103 *See* Pamela Foohey, *Recent Developments in Judicial Estoppel and Dismissal of Employment Discrimination Suits*, Am. Bankr. Inst. J., Dec./Jan. 2011, at 20; Craig A. Gargotta, *Judicial Estoppel and Employment Discrimination Claims in Bankruptcy*, Am. Bankr. Inst. J., Sept. 2005, at 8; Deborah B. Langehennig, *The State of Judicial Estoppel in Bankruptcy*, Am. Bankr. Inst. J., Nov. 2009, at 44; Lynne B. Xerras, *Judicial Estoppel as Applied to Unscheduled Litigation Claims*, Am. Bankr. Inst. J., July 2012, at 58.

104 *See* 11 U.S.C. § 350(b) ("A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.").

105 *See* William H. Brown, Lundy Carpenter & Donna T. Snow, *Debtors' Counsel Beware: Use of the Doctrine of Judicial Estoppel in Nonbankruptcy Forums*, 75 Am. Bankr. L.J. 197, 210-14 (2001).

the claim leads to judicial estoppel.[106] Some state court opinions have also adopted a bright-line approach.[107] However, the majority of circuits use a flexible approach that looks to a variety of factors in deciding whether to apply judicial estoppel to the failure to disclose in a prior bankruptcy case.[108]

Among the majority decisions is an en banc opinion from the Eleventh Circuit, *Slater v. U.S. Steel*, which recently re-examined its case law on judicial estoppel as applied to the failure to list a prepetition claim in bankruptcy.[109] In *Slater*, the plaintiff filed title VII claims for race and sex discrimination that she had not listed in the schedules for her prior bankruptcy. The court reaffirmed its commitment to a two-part test for applying judicial estoppel: (1) did the party take inconsistent positions under oath in an earlier proceeding; and (2) were these inconsistent positions "calculated to make a mockery of the judicial system."[110] The en banc court canvassed its circuit's prior case law and summarized it as holding that the omission of a civil claim in a bankruptcy filing is deemed to be an intention to make a mockery of justice.[111] The court overruled these prior cases, holding that a court should consider the totality of the circumstances in deciding whether a person's inconsistent statements were intended to make a mockery of justice.[112]

Recommendation. Judicial estoppel can be an important tool to prevent a debtor from gaining an unfair advantage through inconsistent statements in a bankruptcy case and later litigation. Therefore, the Commission recommends the continued, but restrained, use of the doctrine of judicial estoppel. The *Slater* court framed the issue as whether the debtor intended to make a "mockery" of the judicial system, but the Commission's preferred formulation is that judicial estoppel should apply when the debtor otherwise would gain an unfair advantage. The relevant inquiry should be about the debtor's intent toward other parties, not the judicial system. A debtor might gain unfair advantage over others and be wholly indifferent about the effect on the judicial system. The word "mockery" also could be interpreted to require a level of malevolence toward the courts that the doctrine of judicial estoppel does not require.

The Commission, however, is concerned that the doctrine has been applied mechanically in a way that is not faithful to the Supreme Court's directive in *Maine v. New Hampshire* as well as the doctrine's historical roots. In deciding whether to apply judicial estoppel, courts should consider the totality of

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106 *See, e.g.*, Eastman v. Union Pac. Ry., 493 F.3d 1151, 1157 (10th Cir. 2007) (commenting judicial estoppel is appropriate except when "'the debtor lacks knowledge of the undisclosed claims or has no motive for their concealment.'" (quoting Browning Mfg. v. Mims (*In re* Coastal Plains, Inc.), 179 F.3d 197, 210 (5th Cir. 1999)); MV Stacey D v. Primary P&I Underwriters (*In re* Superior Crewboats, Inc.), 374 F.3d 330, 335 (5th Cir. 2004) (stating a debtor's failure to disclose is inadvertent only when the debtor lacks knowledge of the claim or has no motive for concealment).

107 *See, e.g.*, Salazar-Abreu v. Walt Disney Parks and Resorts U.S., Inc., 2018 WL 6816757 (Fla. Dist. Ct. App. 2018) (failure to disclose slip-and-fall claim in bankruptcy precluded later state court suit); Wolfork v. Tackett, 540 S.E.2d 611 (Ga. 2001) (failure of a chapter 13 debtor to disclose a tort claim alone is grounds for judicial estoppel).

108 Slater v. U.S. Steel Corp., 871 F.3d 1174, 1176 (11th Cir. 2017) (ruling "a district court should consider all the facts and circumstances" in deciding whether to apply judicial estoppel); Clark v. AII Acquisition, L.L.C., 886 F.3d 261, 266 (2d Cir. 2018) ("[J]udicial estoppel is not a mechanical rule."); Spaine v. Community Contacts, Inc., 756 F.3d 542 (7th Cir. 2014) (holding incomplete schedules cured by an oral disclosure did not give rise to judicial estoppel); Ah Quin v. County of Kauai Dep't of Transp., 733 F.3d 267, 272 (9th Cir. 2013) ("Judicial estoppel is a discretionary doctrine, applied on a case-by-case basis."); Eubanks v. CBSK Fin. Grp., Inc., 385 F.3d 894, 897-98 (6th Cir. 2004) (examining factors explaining why debtor did not disclose a lawsuit).

109 871 F.3d at 1177.

110 *Id.* at 1181.

111 *Id.* at 1182-85.

112 *Id.* at 1176.

the circumstances. In this respect, the Commission's recommendation is consistent with the Eleventh Circuit's approach in *Slater*. The recommendation lists eleven factors that courts might find useful in considering whether the debtor has gained an unfair advantage. The eleven factors are not exclusive. The courts should implement this recommendation through case law, and no statutory or rules amendments are needed. Indeed, the Commission's recommendation is consistent with the current case law in many jurisdictions, and the multifactor list only suggests the range of factors that a court might consider.

The Commission's recommendation reflects the reality that a consumer faces before a bankruptcy filing. There are potentially twenty-seven official forms that a consumer might need to file with a bankruptcy petition. Even with the aid of an attorney, a consumer has a huge task to assemble the information needed to complete these forms. Moreover, a consumer might not appreciate that a potential lawsuit is an asset in the same way as a house or a bank account. Also, it can be unclear when a cause of action arises thereby creating a duty to disclose in the debtor. The Commission considered, but for two reasons rejected, the idea of fixing the issues arising out of the judicial estoppel doctrine by making the disclosure requirements clearer for consumers. First, the recent revision to the bankruptcy forms was designed to accomplish exactly this purpose.[113] Second, the Commission sensed that clearer instructions would not result in fewer mistakes.

Some of the problems with judicial estoppel have arisen through mechanical applications of the doctrine that do not appreciate the context of a consumer bankruptcy filing. Consequently, many of the Commission's recommended factors go to the debtor's knowledge at the time of a bankruptcy filing and the debtor's interactions with the bankruptcy attorney. Other factors consider the extent to which creditors were harmed. In addition, courts should consider any curative steps the debtor took, such as notifying the trustee or creditors.

The final part of the Commission's recommendation is that imposition of judicial estoppel on the debtor should not prejudice a chapter 7 trustee's rights. Specifically, the debtor's failure to list a claim should not preclude a chapter 7 trustee from pursuing the claim on behalf of the estate and creditors. The trustee, as a representative of the creditors, has no control over the debtor's disclosures in the bankruptcy schedules. This recommendation is consistent with existing case law and was included to make clear the Commission intended no change with respect to this aspect of judicial estoppel law.[114]

Through its recommendation on judicial estoppel, the Commission is making no recommendation on the issue of whether and when a debtor has a duty to disclose assets acquired after filing a bankruptcy case or causes of action arising during a bankruptcy case, especially during a chapter 13 case.[115]

113 *See* § 5.06 Bankruptcy Forms (discussing recent revisions to the official bankruptcy forms).

114 *See* Stephenson v. Malloy, 700 F.3d 265 (6th Cir. 2012); Reed v. City of Arlington, 650 F.3d 371 (5th Cir. 2011); 5 Collier on Bankruptcy, *supra* note 32, at ¶ 554.03.

115 *Compare* Waldron v. Brown (*In re* Waldron), 536 F.3d 1239, 1246 (11th Cir. 2008) (holding that chapter 13 debtors have no general obligation to disclose postpetition property acquisitions, including postpetition causes of action, but that the bankruptcy court has discretion under Fed. R. Bankr. P. 1009 to require debtors to amend their schedule of assets) *with* Flugence v. Axis Surplus Ins. (*In re* Flugence), 738 F.3d 126, 130 (5th Cir. 2013) (describing the law as "well settled" that a debtor has a continuing obligation to disclose postpetition causes of action); Kimberlin v. Dollar Gen. Corp., 520 F. App'x 312, 315 (6th Cir. 2013) (upholding judicial estoppel based on an "ongoing duty to disclose assets during bankruptcy").

The Commission expresses no opinion on a debtor's postpetition duty to disclose or the effects of nondisclosure in the bankruptcy case in which the debtor fails to disclose such causes of action. The recommendation on judicial estoppel only addresses the effect of nondisclosure on later litigation if the debtor had a duty to disclose in an earlier bankruptcy case.

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 (USTP) 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.

Background. The chapter 7 trustee serves as a fiduciary to the bankruptcy estate and has the duty to maximize the value of the estate for all its beneficiaries, including not only the creditors but also the interest of the debtor in estate property that can be exempted or abandoned. The Bankruptcy Code gives the trustee several tools to maximize the value of the estate, two of which are particularly relevant to this recommendation. First, section 363(b) authorizes the trustee to sell estate property after notice and a hearing. Second, section 554 allows the trustee to abandon property of the estate that is "burdensome to the estate or that is of inconsequential value and benefit to the estate."

The debtor's interest in exempt property can clash with the trustee's power to sell property. An example comes from *Brown v. Ellman (In re Brown)*, where a chapter 7 trustee sought court approval to sell the debtor's residence for $160,000.[116] The property was subject to two mortgages in the amount of $219,000.[117] Thus, if the trustee sold the property, the entire sale price normally would go to the mortgage-holders, leaving no distribution for the debtor's unsecured creditors or payment of the trustee fees. Overencumbered property is a textbook example of an asset that has inconsequential value to the estate and so may be abandoned by the trustee.[118]

116 851 F.3d 619 (6th Cir. 2017).

117 *Id.* at 621.

118 *See, e.g.*, Skumpija v. Warren (*In re* Skumpija), 2013 WL 6092156, at *6 (Bankr. E.D.N.C. 2013) (granting the debtor's motion for abandonment, because the trustee could not obtain a sale price high enough to satisfy liens on the property, ad valorem taxes, auctioneer fees, and the trustee's commission).

The trustee in *Brown*, however, had entered into an agreement with the senior mortgagee known as a "carve-out," under which a portion of the sales price would be set aside to pay a portion of a junior mortgage, the real estate broker, and other closing costs. The debtor lost her objection that the sale should not be approved because it would forfeit her homestead exemption. The sale occurred, and the debtor lost her house. From a $6,000 carve-out amount separate from the closing costs, the trustee received a fee of $4,685. After paying expenses, only $512 was available for distribution to the unsecured creditors, which represented a dividend of 2.4%.[119]

Exemptions in bankruptcy cases are an important part of bankruptcy's fresh start. They let the debtor maintain an appropriate standard of living after the bankruptcy case by enabling the debtor to emerge from bankruptcy with adequate and necessary possessions. The Commission has two separate concerns relating to a trustee's sale of exempt property. First, the sale should respect the debtor's exemption in the property. There is no question the debtor receives an exemption when the trustee sells property that is not fully encumbered — that is, where the debtor has equity in the property — and the principle is no different when the property is fully encumbered. Second, even when the trustee's sale would respect the debtor's exemption in fully encumbered property, such sales should be rare. Each of these concerns is addressed below

Recommendation — Best Interpretation of Existing Law Protects Debtor's Exemption. There is no textual support in the Bankruptcy Code for the position that the debtor loses exemptions in overencumbered property. Section 522(b) provides that the debtor exempts "property," not "equity" or "value." Similarly, the federal exemption list in section 522(d) generally exempts the debtor's "interest" in property, a phrase broadly encompassing many rights, including tangible, intangible, legal, and equitable rights. Thus, the plain language of the Bankruptcy Code allows the debtor to exempt any interest in property even if there is no equity in the asset. The Commission agrees with the interpretation of the existing Bankruptcy Code from the Bankruptcy Appellate Panel for the Tenth Circuit: "[P]ossession and title allow Debtors to claim valid homestead exemptions, notwithstanding a lack of equity in the Homesteads."[120] *Collier on Bankruptcy* takes the same view.[121]

The contrary precedent is the Sixth Circuit's decision in *Brown*,[122] where the court relied on one of its own unreported opinions that, without citing any supporting authority, had held that a debtor could not claim an exemption in fully encumbered property.[123] The *Brown* court said the unreported opinion

119 The details of the distribution can be found in Trustee's Final Report, *In re* Brown, No. 14-48421 (Bankr. E.D. Mich. June 9, 2016) (docket entry 104).

120 Jubber v. Bird (*In re* Bird), 577 B.R. 365, 384 (B.A.P. 10th Cir. 2017).

121 13 Collier on Bankruptcy, Exemptions, Case Highlights: Issues Concerning Exemptions in Bankruptcy, ch. 10 (16th ed., Richard Levin & Henry Sommers, eds.) ("In light of the statutory formula for lien avoidance under section 522(f)(2), which determines that a lien impairs an exemption even when the debtor has no equity, as well as the fact that the debtor has other interests in property besides a monetary interest, such as possessory interests, the better view is that a debtor may exempt property even if the debtor has no equity in the property.").

122 851 F.3d 619 (6th Cir. 2017). The Sixth Circuit previously had issued an opinion not designated for publication to the same effect, involving the same chapter 7 trustee as was involved in the *Brown* opinion. The *Baldridge* case reaches its substantive conclusion without citation to any authority.

123 *See* Baldridge v. Ellman (*In re* Baldridge), 553 Fed. App'x 598 (6th Cir. 2014).

was consistent with cases from two other courts finding that the debtor's exemption only extends to the value of the property, not to the property itself.[124] The Sixth Circuit seemed unaware that Congress had statutorily overruled one of these cases in 1994.[125] The 1994 amendment changed section 522(f) to make clear that a lien can impair an exemption even when the property is fully encumbered.[126] Thus, the statutory amendment not only rejects the case but also expressly rejects the idea that the debtor cannot have an exemption in a fully encumbered asset. The other case cited by *Brown* involved a completely different context than the trustee's power to sell fully encumbered property — a challenge to the constitutionality of the 2005 change imposing on the debtor a minimum domiciliary requirement to claim a state's homestead exemption.[127] The *Brown* opinion relies on dicta in a footnote broadly characterizing exemption rights that was not necessary to the decision and not likely intended as a careful doctrinal restatement of a debtor's rights in exempt assets.[128]

Although the Commission understands that lower courts in the Sixth Circuit might consider themselves bound by the *Brown* decision, the Commission believes the best interpretation of the existing Bankruptcy Code relies on its plain language that allows the debtor to exempt "property" and "interests." The Commission recommends that courts adopt this interpretation and believes the Sixth Circuit should reconsider its ruling. The Commission also recommends that Congress pass a clarifying amendment as it did in 1994 to recognize that a debtor's interest in exempt property exists even when the property is fully encumbered.

Recommendation — Limitations on Sale of Fully Encumbered Property. Even when the trustee's proposed sale of property would give the debtor the full value of the debtor's exemption, "carve-out" transactions should be rare. The long-established rule is that the trustee should abandon fully encumbered assets, leaving it to the debtor and secured creditors to resolve liens outside of bankruptcy court. Abandonment encourages the efficient administration of the estate while ensuring that trustees do not liquidate property if the proceeds will not provide a meaningful benefit to the unsecured creditors.

The use of carve-out transactions threatens the practice of abandonment. These transactions, which usually involve the sale of fully encumbered assets, with a token amount of money carved out for distribution to the estate, attempt to circumvent the usual rule against the sale of fully encumbered assets. The *Brown* case exemplifies why these transactions should be viewed as dubious: the trustee and

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124 *Brown*, 851 F.3d at 624 (citing Simonson v. First Bank of Greater Pittston (*In re* Simonson), 758 F.2d 103, 105-06 (3d Cir. 1985), and Drummond v. Urban (*In re* Urban), 375 B.R. 882, 885 n.7 (B.A.P. 9th Cir. 2007)).

125 The section-by-section analysis of the House Report states:

> The amendment . . . overrules *In re* Simonson, 758 F.2d 103 (3d Cir. 1985), in which the Third Circuit Court of Appeals held that a judicial lien could not be avoided in a case in which it was senior to a nonavoidable mortgage and the mortgages on the property exceeded the value of the property.

H.R. Rep. No. 103-835, at 54 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3363.

126 *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 303, 108 Stat. 4106, 4132 (adding section 522(f)(2) to the Bankruptcy Code).

127 Drummond v. Urban (*In re* Urban), 375 B.R. 882, 885-86 (B.A.P. 9th Cir. 2007).

128 *See also* 13 Collier on Bankruptcy, *supra* note 121, at ch. 10, n.4 (making similar observations about the precedent relied upon by *Brown*).

real estate professionals received thousands of dollars in commissions, while the general unsecured creditors received no distribution of consequence and the debtor lost her home.

Secured creditors, whose liens survive the bankruptcy process, need neither the protection nor assistance of the trustee in liquidating their claims, since they may continue to avail themselves of foreclosure proceedings. Moreover, allowing trustees to sell fully encumbered assets invites self-dealing. Congress created the concept of abandonment exactly to address these concerns:

> In enacting § 554, Congress was aware of the claim that formerly some trustees took burdensome or valueless property into the estate and sold it in order to increase their commissions. Some of the early cases condemned this particular practice in no uncertain terms, and decried the practice of selling burdensome or valueless property simply to obtain a fund for their own administrative expenses.[129]

Indeed, in reviewing the reasons for creating a U.S. Trustee oversight system, a 1977 House Report stated, "[t]he existence of nominal asset cases, in which the bankruptcy system is operated primarily for the benefit of those operating it, has been one of the most frequently expressed criticisms" of the prior bankruptcy system.[130]

Unfortunately, today the opportunities for this abuse are especially pronounced in regions of the country where consumers continue to struggle from the effects of the housing crisis and underwater mortgages. Also, government statistics show Hispanic and African-American communities can be especially prone to having underwater mortgages.[131] Aggressive bankruptcy sales of underwater properties can fall especially heavily on communities in the most need of relief from financial distress.

The USTP's *Handbook for Chapter 7 Trustees* already limits the ability of trustees to sell fully encumbered property:

> a. Sale of Encumbered Property
>
> > Generally, a trustee should not sell property subject to a security interest unless the sale generates funds for the benefit of unsecured creditors. A secured creditor can protect its own interests in the collateral subject to the security interest. In certain limited circumstances, however, a trustee may properly sell encumbered property that would generate no proceeds for the benefit of unsecured creditors ("fully

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129 Morgan v. K.C. Mach. & Tool Co. (*In re* K.C. Mach. & Tool Co.), 816 F.2d 238, 246 (6th Cir. 1987) (citing Standard Brass Corp. v. Farmers National Bank, 388 F.2d 86 (7th Cir. 1967); Miller v. Klein (*In re* Miller), 95 F.2d 441 (7th Cir. 1967); and Seaboard National Bank v. Rogers Milk Products Co., 21 F.2d 414 (2d Cir. 1927)).

130 H.R. Rep. No. 95-595, at 94 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6055.

131 *See* George R. Carter, III & Alfred O. Gottschalck, *Drowning in Debt: Housing and Households with Underwater Mortgages*, https://www.census.gov/content/dam/Census/programs-surveys/ahs/publications/Drowning_in_Debt.pdf (last visited Feb. 6, 2019); Peter Dreier, Saqib Bhatti, Rob Call, Alex Schwartz & Gregory Squires, *Underwater America*, http://haasinstitute.berkeley.edu/sites/default/files/haasinsitute_underwateramerica_publish_0.pdf (last visited Feb. 6, 2019).

> encumbered property"). For example, a trustee may be able to satisfy in full a blanket security interest on multiple units of property by selling only one unit. Similarly, a trustee may be able to obtain a higher price from an aggregate sale of assets than from selling the assets individually. In a case with other funds available for unsecured creditors, a trustee also may sell fully encumbered property to eliminate a deficiency, if the secured creditor agrees to waive any unsecured claim for a deficiency in the event the sale does not fully satisfy the security interest.[132]

The Commission notes that the examples cited in the *Handbook* — sale of one unit out of multiple units and aggregate sales of assets — are most relevant in commercial bankruptcies.

The Commission appreciates the past regulatory supervision of the USTP to help ensure that sales of overencumbered residential property occur only in appropriate situations, but cases like *Brown* indicate trustees often push the line, if not cross it altogether. The USTP should define the circumstances in which trustees can sell fully encumbered property and should prevent trustees from selling fully encumbered property outside these circumstances. Among the guidelines the U.S. Trustee develops should be a bar on sales of fully encumbered property that do not produce a distribution for unsecured creditors that exceeds the portion of the sales proceeds that pays the trustee's fee and expenses. Requiring that the distribution to unsecured creditors will exceed the trustee's portion of the sale proceeds provides a rule of thumb to help ensure that such sales only occur when there is consequential value for the estate.

§ 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.

Background. Bankruptcy exemptions create a postpetition pool of assets that promote the debtor's postpetition economic well-being and further the debtor's fresh start. The debtor identifies exempt assets at the beginning of a case, but it takes time for a chapter 7 trustee to administer a bankruptcy estate. During administration, estate property will sometimes increase in value. When this happens, both the trustee and the debtor will want to claim the benefit of the appreciation.

132 U.S. Dep't of Justice, Handbook for Chapter 7 Trustees, https://www.justice.gov/ust/handbook-chapter-7-trustees (last visited Jan. 12, 2018).

"Value" can be conceptualized as an inherent characteristic of an asset.[133] For a commercial asset, the value typically would be the discounted present value of the future cash flows the asset will bring to the firm. For a consumer asset, value would include what the owner would have to pay over the life of the asset for similar consumption of another asset — for example, the value of a particular house as compared to what the owner would pay for similar housing. Knowing the value of an asset requires practically omniscient knowledge about the world — e.g., what cash flows will come in the future, what alternatives a consumer will have over the life of the asset, the consumer's preferences over the life of the asset.

Human beings, of course, do not have omniscience about either the present or the future, so we use market prices to estimate value. As more information comes to light — for example, the evolving quality of the schools that are associated with a particular house or changes in the cost of borrowing — we update our estimates of value. "The observed transaction price associated with the transfer of an asset's ownership thus will represent a market consensus resulting from negotiation between various individuals."[134]

This analysis glosses over important variables—such as differing tastes, preferences for risk, and time horizons—that might lead real-world prices to diverge between buyers, but these complications do not diminish the underlying insight. There is no objective truth about the nature of "value" that will ineluctably lead to a principled outcome on whether the debtor or the trustee should benefit from postpetition appreciation. Talking about postpetition changes in "value" is just to say price estimates have moved over time as new information emerged. There is no theoretical reason why the debtor or the creditors should benefit from what is essentially just the passage of time.

In the bankruptcy courtroom, the question of who benefits from postpetition appreciation is not a theoretical exercise but one with very practical consequences for debtors and creditors. Courts cannot throw up their hands at the conceptual impossibility of the task but must come up with a workable rule. For example, the Ninth Circuit has consistently ruled that postpetition appreciation accrues to the benefit of the bankruptcy estate and not the debtor.[135] But in one of these cases, the court indicated the result would be different if the debtor had exempted an asset in full.[136]

Although not the issue actually determined, the Supreme Court's decision in *Schwab v. Reilly* supports the idea that the debtor receives the benefit of appreciation in a fully exempted asset.[137] In *Schwab*, the debtor scheduled the value of exempt cooking equipment at the same amount that she had claimed

133 The discussion in the text draws on Robert M. Lawless & Stephen P. Ferris, *Economics & the Rhetoric of Valuation*, 5 J. Bankr. L. & Prac. 3 (1995); *see also* David Gray Carlson, *Secured Creditors and the Eely Character of Bankruptcy Valuation*, 41 Am. U. L. Rev. 63, 70 (1991) ("Value is a function of exchange. Since a bankruptcy judge will determine value without the benefit of an historical exchange, the judge is required to hypothesize one. The rules for this speculation have never been spelled out.").

134 Lawless & Ferris, *supra* note 133, at 12.

135 Wilson v. Rigby, 909 F.3d 306, 308-09 (9th Cir. 2018); Gebhart v. Gaughan (*In re* Gebhart), 621 F.3d 1206, 1211-12 (9th Cir. 2010); Alsberg v. Robertson (*In re* Alsberg), 68 F.3d 312, 314-15 (9th Cir. 1995); Hyman v. Plotkin (*In re* Hyman), 967 F.2d 1316, 1321 (9th Cir. 1992); Schwaber v. Reed (*In re* Reed), 940 F.2d 1317, 1323 (9th Cir. 1991); *In re* Vu (Vu v. Kendall), 245 B.R. 644, 647-48 (B.A.P. 9th Cir. 2000).

136 *See Reed*, 940 F.2d at 1323 ("No doubt Debtor's argument that appreciation enured to him would have merit if his entire interest in the residence had been set aside or abandoned to him; it was not.").

137 560 U.S. 770 (2010).

as exempt, although the actual market value of the property was more than the claimed exemption. Although the trustee did not object to the debtor's scheduled value, the Supreme Court held that the trustee was nonetheless entitled to the value of the property in excess of the amount listed in the debtor's schedules. However, in its discussion, the Court wrote that "[i]f an interested party fails to object within the time allowed, a claimed exemption will exclude the subject property from the estate even if the exemption's value exceeds what the Code permits."[138] Later, the Court indicated how an exemption of the "asset itself" might be claimed in practice and commented that if the debtor did so and the trustee did not object, "[T]he debtor will be entitled to exclude the *full value of the asset*."[139]

Recommendation. The Commission takes no position on whether the full or partial nature of a claim to an exemption determines who receives postpetition appreciation on the exempted asset. Apart from the doctrinal considerations, there are practical concerns about setting valuations as of the petition date — often called the "snapshot approach." Although valuations are easily asserted hypothetically, in the real world they are messy, fact-intensive affairs that courts must decide. In addition, real-world valuations must inevitably occur against the background of what later unfolded.

Rather than deal in abstractions, the Commission determined that the best approach would be directed at the practical reason disputes arise about who receives postpetition appreciation, and that reason is the inevitability that it takes time to administer a bankruptcy case. The longer a case lasts, the more likely it is that exempt assets will increase in value. Exempt assets also can decrease in value, but decreases in value only occur to the detriment of the debtor. Economists would refer to these concepts as the option value of the asset, an idea that captures the intuition that the longer the trustee can wait to see if the asset might increase in value, the more valuable the asset will be to the trustee.

For an effective fresh start, the debtor needs certainty that, at some point, an exempt asset and any appreciation in the asset are beyond the trustee's reach. The problem is a procedural one, not a problem of substantive valuations. The Commission thus turned to the need for a mechanism to force the trustee to act, instead of sitting by to see if an exempt asset will increase in value. The Bankruptcy Code already has such a mechanism: the power of the court under section 554(b) to compel an abandonment upon the motion of a party in interest. By moving to compel the trustee to abandon an asset, the debtor can force the trustee to decide sooner rather than later whether there is value in an asset claimed as exempt.

The Commission discussed how to make the existing abandonment mechanism more effective to deal with the problem of postpetition appreciation. Because most assets will not raise concerns about postpetition appreciation, an effective and balanced reform would give debtors a tool to use when needed but not burden trustees with the need to monitor all dockets and all assets at all times.

Therefore, the Commission first recommends that individual debtors should be able to file a motion to compel abandonment without paying a filing fee. The current filing fee for a motion to compel

138 *Id.* at 775-76.

139 *Id.* at 793 (emphasis added).

abandonment is $181.[140] This amount is over half of the $335 filing fee for filing a chapter 7 bankruptcy and can be a considerable sum in a consumer case, especially for matters where the dollar value of the asset in question is not very large. Removal of the filing fee for an appropriate motion to compel abandonment would thus remove a large impediment for many consumers when needed, but, because the consumer must take affirmative action and still pay their attorney if they have one, it would not unduly burden the trustee.

The Commission also recommends that the trustee's filing of a no-asset report be deemed an abandonment of any property the debtor scheduled under section 521(a)(1). (Thus, there would not be an abandonment of unscheduled property.) Any interested party would have 14 days to file an objection to abandonment and request a hearing. In addition, the notice for the section 341 meeting should put all parties on notice of the effect of the filing of the no-asset report.[141]

Eliminating the abandonment motion filing fee for individuals to file motions to compel abandonment and having the no-asset report serve as an abandonment are two reforms that work together to give debtors a tool to force a decision by the trustee whether to administer an asset. The Commission's recommendations may not solve the academic puzzle of postpetition value, but they provide a practical solution to make the issue less common in a consumer bankruptcy.

§ 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.

140 U.S. Courts, Bankruptcy Court Miscellaneous Fee Schedule, item 19 https://www.uscourts.gov/services-forms/fees/bankruptcy-court-miscellaneous-fee-schedule (last visited Jan. 9, 2019).

141 The Commission's proposal assumes that abandonment is irrevocable in the sense that the trustee could not attempt to revoke the abandonment later based on a higher sale price than anticipated. *See* Hardesty v. Haber (*In re* Haber), 2017 WL 1017731 (S.D. Ohio 2017) (trustee could not reopen case to capture a surplus on the sale of previously abandoned real estate), *aff'd,* Hardesty v. Haber (*In re* Haber), No. 17-3323 (6th Cir. Oct. 30, 2017).

Background. The 2005 amendments to the Bankruptcy Code closed the "millionaires' loophole" in section 522[142] — a feature that had allowed debtors to obtain higher exemptions by changing their states of domicile. Before the amendments, a wealthy individual domiciled in a state allowing only modest exemptions could move to a state with generous exemptions, wait ninety-one days, and then file a bankruptcy case, immediately obtaining the exemptions offered by the new state of domicile. This opportunity arose because both bankruptcy venue and the applicable state exemption law were determined by the debtor's domicile during the greatest part of the 180 days before the bankruptcy filing.[143]

Section 522(b)(3)(A) now provides that a debtor's current state of domicile will provide the applicable exemption law only if the debtor was domiciled in that state for a continuous period of 730 days before the bankruptcy filing. If not, the applicable state exemption law is that of "the place in which the debtor's domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place." By delaying the availability of a new state's exemption law, Congress closed the loophole that allowed a change of domicile to result in a quick increase in the debtor's homestead exemption. This change, however, introduced at least two significant problems.

First, the debtor's domicile during the six-month period two years before the bankruptcy filing often has no bearing on the debtor's current financial situation (which, outside of bankruptcy, would be governed by the exemption law of the debtor's current state of domicile) and may have very little connection to the debtor's recent financial dealings. The state in which the debtor has been living for the largest part of the 730 days before filing is likely to have far more relevance to the debtor's borrowing than the law of a different state of domicile in the six months preceding that 730-day period.

Second, the exemption law of the former state may deprive a debtor of an essential exemption. Debtors, as a starting point, may choose either the federal exemptions set out in section 522(d) or the state exemptions set out in section 522(b)(3). However, section 522(b)(2) provides that a state may allow debtors only that state's exemptions. A hanging paragraph following section 522(b) provides debtors who have moved to a new state some relief from this limitation to state exemptions. It provides that "[i]f the effect of the domiciliary requirement under subparagraph (A) is to render the debtor ineligible for any exemption, the debtor may elect" the federal exemptions listed in subsection (d).

This hanging paragraph, however, is ambiguous. It may be read to apply either if the debtor is made ineligible for any particular exemption or if the debtor is made ineligible for any exemption at all. If the latter reading is used — that is, if the hanging paragraph is read to apply only where the state law excludes the debtor from every state exemption — it may be of little use to the debtor who has changed domicile. Consider, for example, a state exemption law that allows an exemption for personal property located outside the state — for example, a "wild card" exemption that could be applied to an out-of-state savings account — but that restricts exemptions for homesteads to in-state property. A debtor who has moved from that state within 730

142 *See* Bankruptcy Abuse Prevention & Consumer Protection Act of 2005, Pub. L. No. 109-8, § 307, 119 Stat. 23, 81 (amending section 522(b)(3)).

143 How the 2005 amendments closed the "millionaires' loophole" in section 522 and a detailed overview of the issues created by this change can be found at Eugene R. Wedoff, *A Mobile Debtor Asks: Where Do I Find My Exemptions*, Bankr. Law Letter, June 2017, at 1.

days of a bankruptcy filing would not be deprived of every state exemption because an exemption for a bank account would still be available but would have no exemption for a homestead in the new state. This result was reached in at least two decisions.[144]

Recommendation. The Commission's preferred solution to the two problems created by the domiciliary rules in section 522(b)(3) is a statutory change that would apply the exemption law of the new domicile immediately. This change is consistent with nonbankruptcy law, under which the exemption law of the debtor's state of domicile usually applies regardless of how recently the debtor moved into the state. Using the current domicile also provides an easily applied standard and generally will mean applying the local state law instead of another state's laws that will be unfamiliar to the attorneys and judge in the case.

To eliminate the millionaires' loophole, the recommendation caps the new homestead exemption at the amount of the homestead exemption of the debtor's former state of domicile if the debtor has spent the greater part of the 730 days preceding bankruptcy in another state. The cap prevents a debtor from gaining an increased homestead exemption by changing venue within the 730-day period. It is not likely that exemptions other than the homestead would be large enough to cause a debtor to change domicile to obtain a higher non-homestead exemption.

To further protect against abuse of exemption laws, the debtor's former state of domicile would be the one in which the debtor was domiciled for the greatest part of the 730 days preceding the bankruptcy filing. This way, a debtor who had lived in a low-exemption state for many years could not game the system by establishing a domicile in one high-exemption state for a short period and then moving to another high-exemption state before filing a bankruptcy case. The short period in the first high-exemption state would not set the limit on the current state homestead exemption. Instead, that limit would be set by the law of the state in which the debtor had been domiciled for most of the two-year prefiling period.

The Commission considered but rejected an alternative approach that would have simply applied the federal exemptions for debtors who have changed state domicile within 730 days before the bankruptcy filing. This alternative, while simple to apply, would inappropriately displace state exemption law as well as unnecessarily deprive some debtors of more generous state exemptions. For example, a debtor might move from Florida, which has an unlimited homestead exemption, to Texas, which also provides an unlimited homestead exemption. There is no bankruptcy rationale for imposing the lower federal homestead exemption in such a situation. The Commission's recommendation allows local state law to determine the exemptions, as the bankruptcy law has done since the Bankruptcy Act of 1898, but still caps the amount available in appropriate cases to prevent abuse.

The Commission's recommendation for statutory change would eliminate the ambiguous hanging paragraph following section 522(b)(3)(C) by always making the new state's exemption law apply. As explained above, the hanging paragraph's current trigger allows federal exemptions despite state law generally eliminating that choice if a change of venue "render[s] the debtor ineligible for any exemption," and that phrase may mean either "ineligible for any exemption at all" or "ineligible for any particular exemption."

144 *See In re* Harris, 2010 WL 2595294 (Bankr. D. Idaho 2010); *In re* Katseanes, 2007 WL 2962637 (Bankr. D. Idaho 2007).

But if the proposed statutory change is not enacted, the Commission believes the best interpretation of the hanging paragraph is that the debtor may elect federal exemptions if the debtor is ineligible for any particular exemption. The language admits either interpretation, and in the face of such deep statutory ambiguity, the Commission's position is that courts should implement the statute in a manner most consistent with bankruptcy policy. Allowing the debtor to elect federal exemptions if the debtor is ineligible for any particular exemption allows the debtor to retain assets essential to the ordinary expenses of living. Housing is an essential need, and a change in venue that denies a homestead exemption should result in the option of federal exemptions even if state law allows out-of-state exemptions other than for homesteads. The Commission's interpretation would result in every debtor being given at least one complete set of exemptions — either state or federal — but would not allow a debtor to mix exemptions from multiple sources.

§ 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 $12,575 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.

Background. The only accommodation the federal exemptions make for a family size greater than one person is section 522(m), which allows each debtor in a joint case to claim the exemptions listed in section 522(d), a concept sometimes called "stacking" exemptions. Because only married persons may file a joint case,[145] the benefit that comes from stacking exemptions does not include other types of households such as single persons with dependent children or dependent elderly relatives.

The stacking of exemptions for married couples stems, in part, from the common-sense notion that a larger household will need more resources to effectuate the postbankruptcy fresh start. But larger households have that need regardless of whether the household has a married couple at its core. The larger the household — regardless of the marital status of its heads — the more postbankruptcy resources will likely be needed for an adequate fresh start.

Several state exemption laws have provisions that, for larger households, increase exemptions in ways that do not depend on whether the person claiming the exemption is married. For example, Missouri increases its $1,250 "wild-card exemption" — an exemption that the debtor can apply to assets of the

145 *See* 11 U.S.C. § 302 ("A joint case under a chapter of this title is commenced by the filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such chapter and such individual's spouse.").

debtor's choosing — by $350 per dependent.[146] South Dakota allows a $5,000 general exemption in personal property but increases that amount to $7,000 for a "head of household."[147] Texas allows a personal property exemption of $50,000 and increases that amount to $100,000 for a person who is a member of a "family."[148] Texas also allows an exemption in a motor vehicle for "each member of a family or single adult who holds a driver's license."[149] Wyoming extends a $20,000 homestead exemption to each of "two (2) or more persons who jointly own and occupy" the homestead.[150]

Recommendation. The Commission agrees that bankruptcy law should allow for increased exemptions in larger households and regardless of the marital status of the head of the household. The Commission deliberated extensively on the best mechanism to accomplish that goal. Exemption laws need to be administrable with bright-line rules that lawyers, trustees, and courts can easily apply. The Commission came to recognize that any approach it might adopt had the potential to be overinclusive or underinclusive when applied to specific cases.

The Commission decided the best approach would be to increase the federal wild-card exemption for debtors with dependents regardless of the debtor's marital status. The Commission discussed various figures for the increase and concluded that an increase of $1,000 for each dependent of the debtor would be appropriate. As with many of the Commission's recommendations, some individual commissioners would have gone further, and other commissioners thought a lower amount was appropriate. A $1,000 increase represented the collective judgment of the Commission as a middle-ground approach that balances the interests of debtors in the fresh start and fair payment to creditors by debtors who have assets available for such payment.

Section 522(d)(5) also allows the debtor to augment the wild-card exemption by the unused portion of the section 522(d)(1) homestead exemption, with the augmentation capped at $12,575 — as of the date of this writing. The Commission also recommends that this cap be increased by $1,000 for each dependent of the debtor, with the $1,000 amount again representing a collective judgment of the Commission about the appropriate amount for the increase.

By basing the increases on dependents, there is a potential for "double-dipping." For example, if an unmarried couple with a dependent filed separate bankruptcy petitions, they might both claim the child as a dependent and get the benefit of two increases in the wild-card exemption. The Commission believes such double-dipping is inappropriate and recommends that the increased exemptions based on a particular dependent could not be claimed by more than one debtor.

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146 *See* Mo. Rev. Stat. § 513.440.

147 *See* S.D. Codified Laws § 43-45-4.

148 *See* Tex. Prop. Code Ann. § 42.001(a).

149 *See id.* § 42.002(a)(8).

150 *See* Wyo. Stat. Ann. § 1-20-102(b).

The Commission's recommendation applies only to the federal exemptions. It would not apply in so-called "opt out" states that require their residents to choose the exemptions available under state law rather than the federal exemptions.[151] The Commission discussed but decided against extending its recommendation to encompass state exemption laws. The state exemption schemes vary widely, and overlaying an increase for dependents from the federal wild card on state exemption laws would produce widely disparate results. It also was not clear that such an overlay would be doctrinally feasible, at least not without writing fifty subparagraphs into section 522(d)(5) to adjust for the differences in each state's laws. Finally, even if the technical issues could be overcome, incorporating the changes into state exemption law would be a significant step toward federally mandated minimum state exemptions and a major change in the way the Bankruptcy Code interacts with state law, and such changes would arguably would go beyond the Commission's charge to work within the existing structure of the bankruptcy system.

§ 1.10 Increase in Federal Homestead Exemption

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

Background. Section 522 lists assets that a debtor may exempt from the bankruptcy estate. By exempting an asset, the debtor places it beyond the reach of the bankruptcy trustee and renders it unavailable for distribution to creditors. The exemptions represent the assets that a debtor may keep after bankruptcy and so are a part of the debtor's fresh start. For a homeowner, the most valuable exemption will likely be a homestead exemption that allows the debtor to exempt some or all of the debtor's equity in a personal residence.

Section 522(b)(2) allows states to opt out of the federal list of exemptions and require their residents to use the exemptions provided under state law. Thirty-one states have done so,[152] meaning the federal exemptions are in effect in nineteen states, the District of Columbia, Puerto Rico, and the federal territories.

Currently, section 522(d)(1) provides for a federal homestead exemption not to exceed $25,150. Although the exemption is adjusted for inflation pursuant to section 104, the index used for the adjustment, the Consumer Price Index, has not kept pace with the changes in home prices. Since 1994, the commonly used Case-Shiller Home Price Index has risen more than twice the Consumer Price Index.[153] When the Bankruptcy Code was enacted in 1978, the median sales price for a new home was $58,700, and the federal homestead exemption was $7,500 or 12.8% of the median sales price.[154] In October 2018, the

151 *See* 11 U.S.C. § 522(b)(2) (debtor may claim the federal exemptions "unless the State law that is applicable to the debtor . . . specifically does not so authorize").

152 4 Collier on Bankruptcy, *supra* note 32, at ¶ 522.02[1] n.5.

153 The Commission's recommendation on changing the debt limits for chapter 13 eligibility elaborates on how the Consumer Price Index has not kept pace with the price of housing. *See* § 3.10 Chapter 13 Debt Limits.

154 *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 522(d)(1), 92 Stat. 2549, 2587 (original enactment of federal homestead exemption in amount of $7,500). The U.S. Census maintains the historical data on new residential home sales at https://www.census.

median home value in the U.S. was $309,700, and the federal homestead amount then in effect was only 7.6% of the median sales price.

Recommendation. To reflect housing price inflation more accurately, the Commission recommends a one-time increase in the homestead exemption to $42,500, which would be 13.7% of the median sales price in October 2018. Such an increase would return the federal homestead exemption to approximately the same value it had at the time of its original enactment. Going forward, the federal homestead exemption would continue to be adjusted for inflation under the Consumer Price Index as provided in section 104.

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gov/construction/nrs/pdf/uspricemon.pdf (last visited Jan. 8, 2019).

II. 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 that

(1) 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) 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) 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.

Background. By putting a pause on creditor collection activity, bankruptcy's automatic stay not only provides a breathing spell for debtors but also helps all creditors by preventing piecemeal liquidation of the debtor's assets. When the stay goes into effect, it is inevitable that creditors will be in different stages of the collection process and that some of these creditors will have repossessed collateral but not yet disposed of the collateral.

A substantial split in the case law has developed over what a creditor must do to comply with the automatic stay as it applies to personal property — often a motor vehicle — that has been repossessed prepetition.

After default, state law allows a secured creditor to take possession of personal property.[1] In some of the cases that have reached the bankruptcy courts, the creditor is a municipality with a claim for unpaid traffic or parking fines, for which the municipality gets a lien after taking possession of a motor vehicle — usually by towing. At this point, all the creditor has is the right to possess the property. State law will determine what the creditor may do next, which often includes selling or otherwise disposing of the property. Until the creditor disposes of the property, the debtor remains the owner of the property.[2]

In between repossession and sale, the automatic stay can intervene to create the issues addressed by the recommendations in this section. Under section 541, the bankruptcy estate consists of all of the debtor's "legal and equitable interests" in property, which includes the debtor's right to redeem the property. In *United States v. Whiting Pools, Inc.*, the Supreme Court ruled that a creditor had to turn over property it had in its possession to the debtor given the duty in section 542 of a person in possession of property of the estate to deliver the property to the trustee.[3] The party in possession, however, often has an argument that section 542 does not apply and resists turnover. Thus, as a practical matter, turnover may require a legal proceeding to obtain the physical delivery of the property. Procedurally, a party demanding turnover may be required to commence an adversary proceeding in the bankruptcy case,[4] which takes both time and money.

To reach a result similar to a turnover action, some debtors have pointed to the automatic stay's language that prohibits "any act . . . to exercise control over property of the estate."[5] Their argument is that a creditor's possession of estate property is an act that exercises control over that property and therefore violates the automatic stay. If that argument is correct, the only way for the creditor to purge itself of the automatic stay violation is to surrender possession of the property. Because a violation of the automatic stay can be prosecuted via motion, the debtor has achieved the practical result of a turnover action — possession — without the delay and expense of an adversary proceeding.[6]

Most published decisions have held that a creditor's postpetition possession of estate property by itself violates the automatic stay as the exercise of control over that property, but the circuits have split.[7] The courts have reached differing results for doctrinal reasons, with many of the cases parsing whether possession is an "act"

1 *See* U.C.C. § 9-609(a).

2 *See id.* § 9-617(a) (disposition of the collateral transfers the debtor's rights in the collateral).

3 462 U.S. 198 (1983).

4 *See* Fed. R. Bankr. P. 7001(1); Hinsley v. Boudloche (*In re* Hinsley), 1998 WL 414302, at *11 (5th Cir. 1999); *In re* Perkins, 902 F.2d 1254, 1258 (7th Cir. 1990); Smith v. Wheeler Tech. Inc., 139 B.R. 235, 240 (B.A.P. 9th Cir. 1992).

5 11 U.S.C. § 362(a)(3).

6 The issue is raised primarily in chapter 13 because a chapter 13 debtor has the right to use estate property. *See* 11 U.S.C. § 1303. A chapter 13 debtor's right to use estate property arguably solves an issue of whether the debtor, as opposed to the trustee, has standing to pursue violations of the automatic stay against estate property.

7 *Compare* Weber v. SEFCU (*In re* Weber), 719 F.3d 72 (2d Cir. 2013) (holding that possession exercises control and is a stay violation); Thompson v. General Motors Acceptance Corp., 566 F.3d 699 (7th Cir. 2009) (same); Knaus v. Concordia Lumber Co. (*In re* Knaus), 889 F.2d 773 (8th Cir. 1989) (same) *with* WD Equip. LLC v. Cowen (*In re* Cowen), 849 F.3d 943 (10th Cir. 2017) (creditor's mere possession of estate property is not a stay violation).

as well as whether it constitutes "control."[8] The details of the doctrinal dispute under the existing law are not relevant to the Commission's recommendation for statutory amendments. Like many doctrinal disputes, the one here injects uncertainty into the system. Adding to this uncertainty is the Supreme Court's decision in *Citizens Bank of Maryland v. Strumpf*, where the Court ruled that a bank's administrative hold on a debtor's bank account was not an act to exercise control over the account.[9] *Strumpf*, it can be argued, lends some weight to the notion that passive possession is not an exercise of control, but on the other hand, it deals only with the bank's contractual obligation to make disbursements at the debtor's request, rather than with possession of the debtor's property.

Recommendation. The Commission discussed how these cases are trying to reconcile conflicting policy concerns.[10] Before creditors surrender collateral in their possession, they have a reasonable expectation that the collateral will not decline in value, an expectation that bankruptcy protects through the concept of adequate protection. In addition, some creditors in possession of collateral have a statutory lien that depends on the creditor continuing possession, and bankruptcy law should respect these nonbankruptcy rights. Debtors, on the other hand, frequently have an immediate need for property held by creditors at the time of filing, and the delay and expense needed to obtain a turnover order under section 542(a) may make a bankruptcy filing useless in addressing that need.

The Commission decided that the best solution would be a statutory amendment that resolved the conflicting policy concerns in a pragmatic way. The centerpiece of the Commission's recommendation is an amendment to section 362(a)(3) that expressly recognizes retention of estate property as a violation of the automatic stay. Because retention would be a stay violation, such an amendment would require the creditor to return the property to the debtor to cease violating the automatic stay.

To protect the creditor's interest, an exception to the automatic stay would allow the creditor to retain the property if it was subject to accident, casualty, or theft loss and the debtor did not provide proof of insurance (or equivalent security). For example, a creditor could retain a motor vehicle unless the debtor provided proof of insurance.

The holder of a statutory lien dependent upon possession would have to surrender possession upon being provided proof of insurance, but the Bankruptcy Code also would be amended to protect the status quo of the lien. After surrendering possession, the Bankruptcy Code would deem as a matter of federal law that the lien continues in the same amount and priority as if the creditor had retained possession. The lien would remain effective during and after the bankruptcy case. Once the case ended, the creditor would have the right to obtain a writ of replevin, giving the creditor the power to get possession back, and federal law would provide

8 The competing doctrinal positions are well explained by a pair of articles with Eugene R. Wedoff, *The Automatic Stay Under § 362(a)(3) — One More Time*, Bankr. L. Letter, July 2018, at 1, arguing that the creditor in possession of repossessed collateral is in violation of the stay, and Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay: A Reply to Judge Wedoff*, Bankr. L. Letter, Nov. 2018, at 1, taking the opposite position.

9 516 U.S. 16, 21 (1995).

10 *Cf.* Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part II): Who Is "Exercising Control" Over What?*, Bankr. L. Letter, Sept. 2013, at 1, 8 (arguing "practical considerations" seem to be driving a majority of the courts in their resolution of the interpretive issue).

for restoration of the statutory lien to exactly the status that would have existed had the creditor not given up possession during the bankruptcy case.

The Commission's recommendation to protect statutory lienholders has a precedent in existing provisions. Section 362(b)(3) provides for an exception to the automatic stay for an act necessary to perfect a security interest or to maintain or continue the perfection of a security interest. The security interest must be one that would beat the bankruptcy trustee's "strong-arm" powers to avoid security interests that would not have priority against judicial lienholders or bona fide purchasers of real estate.[11] This exception does not clearly apply to a creditor in possession of collateral because merely holding possession is not clearly an "act" within the meaning of the statute.[12] Similarly, section 542(b)(2) allows a creditor to give notice to maintain or continue perfection of a security interest where nonbankruptcy law requires seizure of property but the creditor cannot because the property is now part of a bankruptcy estate. Like section 542(b)(2), the Commission's recommendation uses federal law to establish state law rights where the creditor cannot perform the usual acts needed under state law to protect those rights due to prohibitions in bankruptcy law. Finally, section 349(b)(1) has provisions to reinstate certain avoided transfers and liens following dismissal of a bankruptcy case.

The statutory amendments are not intended to change creditors' rights under existing law. A creditor in possession of collateral could still promptly seek annulment of the stay based on a lack of adequate protection, bad faith, or other grounds for relief from the stay.

Although a creditor would be motivated to voluntarily surrender repossessed collateral to avoid a continuing violation of the automatic stay, the Commission recommends another amendment to section 542(a) that would clearly require the creditor to deliver the collateral.[13] (The turnover right, of course, would not apply where the creditor was entitled to keep the property because of the new exception to the automatic stay in section 362(b) described above.) Importantly, Federal Rule of Bankruptcy Procedure 7001 would be amended to allow a party to enforce the turnover right by motion rather than by adversary proceeding. The party entitled to possession could enforce the turnover right by motion as well as by moving for sanctions under section 362, and proceeding by motion would allow a debtor to proceed more quickly and less expensively, not requiring any proof of damages.

11 *See* 11 U.S.C. §§ 544(a), 546(b).

12 *Compare, e.g., In re* Peake, 588 B.R. 811 (Bankr. N.D. Ill. 2018) (retaining possession of property to continue perfection is not an "act" excepted from the automatic stay under section 362(b)(3)), *with, e.g.*, City of Chicago v. Kennedy, 2018 WL 2087453 (Bankr. N.D. Ill. 2018) (holding that, because city of Chicago's continued possession of an impounded automobile was necessary to continue perfection, section 362(b)(3)'s exception applied).

13 In making its recommendation, the Commission does not take any position on whether delivery in this context would require a creditor's physical return of the property to the debtor. What a creditor is required to do to effectuate delivery should depend on the facts and circumstances of a particular case (e.g., distance the property is located from the debtor, whether the debtor or creditor moved the collateral a long distance from the debtor).

§ 2.02 Definition of "Surrender"

(a) Courts should interpret "surrender of property" to mean that a debtor (1) relinquishes the property; (2) 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 (3) 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.

Background. Section 521(a)(2) requires an individual debtor to file a statement of intention specifying whether the debtor intends to surrender or retain estate property that secures a debt. If applicable, the debtor also must specify whether the property is exempt, whether the debtor intends to reaffirm the debt, or whether the debtor intends to redeem the property. The debtor has thirty days from the first date set for the meeting of creditors to perform whatever intention the debtor has stated.[14] The automatic stay terminates as to property for which the debtor fails to satisfy these requirements, subject to the ability of the court to continue the stay if the property has consequential value to the estate.[15]

The concept of "surrender" plays a role elsewhere in the Bankruptcy Code. If a trustee has been appointed — as would be true in every chapter 7 and chapter 13 case — the debtor also has a duty under section 521(a)(4) to surrender estate property to the trustee along with "books, documents, records, and papers, relating to property of the estate."[16] Section 727 allows a court to revoke a bankruptcy discharge if the debtor fails to surrender estate property that the debtor acquires postpetition. Section 1325(a)(5)(C) allows a debtor to satisfy the payment requirements to a secured creditor by surrendering the collateral.[17] Thus, the concept of "surrender" plays an important role in the consumer bankruptcy process.

14 11 U.S.C. § 521(a)(2)(B). Section 521(a)(6) states that a debtor must not retain possession of personal property securing an allowed claim for the purchase price of the property, unless within 45 days after the first meeting of creditors the debtor either reaffirms the debt or redeems the property. The Commission's recommendation to harmonize the 30-day requirement of section 521(a)(2) with the 45-day requirement of section 521(a)(6) is discussed at § 2.03 Statement of Intention — Deadlines and Consequences.

15 11 U.S.C. § 362(h).

16 However, a chapter 13 debtor typically remains in possession of property of the estate, "except as provided in a confirmed plan or order confirming a plan." 11 U.S.C. § 1306(b).

17 The term "surrender" also appears in the Bankruptcy Code regarding several nonconsumer issues. *See* 11 U.S.C. § 365(d)(4)(A) (requiring the trustee to surrender nonresidential real property after rejection of a lease on that property); *id.* § 1110(c) (requiring surrender of aircraft equipment); *id.* § 1143 (requiring surrender of a security under a chapter 11 plan to happen within five years of confirmation); *id.* § 1168 (requiring surrender of rolling stock). Chapter 12 also allows a plan to pay a secured creditor through surrender of the collateral. *Id.* § 1225(a)(5)(C). As stated in the foreword, the Commission takes no position on whether its recommendations should apply outside of the context of consumer bankruptcies.

Some courts have characterized the definition of surrender as "well defined" or "well settled."[18] These statements, however, have come in the context of distinguishing the definition of "surrender" from "vesting" to reject the debtor's ability to force a secured creditor to accept collateral through a surrender in a chapter 13 plan. Although it might be well settled that "surrender" and "vesting" have different meanings, the Commission's recommendation is an implicit rejection of the notion that "surrender" itself has an accepted meaning in the bankruptcy courts. Is "surrender" simply walking away from the property? Does "surrender" instead require making the property available for the trustee or the secured creditor? Or, does "surrender" require something even more — such as actively assisting in the turnover of the property? Support for all three propositions can be found in the case law.

For example, in *Wells Fargo v. Sagendorph (In re Sagendorph)*, the court cites *Black's Law Dictionary* and other sources to define "surrender" as "[t]he giving up of a right or claim" and "the relinquishment of any rights in the collateral."[19] Although also characterizing the meaning as "plain and well-established," the *Sagendorph* court in the same passage cites cases that seem to require more than relinquishment.[20] In *Pratt v. General Motors Acceptance Corp. (In re Pratt)*, the First Circuit stated that "surrender" requires "the debtor . . . to make the collateral available to the secured creditor — *viz.*, to cede his possessory rights in the collateral."[21] At the same time, the *Pratt* court rejects the idea that the debtor needs to physically transfer the collateral to the creditor.[22]

But some courts have required physical transfer, holding that the debtor must tender possession of the collateral to the creditor.[23] One court adopted a middle-ground approach, with physical delivery required in some circumstances but not others:

> Physical delivery is required where a debtor has possession of the property at the date of the effective date of the plan, the property is capable of being delivered and such delivery is feasible. A debtor who exercises the surrender option but, despite being perfectly capable of physical delivery and such delivery being feasible, refuses to deliver the vehicle to the creditor has failed to surrender the vehicle. Such delivery includes not just physical delivery of the property, but in the case of vehicles, the surrender of the certificate [of] title to the vehicle, the keys, etc., if the debtor possesses them. Retaining such items would constitute retention of some rights in the property, which is inconsistent with surrender.
>
> What if, on the other hand, the property is capable of delivery but such delivery is not feasible? What if, for example, the property is in the debtor's possession but is in a remote

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18 *See, e.g., In re* Tosi, 546 B.R. 847 (Bankr. D. Mass. 2016); *In re* Williams, 542 B.R. 514, 518 (Bankr. D. Kan. 2014); *In re* Rose, 512 B.R. 790, 793 (Bankr. W.D.N.C. 2014).

19 562 B.R. 545, 552 (D. Mass. 2017) (quoting *Black's Law Dictionary* and *In re* White, 487 F.3d 199, 405 (4th Cir. 2007).

20 562 B.R. at 553 (citing Pratt v. General Motors Acceptance Corp. (*In re* Pratt), 462 F.3d 14, 19 (1st Cir. 2006)).

21 *Pratt*, 462 F.3d at 18-19.

22 *Id.* at 18.

23 Hospital Auth. Credit Union v. Smith (*In re* Smith), 207 B.R. 26, 30 (Bankr. N.D. Ga. 1997); *In re* Robertson, 72 B.R. 2, 4 (Bankr. D. Colo. 1985).

> location? In such instances, the only barrier to surrender is one that the parties could have anticipated in their contractual dealings. If the contract permitted the property's removal to that location, then the secured creditor bore the risk of an inconvenient delivery (though may, of course, be entitled to assert its costs in relation thereto). If the contract did not, it seems reasonable to keep the burden of delivery on the debtor.[24]

Thus, the case law sometimes requires debtors merely to indicate an intention not to own the property, sometimes requires the debtor to make the collateral available for the creditor to pick up, and sometimes even requires the debtor to take some affirmative steps to tender possession or control, although exactly which steps are not entirely clear. The confused case law creates uncertainty that raises costs for debtors and creditors.

Recommendation. The diverging court interpretations demonstrate that the word "surrender" does not inescapably lead to a single conclusion about its meaning. In the courtroom, interpretation is not an abstract, lexicographical exercise but has practical consequences for real parties in real cases. Through its deliberations, the Commission recognized that the word "surrender" is capable of multiple interpretations, even when considered in the context of other code provisions. The Commission believes the best interpretation of "surrender" recognizes its practical consequences and also balances the interests of debtors and creditors.

The Commission's recommended definition of "surrender" is an intermediate approach that can require a debtor to take some affirmative steps. The debtor must not just relinquish any interest in the property but also must make the property available to the creditor. Making property available is more than just refraining from actively hiding the property. If appropriate, the debtor must let the creditor know where the property is located, as well as communicate instructions on how the creditor may retrieve the property.

Relatedly, the debtor cannot impede recovery of the collateral such as by withholding keys or refusing to sign necessary documents. The Commission, however, rejects the idea that surrender requires the debtor to make actual, physical delivery of the property. Nonbankruptcy law generally does not impose affirmative duties on the debtor to physically transfer property to a creditor,[25] and it would be an odd result that the invocation of bankruptcy relief put more duties on the debtor than would occur under nonbankruptcy law.

The debtor does not impede recovery of collateral by asserting legal defenses under nonbankruptcy law. The Commission's recommendation is a rejection of cases like *Failla v. Citibank (In re Failla)*, which hold that a debtor's imposition of defenses in a state-court foreclosure suit is inconsistent with a surrender of the property in bankruptcy.[26] *Failla* misinterprets the "savings clause" in section 521(a)(2),

24 *In re* Ware, 533 B.R. 701, 712 (Bankr. N.D. Ill. 2015).

25 For example, U.C.C. § 9-609(b) allows a secured creditor to repossess personal property if the secured creditor can do so without breaching the peace but imposes no affirmative obligations on debtors to permit the creditor to obtain the collateral.

26 838 F.3d 1170 (11th Cir. 2016). One court has expressly disagreed with *Failla*, *see In re* Ryan, 560 B.R. 339 (Bankr. D. Haw. 2016), *vacated as moot*, 2018 WL 1938512 (B.A.P. 9th Cir. 2018), and another court has described it as "not uniformly followed," *see* Skibbe v. U.S. Bank Trust, 2017 WL 2506405 (N.D. Ill. 2017).

which specifies that it shall not alter the debtor's or trustee's rights under the Bankruptcy Code. *Failla* missed several bankruptcy rights its decision does affect, and the Commission agrees with *Collier*'s characterization of the decision as erroneous:

> The *Failla* decision would preclude a debtor from protecting the exempt property from foreclosure, even if the creditor had no right to foreclose, defeating the purpose of the exemption provisions to protect the debtor's home. Similarly, under section 554, the debtor has a right to request abandonment of property that the trustee cannot or should not administer and to reinstate rights to possession that existed prior to the bankruptcy petition. And under section 521(a)(6), when a debtor fails to perform the stated intention, the creditor is limited to enforcing its rights under applicable nonbankruptcy law. There is no indication that Congress intended to diminish a debtor's nonbankruptcy rights to defend against a foreclosure or repossession when a creditor has no right to foreclose or repossess.[27]

Failla characterizes the debtor's imposition of a foreclosure defense as the debtor trying "to have his cake and eat it, too."[28] Although the Commission understands that it may look like the debtor is taking inconsistent positions, bankruptcy law always has respected the parties' nonbankruptcy rights. The Commission's recommendation merely allows the debtor to interpose whatever defenses the debtor has under nonbankruptcy law.

As mentioned above, section 1325(a)(5) allows a debtor to propose a plan that surrenders collateral to a secured creditor. The Commission's recommendation is not an endorsement of the idea that the debtor can use this provision to forcibly vest property in a secured creditor against the secured creditor's wishes. To recommend a definition of "surrender" is not also to recommend a definition of "vesting," which is a separate concept and generally requires the consent of the party in whom vesting occurs. Elsewhere, the Commission has made a recommendation on a process in a chapter 13 plan that would allow a debtor to sell burdensome property that the debtor does not want and the creditor does not want to accept.[29]

On a related point, the Commission's recommendation should not be understood as taking any position on whether *IRS v. White (In re White)*[30] is correctly decided. In *White*, the secured creditor was the IRS. The debtors' chapter 13 plan proposed to surrender personal property on which the IRS could not legally levy but also that the debtors did not intend to physically transfer to the IRS. The court ruled the debtor's actions did not constitute a surrender of the collateral.[31]

The Commission's interpretation recommendation applies the existing statutory law, although the Commission also recognizes that existing circuit-level decisions may bind some courts under the

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27 4 Collier on Bankruptcy ¶ 521.14[5] (16th ed. Richard Levin & Henry Sommer eds.).

28 838 F.3d at 1178.

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

30 487 F.3d 199 (4th Cir. 2007).

31 *Id.* at 207-08.

doctrine of stare decisis. At the same time, the Commission undertook study of the issue because of the uncertainty and litigation costs the current statutory language and absence of a definition create. The better solution would be for Congress to pass a clarifying statutory amendment, adding a definition of "surrender" to section 101 using the elements that the Commission has recommended.

§ 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.

Background. Section 521(a)(2) requires a chapter 7 debtor to file a statement of intention for "debts secured by property of the estate." In the statement, the debtor must choose to do one of three things: reaffirm the debt, surrender the collateral, or redeem the collateral.

Reaffirmation of a debt is a contract binding the debtor to pay the debt even after receiving a bankruptcy discharge. Because reaffirmation removes a debt from the protections of the discharge, section 524 imposes procedural protections before a reaffirmation agreement can become effective.[32] Implementing a reaffirmation agreement requires filing the agreement with the court rather than filing a motion.[33]

Surrender is the return of the collateral to the secured creditor, as the Commission explains in its recommendation for the best interpretation of "surrender" under the Bankruptcy Code.[34]

32 The Commission has suggested improvements to these procedures. *See* § 2.04 Reaffirmation Improvements.

33 *See* Fed. R. Bankr. P. 4008(a).

34 *See* § 2.02 Definition of "Surrender."

Finally, redemption allows a debtor to pay a lump sum to redeem property from a lien, freeing the debtor from future debt payments related to that property. A chapter 7 debtor can redeem "tangible personal property intended primarily for personal, family, or household use" by paying the value of the collateral.[35] A motion to authorize redemption is required.[36] Several lenders now specialize in providing loans that allow bankruptcy debtors to exercise their redemption rights, making redemption a more realistic option than it was two decades ago.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 amended section 521 but added conflicting deadlines for the debtor to perform the action listed in the statement of intention.[37] Under section 521(a)(2)(B), the debtor has thirty days after the date first set for the meeting of creditors, although the court can set a longer time period "for cause."[38] In contrast, section 521(a)(6) provides that the automatic stay terminates as to personal property securing the purchase price of the property (i.e., a purchase-money security interest) if the debtor does not redeem or reaffirm within forty-five days after the meeting of creditors occurs.[39] Section 362(h), also added in 2005,[40] additionally specifies that the automatic stay does not apply to personal property for which the debtor does not timely file a statement of intention or timely perform the action specified in the statement. Both sections 362(h) and 521(a)(6) provide a further consequence when the debtor does not meet the applicable deadlines, namely that the personal property on which the debtor was supposed to act ceases to be property of the estate.[41]

The court in *In re Alvarez*[42] identified four ways courts have tried to reconcile these conflicting deadlines:

- By its express terms, the forty-five-day deadline in section 521(a)(6) applies only to purchase-money security interests in personal property, and the thirty-day deadline in section 521(a)(2) applies to all other security interests. This interpretation produces the odd result that enforcement of purchase-money security interests is subject to a greater delay than enforcement of other security interests.

- Section 521(a)(2) only requires the debtor to perform "his intention" with respect to the property, while section 521(a)(6) requires the debtor to complete the action. Thus, the debtor must take preliminary steps that "perform his intention" within thirty days and must complete the intended act

35 11 U.S.C. § 722.

36 Fed. R. Bankr. P. 6008.

37 [6] Under 11 U.S.C. § 521(a)(2)(A), the debtor must file the statement of intention "within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes."

38 *See* Bankruptcy Abuse Prevention & Consumer Protection Act of 2005, Pub. L. No. 109-8, § 305(2), 119 Stat. 23, 80 (changing the deadline to perform the act from 45 days after filing the statement to 30 days after the date first set for the meeting of creditors).

39 *See id.* § 304, 119 Stat. at 78 (adding section 521(a)(6) and providing a 45-day deadline after the first meeting of creditors).

40 *Id.* § 305, 119 Stat. at 79.

41 Section 362(h)(1)(B) creates an exception to stay termination and removal of property from the estate if the statement of intention "specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms." Additionally, stay termination and removal of property from the estate are subject to a contrary court order entered on motion of the trustee under sections 362(h)(1)(B) and 521(a)(6), based on the court's determination that the property is of consequential value or benefit to the estate.

42 2012 WL 441257 (Bankr. N.D. Ill. 2012).

within forty-five days. Because a debtor cannot unilaterally redeem and reaffirm a debt, this reading would give a bad-faith creditor a motivation to delay to allow the forty-five days to expire.

- Section 521(a)(2) sets forth the debtor's duties to act within thirty days, and section 521(a)(6) specifies the consequences of the debtor's failure to act not only by lifting the stay but also by allowing the creditor to take possession of the property. This interpretation flies in the face of the bankruptcy principle that the lifting of the automatic stay does not transfer possession and instead sends the creditor to state court to exercise its remedies.[43]

- Section 521(a)(6) only overrules the case law that allowed a debtor to "ride-through" on collateral "to simply retain collateral and continue making payments without reaffirming the debt."[44] Under this view, the thirty-day deadline of section 521(a)(2) would control. Because section 521(a)(2) would similarly seem to address ride-through, this interpretation fails to explain why Congress enacted different sections with different time frames.

All of these interpretations have flaws. As the *Alvarez* opinion concluded, "[T]here is no perfect explanation of what Congress intended these sections to mean or how they were intended to interact."[45]

In addition to the issue of how to reconcile the conflicting deadlines, courts have also disagreed about whether there is a deadline by which a debtor must exercise the intention to redeem collateral. Sections 362 and 521 provide for termination of the automatic stay and the removal of property from the bankruptcy estate. But specifying these consequences does not set a deadline by which redemption must occur. Thus, the issue arises of whether a debtor can exercise the right to redeem even after the section 521 deadlines have passed and the automatic stay has terminated as a result. Most courts have held that the debtor's right of redemption survives termination of the automatic stay.[46]

Recommendation — Statutory Harmonization. It is difficult to see the conflicting provisions of section 521 as part of an intentional design. More likely, they only reflect independently drafted separate amendments that do not fit well together when made part of the Bankruptcy Code. The confusion about how section 521 interacts with the automatic stay and which deadlines apply creates uncertainty that leads to costs and delays affecting both creditors and debtors. The Commission recommends that Congress harmonize the different provisions to provide consistency.

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43 4 Collier on Bankruptcy, *supra* note 27, at ¶ 521.14[4] ("[T]he provision does not authorize a creditor to repossess property. It leaves that issue to applicable nonbankruptcy law.").

44 *Alvarez*, 2012 WL 441257, at *6.

45 *Id.*

46 *See, e.g.*, *In re* Thompson, 538 B.R. 410 (Bankr. E.D. Tenn. 2015) (debtor could redeem although the debtor did not perform her intention within 30 days of the date first set for the meeting of creditors); Miles v. Capital One Auto Finance (*In re* Miles), 524 B.R. 915 (Bankr. N.D. Ga. 2015) (debtor could redeem despite not filing motion to redeem until 47 days after the date first set for meeting of creditors); *In re* Alvarez, 2012 WL 441257 (Bankr. N.D. Ill. 2012) (debtors could redeem despite failing to file the statement of intention within the statutory deadline); *In re* Herrera, 454 B.R. 559 (Bankr. E.D.N.Y. 2011) (right of redemption survives termination of automatic stay); *In re* Rodgers, 273 B.R. 186 (Bankr. C.D. Ill. 2002) (failure to act within period set by section 521 did not preclude redemption). *But see In re* Buck, 331 B.R. 322 (Bankr. N.D. Ohio 2005) (debtor could not redeem after expiration of automatic stay); *In re* Jones, 261 B.R. 479 (Bankr. N.D. Ala. 2001) (failure to act within the statutory time periods precludes redemption).

The Commission considered a wide range of recommendations about how this harmonization might occur. The Commission first decided that the requirement for a debtor to file a statement of intention serves a useful purpose and should continue to be a part of the Bankruptcy Code. The statement of intention puts the creditor on notice about how the debtor expects to treat the creditor's collateral during the bankruptcy and thereby allows the creditor to take whatever action the creditor believes is appropriate to protect its rights.

The Commission heard both debtors' and creditors' perspectives on what deadlines are appropriate in the context of the statement of intention. To balance the interests of debtors in having a reasonable time to act and of creditors in having certainty about when the debtor will act, the Commission recommends (a) that an individual debtor should continue to have thirty days from filing the petition to submit a statement of intention regarding all property of the estate that secures a debt, and (b) that the debtor should be required to submit a filing that exercises that intent within sixty days after the meeting of creditors is first scheduled. If the debtor opts for reaffirmation, this filing would be the reaffirmation agreement; if the debtor opts for redemption, the filing would be a motion to authorize the redemption. Measuring the deadline from the scheduling of the meeting of creditors (as opposed to the meeting's conclusion) provides a fixed, certain date for the deadline and allows ample time for the debtor if the meeting is rescheduled or continued. Because the meeting of creditors generally must be scheduled within twenty-one to forty days of filing of the petition, the Commission's proposed deadline gives debtors eighty-one to 100 days to file a motion to exercise the intention. If the debtor has opted to redeem the collateral, the Commission recommends that Congress require the debtor to pay the redemption price within fourteen days of an order authorizing the redemption.

The 2005 amendments to sections 362 and 521 provide that the debtor's failure to perform the stated intention on personal property within the deadlines both terminates the automatic stay and causes the property to "no longer be property of the estate." Thus, if the debtor fails to act, these provisions not only give secured creditors relief from the automatic stay but also deprive the estate of any recovery that the property generates in excess of the secured claims. The potential loss of estate value can concern chapter 7 trustees. Although both sections 362 and 521 have mechanisms for the trustees to file a motion to keep estate property intact, the effect of the provisions is to place a burden on trustees to monitor dockets and file motions whenever necessary to prevent property from falling out of the estate to the detriment of the general creditors.

The debtor's failure to act should not prejudice the rights of trustees and creditors. Therefore, the Commission recommends removing from sections 362(h) and 521(a) the provision that "such personal property shall no longer be property of the estate." Such an amendment would still retain termination of the automatic stay, allowing the creditor to take action to satisfy its secured claim against the property, but it would leave the property in the estate, protecting the interests of creditors and the bankruptcy estate in any surplus value.

Recommendation — Rules Amendment. The Commission's preferred solution would be for Congress to fix the statutory thicket by starting on a clean slate and harmonizing the rules as outlined above. If Congress fails to act, however, the Commission recommends that the Advisory Committee on Rules of Bankruptcy Procedure propose an amendment to Federal Rule of Bankruptcy Procedure 6008. The Advisory Committee, of course, must work within the constraints of the existing statute, but a rule amendment could at least establish deadlines for filing a redemption motion and for the debtor's payment of an authorized redemption.

Having a deadline for acting on a redemption helps both debtors and creditors by speeding up and clarifying the redemption process. The creditor would receive its payment sooner, and the debtor would not have to be concerned about collateral like a motor vehicle being repossessed after bankruptcy. A rule amendment also provides clarity about whether a debtor needs to act by a date certain to exercise the section 722 redemption right.

The Commission recommends that rule 6008 be amended to require a debtor to file a motion to redeem within thirty days of the date first set for the meeting of creditors and to make payment to the creditor no later than fourteen days after the entry of an order authorizing the redemption. Again, the Commission's recommendation for a rules change is contingent on Congress's failure to make broader changes to sections 362 and 521.

§ 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) 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.

Reaffirmation Agreements Generally. A reaffirmation agreement occurs when the debtor waives the bankruptcy discharge as to a particular debt. Although there are no formal limits as to the types of debts a debtor can reaffirm, a common motivation to reaffirm a debt is that the debt is secured, and the debtor must either continue to pay the debt postbankruptcy or lose the collateral. For example, a debtor might reaffirm a car loan to avoid repossession after the bankruptcy case. The Administrative Office of U.S. Courts (AO) reports that reaffirmation agreements were filed in 21.7% of the chapter 7 cases in the 2017 calendar year and that 9.6% of these reaffirmation agreements were filed by pro se debtors.[47]

Because a reaffirmation agreement removes the discharge for the reaffirmed debt, section 524 imposes substantial and specific procedural protections before a reaffirmation agreement is enforceable. A creditor cannot enforce a reaffirmation agreement that does not satisfy these requirements, meaning the debt remains subject to the bankruptcy discharge.

A reaffirmation agreement is enforceable only if it is made before the granting of the discharge.[48] Within sixty days after the first date set for the meeting of creditors, the agreement must be filed with the court (and hence must be in writing).[49] Before or at the time of signing the agreement, the debtor must have received the written disclosures specified in section 524(k).[50] These disclosures consist of four primary parts. The final part, Part D,

47 U.S. Courts, BAPCPA Report — 2017, tbl.4, https://www.uscourts.gov/file/24666/download (last visited Jan. 27, 2019).

48 11 U.S.C. § 524(c)(1).

49 *Id.* § 524(c)(3); Fed. R. Bankr. P. 4008(a).

50 *See* 11 U.S.C. § 524(c)(2).

requires the debtor to calculate monthly income minus monthly expenses to demonstrate the debtor will be able to make the payments on the reaffirmed debt.[51]

The debtor's attorney must submit a declaration or affidavit stating that the agreement is a fully informed and voluntary decision of the debtor as well as that the attorney fully advised the debtor about the consequences of the agreement. The debtor's attorney must also state that the agreement does not impose an undue hardship on the debtor.[52] If the attorney who negotiated the agreement refuses to provide this statement, it is not enforceable.[53]

Section 524 specifies two instances in which the court must act on a reaffirmation agreement.[54] The first instance is when the debtor is acting pro se. The second instance is when the Part D calculation shows the debtor does not have sufficient monthly income to repay the reaffirmed debt. The Commission takes no position on the issue of whether courts can act on reaffirmation agreements outside these circumstances, assuming the agreement otherwise complies with section 524's procedural requirements.[55]

If the debtor is acting pro se, the court must hold a hearing at which the debtor appears and inform the debtor that the agreement is not legally required. The court also must inform the debtor of the legal effects and consequences of both the reaffirmation agreement and defaulting under the agreement.[56] For a pro se debtor, if the debt being reaffirmed is not secured by real property, the court also must approve the agreement as not imposing an undue hardship on the debtor and being in the debtor's best interest.[57] If the court does not follow these procedures, the reaffirmation agreement is not enforceable.

If the Part D disclosures show that the difference between the debtor's monthly income and expenses is not enough to make payments on the reaffirmed debt, the reaffirmation agreement is presumed to be an undue hardship on

51 *See id.* § 524(k)(6).

52 *See id.* § 524(c)(3).

53 *See, e.g.*, Jamo v. Katahdin Federal Credit Union (*In re* Jamo), 283 F.3d 392, 403 (1st Cir. 2002) ("Absent counsel's approbation, no valid reaffirmation could occur."); *In re* Brinkley, 2013 WL 8020916 (Bankr. D.D.C. 2013) ("The reaffirmation agreement filed by the debtors is unenforceable because the debtors' attorney did not certify that, in his opinion, the debtors are able to make the payments despite the presumption of undue hardship having arisen."); *In re* Egwim, 291 B.R. 559, 566 (Bankr. N.D. Ga. 2003) ("[A] represented debtor cannot reaffirm a debt unless the debtor's attorney provides the declaration or affidavit required under 11 U.S.C. § 524(c)(3).").

If the debtor is represented by an attorney in negotiating the reaffirmation, section 524(c)(3) clearly requires an attorney certification of no undue hardship for the reaffirmation agreement to be effective. A related issue is whether the debtor's attorney of record can refuse to sign the reaffirmation agreement on the grounds that the agreement is outside the scope of the representation, meaning the debtor is acting pro se for purposes of the reaffirmation agreement. *See, e.g.*, *In re* Harvey, 452 B.R. 179 (Bankr. W.D. Va. 2010); *In re* Minardi, 399 B.R. 841 (Bankr. N.D. Okla. 2009). The Commission has made recommendations about "unbundling" legal services in a bankruptcy, also known as limiting the scope of representation. *See* § 3.02 Unbundling of Legal Services. The Commission has not taken a position on the specific question of whether attorneys can properly unbundle services related to reaffirmation agreements from other bankruptcy services.

54 A helpful summary of when a court must act on a reaffirmation and what the court must do appears at Ryan W. Johnson, *24 Variations of a Reaffirmation Agreement and the Corresponding Actions Required by the Court*, Am. Bankr. Inst. J., Feb. 2018, at 26.

55 *Compare, e.g.*, Ford Motor Credit Co. v. Morton (*In re* Morton), 410 B.R. 556, 562 (B.A.P. 6th Cir. 2009) ("[A] bankruptcy court may not disapprove an attorney certified reaffirmation agreement solely because the court believes it is not in the best interest of the debtor.") *with, e.g.*, *In re* Bruzzese, 214 B.R. 444, 450-51 (Bankr. E.D.N.Y. 1997) (holding the court had the inherent authority to review reaffirmation agreements even when they are accompanied by the attorney certifications required by section 524(c)).

56 *See* 11 U.S.C. § 524(d).

57 *See id.* § 524(c)(5)-(6).

the debtor.[58] The presumption lasts for 60 days after filing the reaffirmation agreement and can be rebutted by a written explanation "that identifies additional sources of funds to make the payments as agreed upon under the terms of such agreement."[59] Section 524(m) directs, "This presumption shall be reviewed by the court," but provides no specific direction on what form that review must take other than to say that if the presumption is not rebutted, the court "may disapprove" the reaffirmation agreement. The court cannot disapprove the agreement without a notice to the debtor and creditor and a hearing (although a bankruptcy court generally is not required to hold a hearing if no party requests one after receiving notice).[60] Under the language of section 524(m), if the court fails to act on a presumption of abuse, the reaffirmation agreement goes into effect

After the filing of the agreement, the debtor has sixty days to rescind the reaffirmation.[61] One of the disclosures that the debtor must receive is about the right of rescission:

> You may rescind (cancel) your reaffirmation agreement at any time before the bankruptcy court enters a discharge order, or before the expiration of the 60-day period that begins on the date your reaffirmation agreement is filed with the court, whichever occurs later. To rescind (cancel) your reaffirmation agreement, you must notify the creditor that your reaffirmation agreement is rescinded (or canceled).[62]

Neither the Bankruptcy Code nor the Federal Rules of Bankruptcy Procedure specify how the debtor must communicate an intent to rescind a reaffirmation agreement. The statute also does not direct that the rescission must be filed with the court.

Recommendation — Official Form for Reaffirmation. As noted above, a debtor must receive the disclosures enumerated in section 524(k) for a reaffirmation agreement to be valid. These disclosures must be clear and conspicuous.[63] Moreover the statute provides highly specific language that the agreement must contain, and it requires that the disclosures occur in the order specified. The requirements are spread across thirty-four subparagraphs, clauses, and subclauses of section 524(k).

The AO provides five director's forms related to reaffirmation agreements: (1) reaffirmation documents, (2) reaffirmation agreements, (3) motion for approval of reaffirmation agreement, (4) a form order approving a reaffirmation agreement, and (5) an alternative form order. Director's forms provide "guidance for the bar" but do not have official status; their use is optional unless required by local rule or court order.[64] Official Form B427

58 *See id.* § 524(m)(1). Federal Rule of Bankruptcy Procedure 4008(b) requires that the reaffirmation forms include the statement of income and expenses on the debtor's schedules I and J.

59 *See* 11 U.S.C. § 524(m)(1). The presumption does not apply to reaffirmation agreements with a credit union. *See id.* § 524(m)(2).

60 *See id.* §§ 102(1)(B), 524(m)(1).

61 *See id.* § 524(c)(4) (specifying that a reaffirmation agreement is enforceable only if the debtor has not rescinded the agreement within 60 days after the agreement is filed with the court).

62 *Id.* § 524(k)(3)(J)(i).

63 *See id.* § 524(k)(1).

64 *See In re* Jenkins, 2017 WL 7069076, at *5 (Bankr. S.D. Ohio 2017) ("It has generally been held that the use of the 'Official Forms' is mandatory, while the use of the 'Director's Forms' is encouraged unless a court order or local rule mandates such use."); Fed. R. Bankr. P. 9009 advisory committee note; U.S. Courts, Permitted Changes to Official Bankruptcy Forms, https://www.uscourts.gov/

is a cover sheet that must be filed with a reaffirmation agreement. This form does not contain the reaffirmation agreement or disclosures themselves and "includes information necessary for the court to determine whether the proposed reaffirmation agreement is presumed to be an undue hardship for the debtor under §524(m) of the Code."[65]

To promote certainty for creditors that they have complied with section 524 and to promote uniformity, the Commission recommends that the Advisory Committee propose an official form for reaffirmation agreements. The Commission believes the existing director's form provides an excellent starting point and that a goal should be to make the form less confusing for both creditors and debtors.

Recommendation — Form of Rescission. Because the statute does not clearly provide how a debtor should communicate an intent to rescind a reaffirmation, there is substantial uncertainty about how a rescission can occur. Of course, the debtor will often send a written notice to a creditor to provide proof of rescission, but when a debtor does not rescind in a definitive manner, the creditor may assume that the reaffirmation agreement remains valid and so risks being in contempt of court for violating the discharge injunction.

Few clear guidelines emerge from the case law. Courts have stated that there is no writing requirement or any specific method by which a debtor must rescind and have allowed verbal rescissions.[66] Another court honored a clause in the reaffirmation agreement requiring rescission to be in writing,[67] which contradicts the holding of a different court that a reaffirmation agreement cannot change the section 524 rules allowing a debtor to rescind a reaffirmation agreement.[68]

Confusion over how a debtor may rescind a reaffirmation agreement benefits neither debtors nor creditors. The Federal Rules of Bankruptcy Procedure should require that a rescission should be in writing. Because the Bankruptcy Code does not provide any method for rescission, such a provision would not "abridge, enlarge, or modify any substantive right"[69] and thus would be consistent with the rulemaking power to provide rules of procedure. In addition, the Advisory Committee should develop a director's form that a debtor could use to effect a rescission. As a director's form, its use would not be mandatory, and the Commission believes that local courts should not require its use. Because the Commission has recommended that there should be an official form for the reaffirmation agreement, the rescission form would necessarily be a separate form. Any form for the reaffirmation agreement should provide the URL where the rescission form can be located along with the statutorily required language providing the debtor clear and conspicuous notice of the debtor's right to rescind.

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rules-policies/about-rulemaking-process/permitted-changes-official-bankruptcy-forms (last visited Feb. 14, 2019) ("Local Courts sometimes require the use of a particular Director's Form, however, and limit modifications to such forms, or base their local forms on Director's Forms.").

65 Fed. R. Bankr. P. 9009(a) & advisory committee note.

66 *See In re* Polkus, 2008 WL 5099967 (Bankr. D. Ariz. 2008); *see also* Booth v. National City Bank (*In re* Booth), 242 B.R. 912, 916 (B.A.P. 6th Cir. 2000) (Section 524 "does not require that the notice of rescission be in writing; it simply requires 'giving notice of rescission' to the creditor.").

67 *See In re* Graham, 430 B.R. 473 (Bankr. E.D. Tenn. 2010).

68 *See In re* Ireland, 241 B.R. 359 (Bankr. E.D. Mich. 1999) (creditor could not enforce clause that said rescission of one reaffirmation agreement was rescission of other reaffirmation agreements with the creditor).

69 28 U.S.C. § 2075 (setting limits on what the Federal Rules of Bankruptcy Procedure may do).

Recommendation — Postpetition Communications. Bankruptcy's automatic stay gives debtors protection from creditors' collection activities. Communicating about a prepetition debt can be an "act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case" in violation of the automatic stay.[70] The penalties for willfully violating the stay can be severe, including contempt of court and even punitive damages.[71]

The debtor's ability to reaffirm a debt creates practical problems in its interaction with the automatic stay. The Bankruptcy Code seems to contemplate that the debtor and creditor can negotiate a reaffirmation agreement, but also that the creditor will refrain from communicating with the debtor during the pendency of the bankruptcy case. The practical question is how a creditor can do both. Although communication with the debtor's attorney generally is not held to be a violation of the automatic stay, not every communication is best routed through the attorney. Moreover, section 524(c)'s requirement that the debtor's attorney file a statement for a represented debtor's reaffirmation ensures attorney review if the debtor and creditor do reach an agreement through direct communication. And for pro se debtors, a creditor obviously must communicate with the debtor directly.

In addition to communications about a reaffirmation agreement, a debtor also might want to continue receiving periodic statements from a creditor. Commercial lenders, however, routinely discontinue paper and electronic billing and automatic deductions, in deference to the automatic stay's ban on all collection activity. The debtor's account may shift to a different department for servicing and review, without notice to the consumer, making it more difficult for the consumer to maintain payments. Many lenders have developed "workaround" procedures to allow these relationships to be maintained, such as seeking out the consent of the debtor's lawyer to resume billing or even occasionally pursuing specific orders for relief from the stay in order to do so. These "workarounds" are inefficient, costly, and an incomplete solution. Moreover, they leave the creditor with uncertainty and the debtor with negative financial outcomes. The bankruptcy system should not straightjacket the parties to a contract who wish to continue performance but instead should assist the parties in avoiding default and dispute.

The Commission believes that the bankruptcy law should provide creditors some certainty that they can communicate with debtors without running afoul of the automatic stay. Because the automatic stay prohibits collection activity by a creditor but not voluntary action by the debtor to contact the creditor, the Commission also believes that this certainty can be provided without a statutory amendment. The statement of intention should provide separate checkboxes where a debtor may consent to receiving periodic statements as well as communications for purposes of discussing reaffirmation. Checkboxes not only would clearly signal when creditors could communicate with the debtor but also, by the absence of consent in the checkbox, clearly signal when the debtor does not wish such communications. The Commission would also support a statutory clarification allowing such communications to be authorized by the debtor, either as an exception or safe harbor to the automatic stay in section 362 or another carveout from the discharge injunction in section 524(j) for holders of secured claims. A similar safe harbor already appears in section 365(p)(2)(C), which

70 *Id.* § 362(a)(6).

71 *See* 11 U.S.C. § 362(k).

states the automatic stay is not violated by the debtor's notice to a creditor of a desire to assume a lease of personal property and subsequent negotiation of cure of defaults in that lease.

Regulation Z, which implements the Truth In Lending Act, generally requires mortgage servicers to provide periodic statements to homeowners but has exemptions when the debtor is in bankruptcy.[72] The Consumer Financial Protection Bureau (CFPB) recently revised part of these rules.[73] The rules are robust, yet nuanced, and they provide both clear guidance for mortgage servicers when servicing loans owed by bankruptcy filers, and easily understandable monthly statements for debtors. Generally speaking, these rules change the nonbankruptcy requirements for mortgage servicers to provide periodic statements to homeowners and state when servicers must again provide statements after a bankruptcy filing, as well as require certain bankruptcy-driven adjustments in the statements. The Commission believes that these more narrowly tailored rules should control in the context of its recommendation in this section and does not intend any change to the Regulation Z rules on mortgage servicing in bankruptcy. Any implementation of the Commission's recommendations in this section should have a specific carveout for these Regulation Z requirements to the extent they overlap with the Commission's recommendation.

Recommendation — Leases and Reaffirmation. Section 365(p)(2) allows an individual debtor to assume a lease of personal property.[74] The debtor first notifies the creditor in writing that the debtor wishes to assume the lease. The creditor may then respond that it is willing to have the lease assumed and may condition assumption on the curing of defaults under the lease. The debtor then has thirty days to send the creditor a notice in writing assuming the lease.[75]

The Bankruptcy Abuse Prevention & Consumer Protection Act of 2005 added section 365(p)(2) to augment the debtor's ability to keep personal property subject to a lease.[76] Generally speaking, it is the bankruptcy trustee who has the power to assume or reject leases. Because an individual's rights under a lease of personal property are unlikely to have any value, a trustee is unlikely to assume such a lease. If the trustee does not assume a lease of personal property within sixty days after the filing of the bankruptcy petition, it is deemed rejected.[77] If the trustee rejects or does not timely assume a lease of personal property, the leased property

72 *See* 12 C.F.R. § 1026.41(e)(5), (f).

73 *See* Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z), 83 Fed. Reg. 10,553 (Mar. 12, 2018) (to be codified at 12 C.F.R. pt. 1026).

74 It is sometimes said that an unexpired lease is an executory contract, but section 365(a) allows the assumption or rejection of "any executory contract or unexpired lease of the debtor." Thus, under the statute, executory contracts and unexpired leases are separate concepts. For the most part, the distinction is unimportant as section 365 provides the same rules for both executory contracts and unexpired leases, but a few provisions of section 365 apply only to one or the other. *See, e.g.*, 11 U.S.C. § 365(h) (rejection of leases of real property); *id.* § 365(i)-(j) (rejection of executory contracts for the sale of real property); *id.* § 365(n) (rejection of executory contract under which the debtor is a licensor of intellectual property). The provision relevant to the recommendations above, section 365(p), applies only to leases of personal property.

75 Section 365(p)(2)(A) specifies the first two parts of the procedure: the debtor sends a notice to the creditor, and the creditor sends a notice to the debtor. Paragraph (B) then gives the debtor 30 days to assume "after notice is provided" but does not specify to which notice in paragraph (A) it refers. The interpretation in the text assumes that paragraph (B) refers to the creditor's notice back to the debtor because otherwise the provision would allow the debtor to send a notice and then assume the lease 30 days later, even if the creditor has not responded, circumventing the creditor's right to demand cure before assumption.

76 Bankruptcy Abuse Prevention & Consumer Protection Act of 2005, Pub. L. No. 109-8, § 309, 119 Stat. 23, 82.

77 *See* 11 U.S.C. § 365(d)(1).

drops out of the bankruptcy estate, and the automatic stay terminates as to the property.[78] Thus, section 365(p)(2) is intended to give consumer debtors a method to retain leased personal property such as a motor vehicle.

The question arises as to whether section 365(p)(2) operates independently of the reaffirmation requirements in section 524. On one hand, Congress was well aware of section 524 and did not write an exception into section 365(p)(2). Under this reasoning, if the section 524 procedures are not followed, a debtor's obligations under an assumed lease are still discharged in bankruptcy, with the lessor's remedy limited to repossession of the personal property.[79] On the other hand, it has been argued that "Congress would not have added a specific procedure for a chapter 7 debtor to assume a lease if, after discharge, there was no consequence whatsoever should the debtor default on the lease."[80]

The courts have split on the issue.[81] A related issue is whether debtors and lessors can even use the section 524 reaffirmation process to create postdischarge liability on a personal property lease.[82] As Dennis LeVine explained, "[T]he uncertainty in the law creates a significant problem for lessors, who must decide what action to take when a chapter 7 debtor defaults on an assumed lease (without a reaffirmation). Would a collection call to the debtor result in an action for violating the discharge injunction?"[83]

The Commission decided that certainty is most important. There are reasonable arguments to support either resolution of the issue. Therefore, the Commission's recommendation is that Congress make it a priority to enact amendments fixing the uncertainties created by section 365(p)(2) by clearly providing whether an assumption under that provision also requires complying with the section 524 reaffirmation requirements and whether, if reaffirmation is not required, assumption under section 365(p)(2) imposes personal liability on the debtor.

Where courts do allow a section 365(p)(2) lease assumption without a reaffirmation agreement, one concern is that the assumption does not appear on the court record. Therefore, if Congress does not require a reaffirmation agreement for an assumed personal property lease, the Commission recommends that section 365(p)(2) be amended to require that a notice of assumption be filed with the court. To enforce the filing requirement, section 365(p)(2) should further provide that a lessor who does not file a notice of assumption cannot enforce the assumed lease against the debtor.

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78 *See id.* § 365(p)(1).

79 *See* Dennis J. LeVine, *A Lessor's Dilemma: Is There an Intersection Between § 365(p)(2) and 524(c)?*, Am. Bankr. Inst. J., Apr. 2015, at 14, 108-09.

80 *Id.* at 109.

81 Cases holding that lease assumptions under section 365(p)(2) are valid without a reaffirmation agreement include Bobka v. Toyota Motor Credit Corp., 568 B.R. 470 (S.D. Cal. 2018); *In re* Abdemur, 587 B.R. 167 (Bankr. S.D. Fla. 2018); Williams v. Ford Motor Credit Co., 2016 WL 2731191 (Bankr. E.D. Mich. 2016); *In re* Perlman, 468 B.R. 437 (Bankr. S.D. Fla. 2012). Cases holding that a lease assumption under section 365(p)(2) also requires complying with the reaffirmation procedures include Thompson v. Credit Union Fin. Group, 453 B.R. 823 (W.D. Mich. 2011); *In re* Eader, 426 B.R. 164 (Bankr. D. Md. 2010); *In re* Crawford, 2010 WL 2103580 (Bankr. M.D.N.C. 2010); *In re* Creighton, 427 B.R. 24 (Bankr. D. Mass. 2007); *In re* Rogers, 359 B.R. 591 (Bankr. D.S.C. 2007).

82 *See, e.g.*, *In re* Ebbrecht, 451 B.R. 241 (Bankr. E.D.N.Y. 2011) (holding a reaffirmation agreement is ineffective to assume a personal property lease).

83 LeVine, *supra* note 79, at 109.

§ 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.

Background Generally. It is often appropriate for a debtor to file another bankruptcy case after dismissal of an earlier case. For example, an initial chapter 13 case may be dismissed because of plan payment default caused by the debtor's loss of employment, and a later case filed after the debtor gains new employment. Debtors, however, also sometimes file repeated cases in bad faith — e.g., simply to extend the automatic stay, to pursue groundless claims, or for other abusive purposes. Sections 109(g), 349(a), and 362(c)(3)-(4) all address bad-faith repetitive filings either by limiting the debtor's eligibility for a future bankruptcy filing, curbing the application of the automatic stay in a later case, or restricting the discharge of debts that were the subject of an earlier dismissed case. The scope of these provisions and how they interact is poorly defined. The result is uncertainty, and the Commission recommends an overhaul of all three provisions.

Section 109(g). Congress added section 109(g) in 1984 to give courts a tool to deal with abusive repeat filings.[84] A court described the paradigm case that section 109(g) reaches as

> the situation in which the debtor files a bankruptcy case to stay a foreclosure, and when the creditor seeks relief from the automatic stay, the case is then voluntarily dismissed by the debtor. The debtor then refiles prior to the creditor's completing his next attempt to foreclose, and through this scheme, the debtor can continually frustrate the creditor's attempts to foreclose.[85]

"Thus, section 109(g) prevents certain tactics on the debtor's part that could be deemed abusive, and was enacted to prevent debtors from using repetitive filings as a method of frustrating creditors' efforts to recover what is owed to them."[86]

Section 109(g) operates by setting out two distinct grounds limiting eligibility to file a later bankruptcy case. The first ground of ineligibility, set out in section 109(g)(1), applies if the initial case was "dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case." There are two difficulties with this provision: (a) it does not cover all debtor misconduct, only failure to comply with court orders and to appear in court; and (b) it does not require that the order specifying ineligibility be entered in the first case, leaving the question of debtor's misconduct in the first case to be determined in the second case and leaving the parties uncertain as to whether ineligibility will be found.[87]

The second ground of ineligibility, set out in section 109(g)(2), applies if "the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic

84 *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-351, § 301, 98 Stat. 333, 352 (adding the language now codified at section 109(g)).

85 *In re* Patton, 49 B.R. 587, 589 (Bankr. M.D. Ga. 1985).

86 2 Collier on Bankruptcy, *supra* note 27, at ¶ 109.08.

87 *See* Houck v. Substitute Trustee Services, Inc., 791 F.3d 473, 487 (4th Cir. 2015) (holding that where the dismissal order in a debtor's initial filing did not include findings as to the debtor's conduct, a creditor had to present evidence in the subsequent case to establish whether the debtor was ineligible under section 109(g)(1)).

stay provided by section 362 of this title." The provision overlaps with section 362(d)(4)(B), which already gives relief from the automatic stay for real property — in rem relief -- in situations of repetitive filings for the purpose of delaying creditors. Section 109(g)(2) is also ambiguous. It is unclear whether the provision results in ineligibility from any voluntary dismissal after a stay-relief motion or only where the stay motion was the cause for the dismissal.[88]

For both of its grounds of ineligibility, section 109(g) fixes the period of ineligibility at 180 days from dismissal of the initial case. This period may be, on one hand, longer than needed for affected creditors to satisfy their claims to estate property, but on the other hand, it could be too short a period to prevent abuse, because creditors may need more than 180 days to complete collection activity.[89]

Another problem comes from the language of section 109(g)(2), which prohibits refiling for 180 days if the debtor voluntarily dismisses the cases "following the filing of a request for relief from the automatic stay." Read literally, the statute thus requires no causal nexus between the voluntary dismissal and the motion for relief from the automatic stay. For example, creditors have argued the statute applies if the creditor files a motion for relief from the stay in between a debtor moving to dismiss and the court order granting the motion.[90] Similarly, the statute literally would apply even if the debtor successfully defended a motion for relief from the automatic stay or if the property involved in the stay-relief motion was no longer owned by the debtor at the time of the second filing.[91] Although the courts have rejected arguments that would apply section 109(g)(2) in a literal manner that reaches these sorts of wooden and absurd results, its ambiguous language should be clarified for the sake of certainty and reduction in unnecessary litigation.

Section 349(a). Section 349(a) contains two provisions that have been used to deal with debtor misconduct. First, section 349(a) says dismissal of a case does not preclude discharge of that case's debts in a later case "[u]nless the court, for cause, orders otherwise." The court's power to "order otherwise" has been interpreted to allow a court to deny discharge in future cases of all of the debts involved in a case being dismissed.[92] Unlike the specific grounds for denial of discharge set out in section 727(a),

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88 *See In re* Gill, 584 B.R. 63, 66-68 (Bankr. W.D. Okla. 2018) (discussing conflicting interpretations and collecting cases).

89 Using data from RealtyTrac, a 2014 newspaper article set out a chart listing by state the average length of the foreclosure process, showing 39 states with processes then lasting more than 200 days and a national average of 572 days. *See* The Baltimore Sun, *Average Length of Foreclosure by State, by Number of Days*, Apr. 10, 2014, available at https://www.baltimoresun.com/news/data/bal-average-length-of-foreclosure-by-state-by-number-of-days-20140924-htmlstory.html. More recently, ATTOM Data Solutions reported that in the fourth quarter of 2018 the national average time that properties were in the foreclosure process had climbed to 811 days. The states with the five highest times in foreclosure were Hawaii (1,429 days), Florida (1,311 days), Indiana (1,214 days), Arizona (1,183 days), and New Jersey (1,162 days). *See* ATTOM Data Solutions, Inc., *U.S. Foreclosure Activity Drops to 13-Year Low in 2018*, Jan. 15, 2019, available at https://www.attomdata.com/news/most-recent/2018-year-end-foreclosure-market-report/.

90 *See, e.g., In re* Hicks, 138 B.R. 505 (Bankr. D. Md. 1992) (rejecting argument that section 109(g)(2) applies where motion for relief from stay temporally follows the motion for voluntary dismissal); *In re* Ransom, 60 B.R. 19 (Bankr. E.D. Pa. 1988) (same).

91 *See, e.g., In re* Hutchins, 303 B.R. 503 (Bankr. N.D. Ala. 2003) (section 109(g)(2) did not apply where the debtor obtained dismissal after resolution of a motion for relief from the automatic stay).

92 *See, e.g., In re* Norton, 319 B.R. 671 (Bankr. D. Utah 2005). *But see* Colonial Auto Ctr. v. Tomlin (*In re* Tomlin), 105 F.3d 933, 938 (4th Cir. 1997) ("§ 349 was never intended to limit the bankruptcy court's ability to impose a permanent bar to discharge that would have res judicata effect.").

section 349(a) sets out no limitation on the grounds for which denial of discharge might be ordered, and it is subject to no particular procedural rules.

The second limitation in section 349(a) deals not with discharging debt, but with eligibility for a subsequent bankruptcy case. It states that dismissal of one case does not "prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g)." This provision is not subject to any express override and so would appear on its face to allow no period of ineligibility to file a new case in addition to the provisions of section 109(g). However, perhaps because of the authorization for courts to enter orders limiting discharge, it has become somewhat common for courts to enter orders of dismissal "with prejudice," prohibiting the filing of a new bankruptcy case for longer than the 180-day period specified in section 109(g).[93]

Both parts of section 349 provide no specified grounds for court action. Their interaction with the specific grounds for discharge in section 727 and the eligibility rules of section 109 are uncertain. The statutory framework thus clashes with the goal of clearly defining the rights and responsibilities of parties in bankruptcy cases.

Section 362(c)(3) and (c)(4). Section 362(c)(3) and (4), both added in 2005,[94] are directed at preventing bad-faith continuation of the automatic stay through repeat filings. Paragraph (c)(3) provides that if a debtor files a bankruptcy case within one year of the dismissal of a prior case — voluntary or otherwise — the automatic stay will terminate thirty days after the new case was filed unless the debtor establishes both that the new case was filed in good faith as to any creditor affected by the automatic stay and that the case will be completed successfully. Paragraph (c)(4) provides that if two cases were dismissed in the year before the present filing, the automatic stay does not go into effect in the present filing and that the debtor may obtain an order imposing the stay only if the debtor makes the same showings of good faith and likely successful completion.

Because it provides that the automatic stay "terminates with respect to the debtor," paragraph (c)(3) has been especially problematic in its application. The majority of published decisions have interpreted this language to terminate the automatic stay only as to the non-estate property of the debtor so that collateral like automobiles and homes, being estate property, continue to be protected by the automatic stay after the 30-day termination.[95] The majority interpretation offers no benefit to a mortgage holder or auto lender after the dismissal of a chapter 13 case on motion of the trustee and immediately refiled by the debtor. This interpretation of section 362(c)(3) does nothing to change the mortgage holder's need to obtain relief from the automatic stay before continuing a foreclosure, even if stay relief had been

93 *See, e.g.*, Casse v. Key Bank, N.A. (*In re* Casse), 198 F.3d 327, 339 (2d Cir. 1999) (concluding "that § 109(g) does not impose a temporal limitation upon" dismissal with prejudice under section 349(a)); Landis v. Ortega (*In re* Ortega), 2011 WL 10723285, at *6 (Bankr. E.D. Cal. 2011) (holding that "[b]ad faith is cause for dismissal with prejudice under section 349(a)" and enjoining the debtor from filing a subsequent bankruptcy case for two years); *In re* Rusher, 283 B.R. 544, 548 (Bankr. W.D. Mo. 2002) ("Sections 105(a) and 349(a) can be used conjunctively to enjoin a serial filer from filing yet another bankruptcy petition for a period of time in excess of 180 days."). *But see* Frieouf v. United States (*In re* Frieouf), 938 F.2d 1099, 1103-04 (10th Cir. 1991) (order under section 349(a) cannot deny all access to bankruptcy court for more than the 180-day limit of section 109(g)).

94 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 302, 119 Stat. 23, 75-77.

95 *See In re* Smith, 573 B.R. 298, 300-01 (Bankr. D. Me. 2017) (collecting the conflicting authorities).

granted in the initial case. The uncertain interpretation of section 362(c)(3) has also resulted in debtors routinely filing motions for extension of the stay in repeat filings, resulting in additional legal work and additional court hearings that may be unnecessary.

Section 362(c)(3) allows a debtor to continue the stay by producing clear and convincing evidence of changed financial or personal affairs that will lead to a successful completion of the case. Professor Sara Sternberg Greene gathered data on debtor outcomes, using a subset of 73 cases of repeat filers from a larger, nationally random dataset of bankruptcy cases, and she combined this data with interviews of judges and lawyers.[96] She summarized her findings as follows:

> When evaluating motions to extend the stay, judges granted 98% of the motions filed, even when the motions provided no evidence of a "substantial change in financial or personal affairs." The majority of motions filed do not attempt to provide such evidence. Further, a thorough examination of case law on § 362(c)(3) shows that over time, many districts focused on a technicality in the drafting of § 362(c)(3) and have found, based on the plain language of the statute, that it applies only to the property of the debtor, and not to the property of the estate. In these districts, § 362(c)(3) is essentially useless to creditors.[97]

Recommendations. The bankruptcy courts need tools to address abusive or bad-faith repeat filings. Over the years, amendments have added such tools to the Bankruptcy Code, but the result has been a jumble of provisions that do not work well together. The bankruptcy system and creditors do not always receive the protection they should from abusive repeat filings. Debtors acting in good faith have to incur costs to deal with overly broad provisions. The Commission recommends an overhaul of the provisions governing repeat filings so that these rules work to provide greater clarity, fairness, and effectiveness in addressing abusive conduct.

Rather than treating eligibility for a second bankruptcy filing under both section 109(g) and section 349(a), the Commission would place eligibility for a second filing exclusively under the control of section 109(g). Section 349(a) should be amended to recognize that section 109(g) exclusively provides the rules for restricting a later filing because of a dismissal in an earlier case.

At the same time, the Commission recommends rewriting section 109(g) to make ineligibility based on debtor misconduct clearer and more effective. An order of dismissal could restrict eligibility in a future case "for cause," meaning any bad faith conduct by the debtor would be the basis for a limitation on eligibility. The statute then would provide several examples of such misconduct: willful failure to abide by court orders or file a plan, willful and substantial default with respect to a confirmed plan, repetitive dismissed bankruptcy filings, willful failure to appear, or other abuses of the provisions of the Bankruptcy Code. (The proposed amendment would make clear that "abuse" in this context does not mean a dismissal for abuse

96 *See* Sara Sternberg Greene, *Failed Reform: Congressional Crackdown on Repeat Chapter 13 Bankruptcy Filers*, 89 Am. Bankr. L.J. 241, 252 n.47 (2015).

97 *Id.* at 244.

under section 707(b), which is typically for failing the means test.)[98] By allowing a restriction on refiling for repetitive dismissed bankruptcy filings, the Commission's proposal subsumes the purpose of the existing section 109(g)(2), which would be eliminated under the new proposal.

The Commission's recommendation also brings procedural regularity to the process for restricting eligibility in a later case. Any party in interest or the court itself could raise the grounds for a limitation on eligibility. The limitation on eligibility would be subject to notice and a hearing in the initial case so that the debtor would have an opportunity to object, and any conduct-based limitation on eligibility would have to be ordered in the initial case, so that the eligibility limit is clear to all parties before a second filing is made. Implicit in this recommendation is the customary ability of a party to reopen a case to have such a finding made in the initial case.

Although a 180-day period of ineligibility would be the default, a court could impose a shorter period or, upon a showing of substantial abuse, a period of up to 720 days. The period of ineligibility would be subject to reconsideration on the motion of an affected party, based on a showing of changed circumstances or other good cause. The debtor could make an argument for reconsideration or a shortening of the ineligibility in the later case.

The Commission also recommends an amendment to section 349 to make clear that it provides no authority for denying or limiting a bankruptcy discharge and leaves that determination to the other provisions set out in the Bankruptcy Code to deal with discharge. These other provisions — sections 523, 727, 1141, 1228, and 1328 — detail when a debtor should not receive a discharge overall or for particular debts and thus minimize the risk of arbitrariness that otherwise might result from an interpretation of section 349 that gives courts authority to deny discharge unanchored to traditional bankruptcy norms.

Section 362(c)(3) should be repealed in its entirety on the ground that it does not offer effective relief to creditors and generates unnecessary motions from debtors. The effective relief accorded by § 362(c)(4), preventing the stay from going into effect if two prior cases were dismissed in the year before the current filing, should be retained.

§ 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.

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98 The Commission's recommendation on the means test, *see* § 3.07 Means Test Revisions & Interpretations, explains its operation and the concept of dismissal for "abuse" under section 707(b).

Background. The term "debtor's principal residence" has relevance to several provisions of the Bankruptcy Code:

- Section 1322(b)(2) — A chapter 13 plan may not modify a claim secured only by a security interest in real property that is the debtor's principal residence.

- Section 1123(b)(5) — A chapter 11 plan may not modify a claim secured only by a security interest in real property that is the debtor's principal residence.

- Section 524(j)(1) — The discharge injunction still allows a creditor to accept payments in the ordinary course of business from a debtor who does not reaffirm a debt on the debtor's principal residence.[99]

- Section 522(p)(2)(A) — The cap on state homestead exemptions imposed by section 522(p)(1) does not apply to "an exemption claimed by a family farmer for the principal residence of such farmer."[100]

Several Federal Rules of Bankruptcy Procedure also use the term:

- Rule 3001(c)(2)(C) — A proof of claim for a claim secured by the debtor's principal residence must attach mortgage and escrow information.

- Rule 3002(c)(7) — A proof of claim for a claim secured by the debtor's principal residence must be filed with basic attachments within seventy days of the bankruptcy petition, and certain additional attachments must be filed within 120 days of the petition.

- Rule 3002.1 — Certain notices are required during chapter 13 cases for claims secured by the debtor's principal residence.[101]

- Rule 3015.1(d)(1) — A local form chapter 13 plan is allowed only if it has separate paragraphs for curing and maintaining any payment on a claim secured by the debtor's principal residence.

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99 Section 524(j)(1) uses the phrase "principal residence of the debtor" instead of the term formally defined in section 101(13A), "debtor's principal residence." Without discussing the difference in terminology, courts have assumed section 101(13A)'s definition of "debtor's principal residence" applies to section 524(j)(1). *See, e.g.*, Lemieux v. American Servicing Co. (*In re* Lemieux), 520 B.R. 361, 369 (Bankr. D. Mass. 2014); *In re* Stoner, 487 B.R. 410, 418 n.4 (Bankr. D.N.J. 2013).

100 The phrase in section 522(p)(2)(A) is "the principal residence of such farmer" and not the section 101(13A)-defined term of "debtor's principal residence." There appears to be one case about the scope of section 522(p)(2)(A), in which the court assumed the section 101(13A) definition applied without discussing the difference in terminology. *See In re* Tinsley, 2010 WL 4823208, at *10 (Bankr. N.D. Tex. 2010).

Although section 522(p)(2)(A) applies to "family farmers," its application is not limited to chapter 12, the "family farmer" chapter. *See id.* at *10-13 (applying section 522(p)(2)(A) to a chapter 7 case).

101 The Commission's recommendation on Federal Rule of Bankruptcy Procedure 3002.1 explains that rule's scope and operation. *See* § 2.07 Improvements to Federal Rule of Bankruptcy Procedure 3002.1 — Payment Change Notices and Notices of Final Cure.

Thus, the status of a property as the "debtor's principal residence" can have important consequences in a bankruptcy case.

Section 101(13A) defines "debtor's principal residence" as follows:

> The term "debtor's principal residence"—
>
> > (A) means a residential structure if used as the principal residence by the debtor, including incidental property, without regard to whether that structure is attached to real property; and
> >
> > (B) includes an individual condominium or cooperative unit, a mobile or manufactured home, or trailer if used as the principal residence by the debtor.

If a debtor continuously uses the same property as the principal residence, the definition can be applied in a straightforward manner. But if the debtor changes principal residences, a question arises as to the time at which the definition applies. Options include the petition date, the time the loan was made, or, in a chapter 13 case, the confirmation date.

A related question arises about the valuation date for the debtor's principal residence. If senior liens absorb all the value of a debtor's principal residence, there is no collateral value to support junior liens. All of the eight circuits that have addressed this situation conclude that a junior lien without collateral value is effectively unsecured, is not a claim secured by the debtor's principal residence, and so is not protected by section 1322(b)(2) against modification in a chapter 13 plan.[102] In a rising or falling market, the valuation date for the principal residence can determine whether any collateral value exists for a junior lien.

Recommendations. The Commission recommends that courts interpret the Bankruptcy Code to provide that both the status of property as the debtor's principal residence and the value of the debtor's principal residence are determined as of the petition date. The Commission also supports clarifying amendments to the same effect. The reasons for the Commission's recommendations are explained separately below.

Principal Residence Status. A substantial number of courts have held that the determination of what is the "debtor's principal residence" should be made at the time of filing, applying the statutory definition to whatever property the debtor occupies as the principal residence at the time of filing.[103] Another

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102 *See* Minnesota Hous. Auth. v. Schmidt (*In re* Schmidt), 765 F.3d 877 (8th Cir. 2014); Branigan v. Davis (*In re* Davis), 716 F.3d 331 (4th Cir. 2013); Zimmer v. PBS Lending Corp. (*In re* Zimmer), 313 F.3d 1220 (9th Cir. 2002); Lane v. Western Interstate Bancorp (*In re* Lane), 280 F.3d 663 (6th Cir. 2002); Pond v. Farm Specialist Realty (*In re* Pond), 252 F.3d 122 (2d Cir. 2001); Tanner v. FirstPlus Fin. Inc., 217 F.3d 1357 (11th Cir. 2000); Bartee v. Tara Colony Homeowners Assoc. (*In re* Bartee), 212 F.3d 277 (5th Cir. 2000); McDonald v. Master Fin. Inc. (*In re* McDonald), 205 F.3d 606 (3d Cir. 2000).

103 *E.g.*, Benafel v. One West Bank (*In re* Benafel), 461 B.R. 581, 590 (B.A.P. 9th Cir. 2011) (comprehensively reviewing the case law and stating the petition date is supported by "a significant majority of cases"); BAC Home Loans Servicing v. Abdelgadir (*In re* Abdelgadir), 455 B.R. 896 (B.A.P. 9th Cir. 2011) ("[T]he determinative date for whether a claim is secured by a debtor's principal residence is, like all claims, fixed at the petition date."); *In re* Hueramo, 564 B.R. 604, 606-07 (Bankr. N.D. Ill. 2017) (characterizing the petition date

reading is that the definition applies to whatever property served as the debtor's principal residence at the time the loan was made, a position that has the Third Circuit's imprimatur.[104] *Collier on Bankruptcy* notes that other courts have used the date of plan confirmation or a "discretionary" approach.[105]

The Commission believes using the petition date to decide what is the debtor's principal residence is most faithful to the text and policies of the Bankruptcy Code. The statutory language speaks to the present and not the past. The antimodification rule of section 1322(b)(2) applies to property "that *is* the debtor's principal residence" (emphasis added). Using the petition date also is consistent with section 502(b), which expressly directs that the bankruptcy court shall determine the amount of a claim "as of the date of the filing." As a matter of policy, bankruptcy provides a tool for a debtor to deal with existing financial distress, which is most consistent with using the petition date as the measurement point rather than a point that might be far into the past. A strong argument for using the loan date is that it would allow the creditor to be certain at the time of lending that a loan then secured by the debtor's principal residence would be protected in a future bankruptcy case by section 1322(b)(2)'s antimodification provision. The statutory language and countervailing policies, however, more strongly point toward the petition date.

Principal Residence Valuation. On the question of the appropriate valuation date, the substantial majority of courts have held that it should be the petition date.[106] The Commission agrees with this court majority. As explained in *In re DiMauro*:

> A bright line rule of the petition date minimizes gamesmanship and reduces the incentive to delay litigation or appeals. Any other approach, such as the confirmation date, could be subject to abuse by parties deliberately adjourning or delaying proceedings in hopes of a different result.[107]

Using the petition date as the valuation date creates greater certainty for debtors proposing a chapter 13 plan and reduces the need for evidentiary hearings on postconfirmation changes in value.

In adopting this recommendation, the Commission does not mean to suggest changes in the way section 348(f)(1)(B) operates. Section 348(f)(1)(B) states that valuations in a chapter 13 apply if the

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as the majority rule); *In re* Christopherson, 446 B.R. 831 (Bankr. N.D. Ohio 2011) ("The majority of courts has determined that the critical date is the petition filing date.").

104 *See* Scarborough v. Chase Manhattan Corp. (*In re* Scarborough), 461 F.3d 406 (3d Cir. 2006); *see also In re* Hutsler, 2016 WL 7984348 (Bankr. W.D. Mo. 2016); *In re* Coyle, 2016 WL 5800465, at *5 (Bankr. D. Conn. 2016).

105 8 Collier on Bankruptcy, *supra* note 27, at ¶ 1322.06[1][a].

106 *See, e.g.*, Marsh v. U.S. Dep't of Housing & Urban Dev. (*In re* Marsh), 929 F. Supp. 2d (N.D. Ill. 2013); TD Bank v. Landry, 479 B.R. 1 (D. Mass. 2012); DiMauro v. Wilmington Trust Co. (*In re* DiMauro), 548 B.R. 685 (Bankr. D. Del. 2016); Fair v. First Choice Am. Comm. Fed. Credit Union (*In re* Fair), 2014 WL 3617875 (Bankr. N.D. W. Va. 2014); *In re* Garn, 2013 WL 5723746 (Bankr. D. Utah 2013); *In re* Gilpin, 479 B.R. 905 (Bankr. M.D. Fla. 2011); *In re* Valls, 2010 WL 2745951 (Bankr. S.D. Fla. 2010); Young v. Camelot Homes, Inc. (*In re* Young), 390 B.R. 480 (Bankr. D. Me. 2008); Dean v. LaPlaya Inv. Inc. (*In re* Dean), 319 B.R. 474 (Bankr. E.D. Va. 2004).

Some courts have used the confirmation date. *See* Arthur Funk & Sons, Inc. v. Backenstoes (*In re* Backenstoes), 2012 WL 4793501 (Bankr. M.D. Pa. 2012); Roach v. Bank of Missouri (*In re* Roach), 2010 WL 234959 (Bankr. W.D. Mo. 2010). One court used a "totality of the circumstances" approach. *See* Wood v. LA Bank (*In re* Wood), 190 B.R. 788 (Bankr. M.D. Pa. 1996).

107 *DiMauro*, 548 B.R. at 689.

case is converted to chapter 11 or chapter 12 but not if the case is converted to a chapter 7. Congress added this section in 2005 to overrule "a line of cases holding that plan confirmation constitutes an implied valuation that applies in the Chapter 7 case upon conversion."[108] Section 348(f)(1)(B) allows the chapter 7 trustee to "be heard on the accuracy of the values scheduled in Chapter 13."[109] As provided in section 348(f)(1)(B), a chapter 7 trustee who believes there is substantial equity in property is not bound by any valuations that might have been made in the chapter 13 case prior to conversion. Under the Commission's recommendation, if the debtor disputes the chapter 7 trustee's valuation of the property, the court will make a new valuation of the property for the chapter 7 but decide the question of fact regarding valuation as of the petition date.

Finally, the Commission discussed cases in which a mortgage on the debtor's principal residence includes other collateral. This situation occurs if the debtor has incurred debt secured by a multi-unit building in which the debtor resides in one of the units.[110] *Collier on Bankruptcy* gives other examples: the security interest includes personal property, other real property, or incidental property such as easements or mineral rights.[111] Because section 1322(b)(2) prevents modification of a claim secured "*only* by a security interest in real property that is the debtor's principal residence" (emphasis added), the question has arisen as to whether antimodification applies where the security interest includes the debtor's residence and other property.[112] The Commission takes no position on this issue and believes it should continue to develop through the usual appellate process.

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

108 Samuel K. Crocker & Robert H. Waldschmidt, *Impact of the 2005 Bankruptcy Amendments on Chapter 7 Trustees*, 79 Am. Bankr. L.J. 333, 346 (2005); *see also* Bankruptcy Abuse Prevention & Consumer Protection Act of 2005, Pub. L. No. 109-8, § 309, 119 Stat. 23, 82 (adding section 348(f)(1)(B)).

109 Crocker & Waldschmidt, *supra* note 108, at 347.

110 *Compare, e.g.*, Scarborough v. Chase Manhattan Corp. (*In re* Scarborough), 461 F.3d 406 (3d Cir. 2006) (antimodification rule does not apply to a multi-unit building that also contains the debtor's principal residence) *with, e.g.*, Wages v. J.P. Morgan Chase Bank (*In re* Wages), 508 B.R. 161, 165-66 (B.A.P. 9th Cir. 2014) (rejecting *Scarborough* and applying antimodification rule to real estate the debtor occupied as a principal residence, although it also included a home office and parking for commercial vehicles used in the debtor's business).

111 8 Collier on Bankruptcy, *supra* note 27, at ¶ 1322.06.

112 *See, e.g.*, *In re* Lister, 593 B.R. 587 (Bankr. S.D. Ohio 2018) (concluding that mortgage on mixed-use property could not be modified, court identified three approaches: 1) "bright-line only" approach, protecting against modification *only* if the property is debtor's principal residence; 2) "bright-line includes" approach, preventing modification if property *includes* use as principal residence; and 3) case-by-case approach, considering factors such as parties' intentions for use).

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

Background — Payment Change Notices. Federal Rule of Bankruptcy Procedure 3002.1(b) requires that mortgage creditors file and serve "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 twenty-one days before a payment in the new amount is due." Notice must be given on Official Form 410S1, the Notice of Mortgage Payment Change.

Form 410S1 requires the creditor to state the basis for the changed payment amount, the current and new payment amounts, and the date when the change will take effect. The two most common payment changes on mortgage accounts result from interest rate and escrow account adjustments. These changes are subject to disclosure requirements under the Truth in Lending Act (TILA) for adjustable-rate mortgages and the Real Estate Settlement Procedures Act (RESPA) for escrow accounts, and Form 410S1 instructs the creditor to attach to the form a rate-change notice or escrow account statement that is prepared under nonbankruptcy law (TILA and RESPA) with respect to the payment change.

The Advisory Committee Note indicates that rule 3002.1(b) is intended to assist the debtor and trustee in complying with the requirement under section 1322(b)(5) to maintain current mortgage payments:

> [The Rule] is added to aid in the implementation of § 1322(b)(5), which permits a chapter 13 debtor to cure a default and maintain payments on a home mortgage over the course of the debtor's plan. . . . In order to be able to fulfill the obligations of § 1322(b)(5), a debtor and the trustee have to be informed of the exact amount needed to cure any pre-petition arrearage, see Rule 3001(c)(2), and the amount of the postpetition payment obligations. If the latter amount changes over time, due to the adjustment of the interest rate, escrow account adjustments, or the assessment of fees, expenses, or other charges, notice of any change in payment amount needs to be conveyed to the debtor and trustee. Timely notice of these changes will permit the debtor or trustee to challenge the validity of any such charges, if appropriate, and to adjust post-petition mortgage payments to cover any undisputed claimed adjustment.

Over time, three distinct problems have arisen that the Commission believes can be resolved by amendments to rule 3002.1(b): (1) payment change notices that fail to give at least twenty-one days' notice; (2) frequent payment changes of small amounts in home equity lines of credit (HELOCs); and (3) the extent to which the rule applies to reverse mortgages.

Recommendation — Untimely Notices of Payment Changes. At times, creditors file payment change notices that give less than twenty-one days' notice of the date the new payment amount will be due. If the payment increases, it is unfair to debtors and trustees to make the payment change effective when the parties have not been given the required notice. Conversely, if the payment decreases but the creditor gave less than twenty-one days' notice, it is unfair to make the debtor or trustee wait at least twenty-one days before the change becomes effective.

Therefore, rule 3002.1(b) should be amended to provide a special effective date for payment changes when the creditor fails to timely file the notice. If the payment is scheduled to increase and the creditor fails to give at least twenty-one days' notice of the new payment amount, the payment change will be effective on the first payment due date that is at least twenty-one days from the filing date of the notice. For example, if the due date for mortgage payments falls on the first day of the month and the creditor files a notice of payment change on January 29th purporting to be effective on February 1, the payment increase would not be effective until March 1, which is the first due date that is at least twenty-one days after January 29.

If the notice of payment change reflects a payment decrease and is filed and served without providing the required twenty-one days' notice, the effective date of the changed payment would be the later of the date of the filing of the notice or the date specified in the notice. This gives the debtor the benefit of the reduced payment as soon as possible.

Through its proposed amendments, the Commission does not intend any changes in the power of the court to take any of the actions permitted under subdivision (i) of rule 3002.1 for the creditor's failure to timely file the payment-change notice. Establishing an effective date of late payment-change notices offers certainty and uniformity for all parties while preserving the power to sanction the creditor's failure to file the notice when appropriate.

Recommendation — HELOC Payment Changes. Mortgage servicers have suggested that compliance with the payment-change notice requirements is burdensome with respect to a home equity line of credit (HELOC), because the payments on such mortgages may change monthly and in small amounts. Servicers have in some cases requested that courts exempt such loans from rule 3002.1. One court refused to grant such a request, finding that compliance with the rule is mandatory and that the court lacks discretion to extend the time deadlines or excuse performance.[113] Another court modified the payment-change notice requirement for a HELOC loan, requiring that notices be filed every six months until the last year of the debtor's plan, at which time quarterly filings were required.[114]

On September 19, 2012, the Advisory Committee on Rules of Bankruptcy Procedure conducted a roundtable discussion with representatives of the mortgage-servicing industry, consumer debtors, chapter 13 trustees and others to discuss ways to improve Federal Rule of Bankruptcy Procedure 3002.1. One of the discussion topics was the treatment of HELOCs, and various proposals for amending rule 3002.1(b) were considered. Following the roundtable and further consideration by the Advisory Committee, an amendment to rule 3002.1(b) was published for comment. This amendment was finalized and became effective on December 1, 2018. It adds the following sentence at the end of amended rule 3002.1(b)(1): "If the claim arises from a home-equity line of credit, this requirement may be modified by court order."

The Advisory Committee Note related to this change states:

> Subdivision (b) is subdivided and amended in two respects. First, it is amended in what is now subdivision (b)(1) to authorize courts to modify its requirements for claims arising from home equity lines of credit (HELOCs). Because payments on HELOCs may adjust frequently and in small amounts, the rule provides flexibility for courts to specify alternative procedures for keeping the person who is maintaining payments on the loan

113 *In re* Adkins, 477 B.R. 71 (Bankr. N.D. Ohio 2012).

114 *In re* Pillow, 2013 WL 10252924 (Bankr. W.D. Mich. 2013).

apprised of the current payment amount. Courts may specify alternative requirements for providing notice of changes in HELOC payment amounts by local rules or orders in individual cases.

A uniform procedure for addressing HELOC payment change notices should be adopted.[115] Bankruptcy rules that establish uniform procedures for the treatment of claims secured by home mortgages generally further the objective of economical and efficient administration of bankruptcy cases. The approach permitted under the 2018 amendment will detract from this objective by making it difficult for mortgage servicers to comply with myriad local rules or orders in individual cases.

The Commission believes that an annual notice should suffice with respect to HELOCs, provided that the monthly changes are less than $10 and the annual notice explains the monthly changes and includes a reconciliation amount to account for any overpayment or underpayment received during the prior year. The monthly payment specified in the annual notice would be adjusted upward or downward to account for the reconciliation amount.

Background and Recommendation — Reverse Mortgages. Reverse mortgage loans are a form of credit secured by first mortgages on single-family residences and are available to borrowers 62 years of age and older. Two types of reverse-mortgage products are generally available: reverse mortgages offered under the home equity conversion mortgage (HECM) program insured by the Federal Housing Administration (FHA), and proprietary reverse-mortgage products offered by lenders. Instead of borrowing a lump sum and repaying it over time, borrowers may receive loan proceeds not only in the form of a lump sum, but also as a line of credit or regular monthly advances. The loan proceeds are not required to be repaid until the borrower (or survivor if joint loan) dies or moves, or there is a default on other obligations. Lenders are repaid the loan proceeds and interest out of the proceeds from the sale of the home.[116]

While there are no monthly loan payments required of the borrower, reverse mortgages are not "payment-free." Rather, the loan documents require reverse-mortgage borrowers, like traditional mortgage borrowers, to pay for "property charges." These charges include real estate taxes and hazard insurance premiums and, if applicable, condominium association fees, ground rents, or other special assessments. If sufficient funds are not set aside or the funds run out, then the borrower is responsible for making these payments directly.

Default occurs when the borrower is responsible for, but fails to pay, the property charges. After giving the borrower notice and an opportunity to cure the default, and after obtaining approval from HUD, the creditor may accelerate the debt, making all sums due under the loan immediately payable. The homeowner's failure to pay the property charges is an event of default and can trigger a foreclosure. Alternatively, and more commonly, the creditor will pay the outstanding property charges by withholding

115 The Commission believes nonuniform practices in the bankruptcy system generally are a problem and recommends that courts adopt local rules, standing orders, and practices that promote uniformity. *See* § 4.02 Nonuniform Court Practices. The Commission's recommendation for a uniform procedure to address HELOC payment-change notices addresses these concerns.

116 An explanation of reverse mortgages appears at Tara Twomey, *Reverse Mortgages in Bankruptcy*, Am. Bankr. Inst. J., Aug. 2014, at 18.

amounts from monthly payments or by charging amounts to a line of credit. In this situation, the payment is considered a distribution of available loan proceeds and the borrower is not considered delinquent. This solution works so long as loan funds remain available to draw. When the available credit on the reverse mortgage is insufficient to cover the outstanding property charges (i.e., the principal limit has already been reached), HUD generally requires lenders to advance their own funds, known as "loan advances" or "corporate advances," to pay the property charges. Once there are no longer sufficient funds in the available credit, the loan is then in default and servicers will submit a due-and-payable request to HUD, which will lead to acceleration of the debt and foreclosure.

When rule 3002.1 first went into effect on December 1, 2011, it applied to principal residence loans that were "provided for under Code section 1322(b)(5) in the debtor's plan." Based on this language, the debtor's curing of a default on a reverse mortgage under section 1322(b)(5) was clearly covered by rule 3002.1. Thus, the holder of the mortgage claim was required to provide notice of postpetition fees under rule 3002.1(c).

The reference to section 1322(b)(5) led some courts to conclude that rule 3002.1 applied only if the debtor's plan clearly "provided for" the claim under that section, and only if the debtor had a prepetition arrearage that was being cured under the plan. Responding in part to these decisions, the Rules Committee in 2016 deleted the reference to section 1322(b)(5) from rule 3002.1(a) and replaced it with: "for which the plan provides that either the trustee or the debtor will make contractual installment payments." The Advisory Committee's Note issued with the rule amendment states that the "reference to § 1322(b)(5) of the Code is deleted to make clear that the rule applies even if there is no prepetition arrearage to be cured."

The 2016 amendment arguably makes reverse mortgages no longer subject to rule 3002.1 because the debtor does not make "contractual installment payments." While payment of property charges is a contractual payment, the requirement that it be an "installment" payment could lead courts to conclude that a chapter 13 plan providing for the curing of past payment charges and the maintenance of future payment charges is not subject to rule 3002.1. The Commission believes that a simple fix would ensure that the 2016 amendment does not work an unintended change. Deleting the word "installment" would make clear that rule 3002.1 applies to reverse mortgages. The language would then provide: "This rule applies in a chapter 13 case to claims (1) that are secured by a security interest in the debtor's principal residence, and (2) for which the plan provides that either the trustee or the debtor will make contractual payments." An Advisory Committee's Note should explain that the change is intended to make clear that reverse mortgages are covered by the rule and that there is an obligation to send notices of postpetition fees and notices, as well as motions and responses related to the status of the mortgage.

Because reverse mortgages do not require the debtor to make installment payments, the payment-change notice requirements under rule 3002.1(b) are generally not applicable, but the rule does apply to attorney fees and other charges under defaulted reverse mortgages being cured though the plan. It would be helpful if this distinction was also stated in the Advisory Committee's Note.

Background — Notices of Final Cure. Subsections (f), (g), (h) and (i) of Federal Rule of Bankruptcy Procedure 3002.1 provide the procedure for determining the status of a mortgage claim at the end of the case. This procedure, known as a notice of final cure, includes detailed requirements for the creditor's response to the notice filed by the trustee or the debtor. The provisions permit the debtor or trustee to file a motion for the court to determine whether the default has been cured and all required postpetition amounts have been paid. The consequences for failing to timely provide information are also established by these provisions.

The notice of final cure process needs expansion and improvement. The process should be familiar and streamlined, and it should produce the precise information needed by the parties. This process should occur midcase to give the debtor, trustee, and creditor an opportunity to address any issues while time remains in the case. The process should also occur at the end of the case to provide the information needed just prior to case closing so that the loan can be properly serviced and so that debtors can know exactly what obligations remain. The process needs to be effective in both conduit and nonconduit jurisdictions[117] and also for both large and smaller servicers. Finally, any new rule needs to provide more robust consequences for failing either to respond or to provide the required data.

Under section 1322(b)(5), a debtor is permitted to cure any default and maintain home mortgage payments over the life of the bankruptcy plan. To be successful, the debtor and trustee must know the amount needed to cure the pre-petition default and must be informed about postpetition payment changes and postpetition fees, expenses and charges incurred during the plan. Federal Rule of Bankruptcy Procedure 3002.1 was enacted to require this information.

The intent was both for the trustee to file a notice of final cure in every case containing a mortgage on the debtor's principal residence and for the debtor to have the opportunity to file a notice of final cure if the trustee failed to do so. But, in the experience of the Commission, there are many cases in which neither the trustee nor the debtor files a notice of final cure. Although the rule mandates a response, there are also many cases in which the trustee files a notice of final cure, but the creditor does not file a response or makes an incomplete response. As a result, there are many cases in which the creditor does not report the status of the loan at the end of the case. In such cases, debtors with home mortgages complete their chapter 13 cases without certainty as to the status of their mortgages. Even when the notice and response procedure in rule 3002.1 works as intended, the end-of-case timing is often too late for plan modification to address postpetition payment changes, fees, expenses, charges and defaults. Conversely, there are some trustees and debtors who not only file a notice of final cure, but file additional motions or requests for information not provided for in rule 3002.1. These include "qualified written requests" under RESPA,[118] requests for full payment histories, and motions to deem the account current. These

117 For a discussion of the concept of "conduit" plans and the Commission's recommendations on the subject, see § 4.06 Conduit Mortgage Payments.

118 A "qualified written request" is written correspondence from a borrower to a loan servicer requesting information relating to the servicing of the loan and that meets certain criteria. Typically, a qualified written request will identify errors the borrower believes have been made in the servicing of the loan. If the borrower makes a qualified written request, the loan servicer must respond within thirty days either correcting the error (including crediting the borrower's account, if appropriate) or stating the servicer has investigated and providing the reasons the servicer believes the account is correct. *See* 12 U.S.C. § 2605(e). A discussion of RESPA's

additional requests fill some of the voids in rule 3002.1 practice, but cause uncertainty and expense for creditors needing to prepare multiple responses and to gather information in addition to that required by rule 3002.1. The absence of procedural uniformity has impaired efforts by creditors to reliably automate the management of rule 3002.1 notices in chapter 13 cases. The Commission determined that a single, mandatory, motion-driven process would be more efficient and effective for all parties.

Recommendations — Midcase Status Process and Motion Practice. The Commission recommends amending rule 3002.1 to add a midcase status process to complement the existing final cure process. Both procedures would include data points required to be included in the creditor's response and in the resulting court orders. The proposed amendments also provide more robust consequences for failing to provide required information.

The current notice process should be replaced with the motion-and-order practice familiar under Federal Rules of Bankruptcy Procedure 9013 and 9014, with a standardized style for the motion to improve automation and to increase the efficiency of PACER/ECF searches.[119] The motions should include an additional warning that a creditor may be sanctioned under rule 3012.1(i) for failing to respond.

Recommendation — Creditor's Response and Amendments to Federal Rule of Bankruptcy Procedure 3002.1(g). The Commission recommends amending rule 3002.1(g) to emphasize and clarify that the creditor's response to a notice of final cure is mandatory. The response must include the principal balance owed; the date when the next installment payment is due; the amount of the next installment payment, separately identifying the amounts due for principal, interest, mortgage insurance and escrow, as applicable; and the amount, if any, held in a suspense account, unapplied funds account, or any similar account. The rule as amended would add a means for the debtor or trustee to object and request a hearing and provide that an objection would commence a contested matter.

Recommendation — Court Action and Amendment to Federal Rule of Bankruptcy Procedure 3002.1(h). The Commission also recommends amending rule 3002.1(h) to provide for the court to enter an order determining the status of the mortgage claim. The order would include the same data points listed in the response in the proposed amendment to rule 3002.1(g).

Recommendation — Motion to Compel and Amendment to Federal Rule of Bankruptcy Procedure 3002.1(i). Finally, the Commission proposes adding a provision for the debtor or trustee to file a motion to compel a response and for appropriate sanctions. If the motion is granted, the court must require 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 unjust. The failure of the mortgage creditor to file a response would be treated as contempt of court. These changes are modeled after similar provisions in

application in bankruptcy, including the role of qualified written requests, appears at John Rao, *Servicing of Home Mortgages in Bankruptcy: When Worlds Need Not Collide*, Am. Bankr. Inst. J., Feb. 2009, at 1.

119 The Commission has recommended a uniform set of naming conventions for pleadings, events, and party names generally; *see* § 5.07 Case Management (CM)/Electronic Case Filing (ECF) & Docketing Improvements.

Federal Rule of Civil Procedure 37, including amendments to rule 37 that were made after the Advisory Committee on Rules of Bankruptcy Procedure first promulgated rule 3002.1(i).

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 a 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 a 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.

Background. The case of *Law v. Siegel*[120] reached the U.S. Supreme Court after a debtor had claimed his house was covered by two deeds of trust, with the junior deed of trust being in the amount of almost \$157,000. Between the deeds of trust and the California homestead exemption, there was no equity in the house for the trustee to pursue. Justice Scalia's opinion described the true situation:

> The deed of trust supporting [the junior lien] had been recorded by Law in 1999 and reflected a debt to someone named "Lili Lin." Not one but two individuals claiming to be Lili Lin ultimately responded to Siegel's complaint. One, Lili Lin of Artesia, California, was a former acquaintance of Law's who denied ever having loaned him money and described his repeated efforts to involve her in various sham transactions relating to the disputed deed of trust. That Lili Lin promptly entered into a stipulated judgment disclaiming any interest in the house. But that was not the end of the matter, because the second "Lili Lin" claimed to be the true beneficiary of the disputed deed of trust. Over the next five years, this "Lili Lin" managed — despite supposedly living in China and speaking no English — to engage in extensive and costly litigation, including several appeals, contesting the avoidance of the deed of trust and Siegel's subsequent sale of the house.[121]

After the trustee had spent \$500,000 in attorney's fees battling the debtor's misrepresentations, the lower courts upheld a "surcharge" against the debtor's \$75,000 homestead exemption, denying the debtor that exemption.[122]

The Supreme Court reversed, finding no authority in the Bankruptcy Code for the surcharge of the exemption. The Court was hardly sympathetic to the debtor's "egregious misconduct" that "may produce inequitable results for trustees and creditors in other cases."[123] Bankruptcy courts, however, have to operate within the letter of the Bankruptcy Code. Whatever powers these courts have to sanction fraudulent conduct, the Supreme Court held denial of an exemption was not among them.

Recommendation. In the experience of the commissioners, most debtors who walk through the bankruptcy courthouse doors are "honest but unfortunate" debtors looking for "a new opportunity in

120 571 U.S. 415 (2014).

121 *Id.* at 419.

122 *Id.* at 420.

123 *Id.* at 426.

life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt."[124] But, in a system that sees hundreds of thousands of cases each year, it is inevitable that some debtors will hide assets, lie about the nature of the assets, or misrepresent the debtor's interest in the assets. Although it is true that other measures exist to punish or deter such conduct, such as a denial of discharge or sanctions under Federal Rule of Bankruptcy Procedure 9011, these measures do not necessarily restore the losses that the misrepresentations can cause creditors and trustees.

The Commission therefore recommends a statutory amendment to limit the application of *Law v. Siegel* and provide the statutory authority the Court found lacking to deny an exemption when the debtor knowingly and fraudulently conceals an asset. The Commission's recommendation is not for a free-floating judicial power to deny an exemption in any asset upon a finding of knowing and fraudulent concealment somewhere in the bankruptcy case.[125] Rather, the Commission recommends a tailored rule, giving bankruptcy courts the power to deny an exemption in the asset the debtor has knowingly and fraudulently concealed. Such a change would provide a balanced solution to remedy the harm to the bankruptcy estate caused by a knowing and fraudulent concealment.

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124 Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

125 This observation does not exclude the possibility of other, existing consequences to knowing and fraudulent concealment of an asset, such as denial of discharge, *see, e.g.*, 11 U.S.C. § 727(a)(2), or criminal prosecution, *see, e.g.*, 18 U.S.C. § 152.

III. FACILITATING 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 the Commission recommendation at § 5.06 Bankruptcy Forms, 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 ensuring 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:

(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.

Background. How consumers pay for legal representation in bankruptcy is one of the most important issues facing the bankruptcy system. Consumers who cannot pay either cannot access the bankruptcy system or must file pro se, and studies show pro se filers get inferior outcomes.[1] Another study suggests consumers are increasingly using "no money down" chapter 13 cases that allow payments of their attorney's fees through the chapter 13 plan, although such filers end up paying more and are less likely to receive a bankruptcy discharge.[2] A bankruptcy system that works only for those who can pay for legal representation does not further the American ideal of equal justice under law.

The current situation is the result of legal rules that begin with the U.S. Supreme Court's decision in *Lamie v. United States Trustee*,[3] which held that attorney's fees for work done on behalf of chapter 7 debtors during the bankruptcy case cannot be treated as an administrative expense and therefore cannot be paid from estate assets. Next, almost every published decision has held that any agreement to pay attorney's fees is a prepetition fee agreement subject to the automatic stay and the bankruptcy discharge.[4] Putting this case law together, an attorney who is owed money for work done before filing the bankruptcy petition is no different than any other unsecured creditor. Additionally, the Eleventh Circuit has held that an attorney cannot advise a client to incur debt from another person to pay the attorney fee for bankruptcy representation.[5]

Under this state of the law, an attorney offering representation to potential chapter 7 debtors has four fee options, each of which produces undesirable results:

> <u>*Option 1*</u>*:* The attorney can delay filing a chapter 7 case until the debtor has paid up front all of the anticipated fees in the case. There are three problems with this common approach. First, it deprives the debtor of immediate relief, which might especially frustrate the debtor's goal in filing bankruptcy if there is ongoing or imminent collection activity, such as wage garnishment or seizure of collateral. Second, if the debtor is unable to complete the prepetition payments, no case will be filed, and the debtor will likely lose at least some portion of the funds deposited with the lawyer as payment for whatever services — legal or administrative — were provided. Third, if the debtor does complete the required prepetition payment, and the case requires unanticipated services after filing, the attorney will have the same difficulties in collecting additional fees as in cases filed without prepayment.

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1 One study found chapter 7 debtors who were represented by an attorney were over nine times as likely to get a discharge as chapter 7 debtors who filed pro se. Angela K. Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 Wm. & Mary L. Rev. 1933, 1974 tbl.3b (2011).

2 *See* Pamela Foohey, Robert M. Lawless, Katherine Porter & Deborah Thorne, *"No Money Down" Bankruptcy*, 90 S. Cal. L. Rev. 1055, 1075 tbl.1, 1093 tbl.5 (2017).

3 540 U.S. 526 (2004).

4 *See* Bethea v. Robert J. Adams & Associates, 352 F.3d 1125 (7th Cir. 2003); *see also In re* Beschloss, 2018 WL 2138276, at *2 (Bankr. S.D.N.Y. 2018) ("[W]hether [a prepetition] obligation to pay the law firm's fees was based on an initial retainer agreement . . . on quantum meruit for the work that they performed, or . . . on a promise to pay even if the debtor got a discharge . . . [t]hey are all subject to discharge.").

5 *See* Cadwell v. Kaufman, 886 F.3d 1153 (11th Cir. 2018) (applying § 526(a)(4) of the Bankruptcy Code).

Option 2: The attorney can file a chapter 7 case without receiving full payment of the anticipated fees, hoping that the debtor will voluntarily pay the fees from non-estate assets postpetition. This option presents a low likelihood that the attorney will be paid. The debtor has no financial incentive to pay the fees because the bankruptcy is accomplishing the debtor's goals without payment, and the attorney has no ability to take any collection action — even suggesting voluntary repayment — because the claim for fees is subject to the automatic stay and the discharge injunction.

Option 3: The attorney can bifurcate the legal services to be provided, first entering into an agreement with a nominal fee covering only prepetition services and then entering into a postpetition agreement for the bulk of the fees to cover postpetition services. Because it occurs postfiling and creates postfiling obligations, the automatic stay and the bankruptcy discharge do not apply to the postpetition agreement. Thus, the attorney theoretically can demand payment and engage in collection activity after discharge. This option, however, has at least five drawbacks. First, local rules or practice may not allow the unbundling of postpetition services.[6] Second, even if unbundling is allowed, the court may find that the fees allocated to prepetition services are unreasonably low and the fees for postpetition services are unreasonably high. Third, the client may decline to enter into the second fee agreement, requiring the attorney to withdraw from the representation, leaving the debtor unrepresented and leaving the attorney with no ability to obtain additional payment for the services already rendered. Fourth, where the client enters into a postpetition contract, there is no incentive for the client to pay for the postpetition services other than a threat of collection action, which the attorney may be reluctant to engage in, both because of its expense and because it may generate unfavorable reviews of the attorney, online and otherwise. Fifth, the attorney may assign the right to be paid under the postpetition agreement to a third-party collector, incurring significant charges and increasing the fee charged to the client to offset these charges. As illustrated by later discussion of options that merit congressional consideration, the Commission expressly disapproves of attorney fee factoring agreements between debtors' attorneys and third-party collectors.[7]

Option 4: The debtor can file the case under chapter 13 instead of chapter 7. If the debtor makes any payments required by the chapter 13 plan, at least a portion of the attorney fees will be paid. Also, the debtor has an incentive to make payments because, absent the uncommon occurrence of a "hardship" discharge, the court will grant a discharge only if the debtor makes all plan payments. But this option also has drawbacks. First, chapter 13

6 The Commission has made a recommendation on unbundling at § 3.02 Unbundling of Legal Services.

7 Alleging multiple disclosure and ethics issues, the U.S. Trustee has filed several suits against attorneys who were bifurcating and factoring client accounts for filing chapter 7 using the services of a national company. *See, e.g., In re* Wright, 591 B.R. 68 (Bankr. N.D. Okla. 2018); *see also* Complaint, U.S. Trustee for the Central Dist. of Cal. v. Ashcraft, Adversary Proceeding 6:17-ap-01721 (Bankr. C.D. Cal. Dec. 12, 2017); Daniel Gill, "Firm Sued by U.S. Trustee Over Billing Practices in Chapter 7" (Dec. 19, 2017), available at https://www.bna.com/firm-sued-us-n73014473436/ (last visited Dec. 27, 2018) (summarizing the complaint and including responses from the company).

imposes additional costs on the debtor, both in higher fees and in the requirement that the debtor devote all disposable income to paying claims under the plan. Second, if the court does dismiss the case, the debtor will not only fail to receive a discharge but also will lose any fees paid to the attorney and chapter 13 trustee, as well as other costs the debtor has incurred in filing. Third, it may be unethical for an attorney to file a chapter 13 case for a client when chapter 7 provides the relief that the client needs, simply because the attorney prefers the more secure fee payment in chapter 13.

Table 1 summarizes the effects of these four options on debtors and their attorneys, setting out for each option (a) how much the option increases the likelihood of debtor payments, (b) how much it increases the attorney's costs, and (c) how much it diminishes the debtor's relief.

Comparisons of Existing Options to Pay Chapter 7 Attorney Fees

Table 1

	Effectiveness in encouraging fee payment	*Cost to the attorney*	*Negative effect on the debtor*
Option 1: Delay filing until anticipated fees are paid	*High* Debtor has high incentive to pay the fees, because otherwise there will be no filing.	*Low* Any administrative cost in holding funds before filing can be covered by a higher fee.	*High* The delay in filing may cause harm to the client, and the attorney may deduct expenses from any refund if the case is not filed.
Option 2: Chapter 7 filing without prepayment	*Low* The debtor is under no legal obligation to pay the fees; the automatic stay and discharge prevent the attorney from asking for fee payment.	*High* Failure of the debtor to make completely voluntary payments results in no possibility of payment for the services provided.	*Low* There is no negative effect. Unless the debtor chooses to pay the fee, without prompting, the debtor obtains the legal services without charge.
Option 3: Bifurcated representation	*Moderate* Although excepted from discharge, fees under the post-filing contract may be difficult to collect.	*Moderate* The attorney incurs costs of collection if the debtor fails to complete payments and may have to defend the bifurcation if it is challenged as unethical.	*Moderate* The debtor is subject to collection of unpaid fees and may incur liability for costs of collection. The unpaid fees may be assigned for collection, increasing costs to the debtor.
Option 4: File chapter 13	*High* The debtor is encouraged to complete plan payments to obtain a discharge and avoid the need for refiling after dismissal.	*Moderate* The court may dismiss the case for failure to make plan payments before payment of attorney fees. Collecting unpaid fees would impose costs and reputation risk.	*High* The attorney fees are higher than a chapter 7; failure to complete plan payments results in a loss of fee and expense payments and no discharge is obtained.

The Ninth Circuit summarized the inadequacy of these alternatives for payment of the debtor's attorney fees in chapter 7:

> [B]ecause no existing solution is totally satisfactory, it is only the rarity of litigated disputes in this area (as a practical matter) that avoids a real chilling of competent counsel's willingness to represent Chapter 7 debtors. Needless to say, the optimum solution to the problem would call for action by Congress to provide express statutory authority and an express procedure for the compensation of Chapter 7 debtors' attorneys who render postpetition services.[8]

Attorneys serve as the gateway for the bankruptcy system. Whether persons get the bankruptcy relief they seek very much depends on whether the system incentivizes competent counsel to serve with fair compensation.

*Recommendation — System Changes to Make Bankruptcy Less Expensive. I*n the Commission's deliberations, several commissioners expressed the view that the root problem stems from a system that is poorly designed for the needs of the average consumer whose financial affairs are simple and whose bankruptcy cases are straightforward. Over 90% of chapter 7s are no-asset cases that provide no distribution to unsecured creditors,[9] but these cases are all administered under a heavily judicialized procedure using the same statute, rules, and forms as are used by all individuals regardless of wealth. Moreover, the many amendments to the Bankruptcy Code have made it a complex law to navigate, making it more imperative than ever for consumers to have expert and expensive legal assistance.

Part of the solution to make it easier for consumers to pay for their bankruptcies is to lower the cost of filing bankruptcy. The Commission's charge — to recommend "improvements to the consumer bankruptcy system that can be implemented within its existing structure" — limited what it could recommend. Were it not for this limitation, some commissioners might have had an interest in exploring measures such as a new consumer-only bankruptcy law or administering the consumer bankruptcy system through a government agency. Other commissioners believe such measures are not necessary, but the Commission as a whole agreed that solutions that would require a complete overhaul of the bankruptcy system were beyond the Commission's charge. The recommendations in this section reflect the task that was set before the Commission and should not be interpreted either as a rejection or an endorsement of more radical solutions.

The Commission agreed on several measures that would lower costs and can be implemented within the existing structure of the bankruptcy system:

> (1) As the Commission has recommended elsewhere, the AO, the Federal Judicial Center (FJC), and the Advisory Committee on Rules of Bankruptcy Procedure should work with both nonprofit and for-profit private actors to develop software that allows for easier data entry on bankruptcy forms.[10] Such software would lower the costs to attorneys, which in

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8 Gordon v. Hines, 147 F.3d 1185, 1190 (9th Cir. 1998).

9 Dalié Jiménez, *The Distribution of Assets in Consumer Chapter 7 Bankruptcy Cases*, 83 Am. Bankr. L.J. 795, 819 (2009).

10 *See* § 5.06 Bankruptcy Forms.

the competitive market for consumer bankruptcy lawyers presumably would be passed through to debtors in the form of lower fees.

(2) Legal aid organizations and private attorneys should increase the availability of pro bono representation for bankruptcy debtors.

(3) Although the law currently allows a court to waive the filing fee for debtors within 150% of the poverty line,[11] that law should be expanded to reach more individuals and allow the payment of partial filing fees in appropriate cases.

(4) Consistent with its recommendation on stand-in counsel,[12] the Commission recommends the bankruptcy system should allow trustees, using video technology, to conduct section 341 meetings remotely and should encourage trustees to offer section 341 meetings outside of regular working hours. Attendance at the section 341 meeting, required in every bankruptcy case, can be a burden for poorer debtors who cannot easily take time off work. In this situation, the bankruptcy process can contribute to the debtor's financial distress instead of alleviating it. Also, in rural areas, the section 341 meeting can require hours of travel that the debtor does not have available or cannot financially afford. Expanded use of video attendance at section 341 meetings requires the balancing of interests of debtors, debtors' attorneys, trustees, and creditors, as well as the overall integrity of the bankruptcy system.

(5) Congress should provide for legal representation of low-income debtors in the bankruptcy process in a manner that the federal public defender currently provides in the criminal justice system.

Recommendations — Statutory Amendments. The Commission debated over several meetings the question of whether and how to amend the Bankruptcy Code to address the payment of attorney's fees in chapter 7 bankruptcies. Culling ideas from the committee report it had received, as well as proposals from individual commissioners, the Commission eventually narrowed its discussion to four options:

Option 1: The first option would be to make chapter 7 attorney's fees nondischargeable without any additional procedures. Under this option, Congress would add a new paragraph to section 523(a) to except from discharge amounts due under any agreement for payment of chapter 7 fees. Nondischargeability would be automatic, and the attorney could enforce the agreement in any court with jurisdiction over the matter, much as domestic support obligations may be enforced under current law. An exception to the automatic stay would be added to allow for postpetition payment of chapter 7 attorney fees along with coordinating amendments to other sections to deal with other issues.

11 *See* 28 U.S.C. § 1930(f). Individual debtors also may pay the filing fee in installments. *Id.* § 1930(a).

12 *See* § 3.05 Stand-in Counsel.

By allowing an attorney to discuss fee payment with the debtor during and after the bankruptcy case and to take collection action if necessary, attorneys would have more incentive to file a chapter 7 case before the full fee was paid. This proposal would simply render unpaid legal fees in chapter 7 cases nondischargeable, and the attorney would be in the same position as with a nonbankruptcy client's promise to pay fees. Section 329, the rules of professional ethics, and contract law would provide safeguards against unreasonable fees.

Option 2: The second option would add procedural protections to the first option. These protections would provide for judicial review of fee agreements at the outset of a case to ensure reasonable charges. The attorney would need to move for nondischargeability during the bankruptcy case, and a debtor could recover fees and costs in response to an unjustified request for nondischargeability. This option would be implemented principally through amendments to sections 329 and 523(a), along with coordinating amendments elsewhere in the Bankruptcy Code.

Option 3: The third option would be to make the bankruptcy discharge contingent on a chapter 7 debtor's completion of payments under a prepetition fee agreement. Debtors would have an incentive to pay the attorney's fee because otherwise they would not receive a discharge. There would be a procedure to allow discharge if the debtor showed an inability to pay. A new exception to the automatic stay would allow postpetition payment of attorney's fees, as well as allow discussion of repayment between attorney and debtor. This option would be implemented principally through an amendment to section 727, along with coordinating changes elsewhere in the Bankruptcy Code.

Option 4: The fourth option would authorize attorneys for chapter 7 debtors to enter into prepetition fee agreements under which the debtor could make voluntary payments postpetition. Entry of discharge would be delayed for a brief period of time, such as six months from case commencement, to permit discussion and potential payment of a reasonable fee. This option could be implemented principally through an amendment to section 727 and an amendment to Federal Rule of Bankruptcy Procedure 4004 on the issuance of a discharge order. Section 362 would need to be amended to allow postpetition collection of attorney's fees paid voluntarily. Protection against unreasonable fees would be under section 329, which would require judicial approval of any fee agreement. Coordinating amendments would be necessary elsewhere, especially to ensure that no prejudice occurs to whatever rights a secured creditor has to access its collateral during the delay in discharge. Although this option would not assure attorneys of payment of their fees, it would provide a mechanism allowing payment of the fees to be requested and received postpetition.

At the center of each of these options is the necessity of some sort of mechanism to allow postpetition collection of chapter 7 attorney's fees. Each option has costs and benefits as summarized in Table 2.

Comparisons of Proposed Amendments to Allow Postpetition Collection of Chapter 7 Attorney's Fees

Table 2

	Effectiveness in encouraging fee payment	*Cost to the attorney*	*Negative effect on the debtor*
Option 1: Attorney's fee excepted from discharge, no procedural protections	*Moderate* Although excepted from discharge, fees may be difficult to collect.	*Moderate* The attorney would incur costs of collection for unpaid fees.	*Moderate* The debtor is subject to fee-collection action but obtains discharge of other debts. The debtor's principal protection against unreasonable fees is only section 329.
Option 2: Attorney's fee excepted from discharge, with procedural protections	*Moderate* Although excepted from discharge, fees may be difficult to collect.	*High* Attorney would have to initiate a procedure in the bankruptcy case.	*Moderate* The debtor is subject to fee collection but obtains discharge of other debts. Judicial review in every case offers additional protection against unreasonable fees.
Option 3: Delay discharge until attorney's fees are paid	*High* Debtor will likely complete fee payments to obtain the general discharge.	*Low* The attorney need only file a notice of nonpayment in the bankruptcy case. Collection action is likely not needed.	*High* The penalty for not paying fees is loss of discharge.
Option 4: Delay discharge for six months	*Low to moderate* The debtor is under no legal obligation to pay the fees	*High* Judicial proceedings are required before collection efforts can begin.	*Low* The attorney may repeatedly suggest voluntary fee payment

The Commission decided that options two and four merit congressional consideration. The Commission's numerical listings of the two possibilities in the table or in its formal recommendation above is not meant to imply a preferred ranking.

What the Commission has listed as option two is the creation of a discharge exception for a prepetition fee agreement for a chapter 7. This option would require several changes, specifically:

- A new subsection would be added to section 329 providing (a) that on motion of an attorney for an individual debtor in a chapter 7 case, stating that the attorney has fully advised the client about the effect of the agreement, the court could approve a prepetition agreement for the debtor to pay the attorney's fees as specified in the contract; and (b) that such a contract would not be treated as an executory contract under section 365. In approving a fee agreement, the bankruptcy court could include in its order provisions

(1) prohibiting an increase in fees based on delay in payment under the contract,

(2) prohibiting or limiting interest on the installment payments,

(3) requiring enforcement of the agreement only through the bankruptcy court, specifically prohibiting arbitration,

(4) prohibiting assignment, factoring, or other collection by a third party, and

(5) imposing other conditions to avoid abusive or unnecessary collection practices.

- Section 362(b) would be amended to add a new exception from the automatic stay allowing an attorney to discuss with the debtor the payment of fees under a fee agreement approved under section 329.

- Section 523(a) would be amended to add an exception from discharge for amounts due under a postpetition fee agreement approved under section 329.

- Section 523(c)(1) would be amended to provide that the new exception from discharge for attorney fees will only be effective upon an order entered by the court presiding over the bankruptcy case on request of the attorney or firm to whom the fees are owed, based on a determination by the court that the outstanding fees were incurred reasonably and in compliance with any conditions imposed by the bankruptcy court.

- Section 523(d) would be amended to include the new exception from discharge as one for which the debtor may obtain payment of costs and reasonable attorney fees if the position of the attorney is not substantially justified.

- Section 1328(a)(2) would be amended to include the new exception from discharge in chapter 13.

- Section 526(a)(4) would be amended to exclude agreements for payment of chapter 7 legal fees, allowing an attorney to recommend entry into such an agreement.

- Federal Rule of Bankruptcy Procedure 2016(b) would be amended to require the filing of any motion to approve a prepetition agreement for the debtor's payment of fees for the attorney's services under section 329 at the same time as the statement required by the rule.

- Federal Rule of Bankruptcy Procedure 4007(a) and (c) would be amended to provide that the new discharge exception for chapter 7 attorney fees may be implemented by motion rather than through an adversary complaint, and that the motion must be filed within five years of the entry of discharge in the case.

- Federal Rule of Bankruptcy Procedure 7001(6) would be amended to allow determinations of the nondischargeability of obligations under court-approved fee agreements to be made by motion rather than adversary proceeding.

The Commission also believes that what it has listed as option four merits congressional consideration. This option would delay the discharge for six months and would require the following changes:

- Section 526(a)(4) would be amended to exclude agreements for payment of chapter 7 legal fees, allowing an attorney to recommend entry into such an agreement for voluntary payment.

- Section 362(b) would be amended to add a new exception from the automatic stay for payment of chapter 7 debtors' attorney fees and for discussion between the attorney and client for voluntary payment.

- Section 329 of the Bankruptcy Code would be amended to add a new subsection providing (a) that on motion of an attorney for an individual debtor in a chapter 7 case, stating that the attorney has fully advised the client about the effect of the agreement, the court may approve a prepetition agreement for the debtor's payment of fees for the attorney's services as specified in the contract; and (b) that such a contract will not be treated as an executory contract under section 365. In approving a fee agreement, the bankruptcy court could require provisions

  (1) prohibiting an increase in fees based on delay in payment under the contract,

  (2) prohibiting or limiting interest on the installment payments,

  (3) requiring enforcement of the agreement only through the bankruptcy court, specifically prohibiting arbitration,

  (4) prohibiting assignment, factoring or other collection by a third party, and

  (5) imposing other conditions to avoid abusive or unnecessary collection practices.

- Either section 727 or Federal Rule of Bankruptcy Procedure 4004 would be amended to provide that if the court approves a prepetition fee agreement under section 329, the discharge would be delayed. The Commission believes a delay of six months would be appropriate.

- Federal Rule of Bankruptcy Procedure 2016(b) would be amended to require the filing of any motion to approve a prepetition agreement for the debtor's payment of fees for the attorney's services under section 329 of the Code at the same time as the statement required by the rule.

- Section 365 would be amended to prohibit the trustee from assuming or rejecting a contract for payment of chapter 7 debtors' attorney fees.

- Section 503(b) would be amended to provide that the reasonable unpaid postpetition fees for the debtor's attorney, as approved by the court under section 329, would be an administrative expense in an asset case.

- Coordinating amendments would need to be made to ensure that the delay in discharge does not prejudice the rights of secured creditors given that section 362(c) provides that the automatic stay terminates at discharge. Such an amendment might state that if discharge was delayed under this procedure and absent a court order to the contrary, a secured creditor could proceed at a given point in time — so many days after the meeting of creditors — or at the time discharge would have been entered had the delay not occurred.

Under this proposal, any fees unpaid after the expiration of the delay would be subject to discharge. As with other prepetition debts, the debtor could voluntarily continue to pay the unpaid amount after entry of discharge. It is not part of the Commission's recommendation that any unpaid fees would be subject to reaffirmation.

§ 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.

Background. "Unbundling," more formally known as "limited-scope representation" or "limited-services representation," occurs when a lawyer specifies to a client limits on what the lawyer will do for the client. Unbundling is common in consumer bankruptcy cases where a lawyer often accepts a flat fee and wants to make clear to the client that the fee does not cover services for unanticipated and possibly expensive contingencies, such as a trial over the debtor's eligibility for a discharge. Unbundling also can be a tool to address the rising costs of a consumer bankruptcy filing.[13]

Theoretically, unbundling is a matter of contract between the lawyer and the client. In reality, unbundling raises serious ethical concerns about whether the client meaningfully consented to a limited representation given the lawyer's immense informational advantage about what services the client will need and the client's expectation the lawyer will act in the client's best interest. Model Rule of Professional Conduct 1.2(c) allows a lawyer to limit the scope of a representation if the limitation is reasonable and the client gives informed consent.

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13 *See* Pamela Foohey, et al., *supra* note 2, at 1066 (2017) (finding median chapter 7 fees using 2013-16 data of $1229 and median chapter 13 fees of $3217). The mean figures from the ABI Consumer Bankruptcy Fee Study using 2007-08 data and adjusted for inflation are $1195 for chapter 7 asset cases and $2858 for chapter 13. *See* Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 Am. Bankr. Inst. L. Rev. 17, 30 (2012) (reporting figures of $1,072 for chapter 7 asset cases and $2,564 for chapter 13 cases).

In consumer bankruptcy, unbundling can allow some potential consumer filers access to legal assistance they otherwise would not be able to afford. But, unbundling can be a two-edged sword. Unbundling can leave debtors with no help when needed. Such debtors then often seek legal advice from those who cannot provide it, such as the court clerk's office, their trustee, or even the judge. The question is whether justice is better served by allowing access to only some basic legal services, such as preparation of the bankruptcy petition and schedules, or leaving the debtor without any legal help. Always lurking in the background is whether the typical consumer debtor can give informed consent to a limited representation in a complex bankruptcy matter.

As costs have risen and competitive pressures on attorneys have climbed, issues about unbundling seem to be increasing in the bankruptcy system. Numerous articles try to parse the boundary lines for practitioners about when unbundling is appropriate.[14] In remarks to bankruptcy trustees, the director of the U.S. Trustee Program (USTP) twice recently has expressed concern over the deleterious effects that excessive unbundling can have on consumer bankruptcy filers.[15]

Unbundling also plays a role in attempts to bifurcate bankruptcy attorney fees into smaller amounts the consumer must pay in full before filing bankruptcy and larger amounts that the consumer can pay in installments after filing. For bifurcation to be effective, the prepetition agreement must necessarily limit the scope of the attorney's postpetition representation. The Commission has a separate proposal on payment of attorney's fees that should minimize, if not eliminate, the motivations to bifurcate attorney's fees,[16] but bifurcation of fees is another example of how issues about unbundling are playing an increasing role in how consumers access the bankruptcy system.

In considering unbundling in consumer bankruptcy, the Commission was aware that it was not writing on a blank slate. The Final Report of the American Bankruptcy Institute's National Ethics Task Force has a twenty-five-page section describing best practices for limited-scope representations in consumer bankruptcy cases. The Task Force described its goal as addressing the following concerns:

> In considering the issue of Limited Services Representation, the Task Force recognizes the necessity of reconciling the need to protect debtors from receiving inadequate and ineffective representation, even for a limited fee, and the interest of providing

14 Alexander Laughlin, *Unbundling as a Means of Financing Bankruptcy Fees and Working Without a "Wet" Signature*, Am. Bankr. Inst. J., Oct. 2017, at 30; Zach Mosner, *Unbundling and Ghostwriting: Who Ya Gonna Call?*, Am. Bankr. Inst. J., Sept. 2016, at 14; Gary E. Sullivan & Jessica M. Zorn, *Bankruptcy and Unbundling: Oil and Water*, 77 Ala. Law. 344 (2016); Carrie E. Zuniga, *The Ethics of Unbundling Legal Services in Consumer Cases*, Am. Bankr. Inst. J., Oct. 2013, at 14.

15 U.S. Dep't of Justice, "Remarks of Director Cliff White Before the 2018 Annual Conference of the National Association of Bankruptcy Trustees" (Aug. 16, 2018), https://www.justice.gov/ust/speeches-testimony/nabt_annual_conference_08162018; U.S. Dep't of Justice, "Remarks of Director Cliff White Before the 53rd Annual Seminar of the National Association of Chapter 13 Trustees" (June 28, 2018), https://www.justice.gov/ust/speeches-testimony/director-addresses-53rd-annual-seminar-national-association-chapter-13-trustees.

16 *See* § 3.01 Chapter 7 Attorney's Fees.

> debtors with the option of limited legal representation in lieu of self-help resources or non-legal assistance.[17]

The Commission agrees with these goals. In preparing this report, the Commission drew on the Task Force's report. The Commission commends to practitioners, assuming it is consistent with any applicable local rule, the Task Force's model agreement for use with clients, which tries to plainly lay out the services the attorney will provide and includes a checkbox format the client can readily understand.[18]

Recommendation. As noted above, the rules of professional conduct allow an attorney to limit the scope of representation so long as any limitations are reasonable. The Commission first considered drafting a model local rule that jurisdictions could use to draw lines between the services an attorney could and could not unbundle. At the extremes, the issues are easy. For example, it seems clearly unreasonable for an attorney to disclaim responsibility to take basic steps to ensure the debtor receives a discharge, because a discharge is typically the whole point of filing a bankruptcy petition. On the other hand, it clearly seems reasonable for the attorney to specify that the flat fee for filing the bankruptcy case does not include defending the debtor at a trial on dischargeability.

Once the Commission moved away from the extremes, the issues became increasingly difficult. For example, what if the debtor said the principal purpose of the bankruptcy was to discharge a debt that a competent attorney would know raises discharge issues?[19] Also, commissioners from different states expressed views about what their state bars required as well as the appropriateness of unbundling specific services given local conditions. What might make sense in a rural environment where attorneys are far apart might not be a reasonable place to draw a line in a dense urban area where consumers have access to more alternatives for legal representation. The local costs of filing and other local barriers to justice also need to be considered.

Unlike the National Ethics Task Force, which promulgated a model rule,[20] the Commission decided that the better course was to encourage the promulgation of local rules addressing unbundling. The Task Force's report noted that "dozens" of judicial districts already have local rules.[21] These local rules, together with the Task Force's model rule, provide excellent starting points for jurisdictions to implement a local rule on unbundling or update an existing rule.

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17 Final Report of the ABI National Ethics Task Force 51 (2013) (available at https://abi-org.s3.amazonaws.com/Endowment/Research_Grants/Final_Report_ABI_Ethics_Task_Force.pdf) (last visited Dec. 27, 2018).

18 *Id.* at 60-63.

19 *Cf. In re Seare*, 515 B.R. 599 (B.A.P. 9th Cir. 2014) (upholding sanctions and rejecting the attorney's attempt to limit the representation because a cursory investigation would have led the attorney to know defending an adversary proceeding for fraud would be necessary to accomplish the client's objective).

20 *See* Final Report, *supra* note 17, at 57-59. Recognizing the differing requirements in differing states, the Task Force's model rule begins with the qualifier "If permitted by the governing Rules of Professional Conduct . . . ."

21 *Id.* at 52.

The Commission's recommendation should not be misinterpreted as indifference to the importance of addressing unbundling issues. The Commission recommends that every jurisdiction have a local rule that provides certainty to attorneys about what services can be unbundled and the procedures for unbundling. The local rulemaking process allows the professional community to come together, consider local conditions and state rules of professional responsibility, then implement appropriate client protections without unduly blocking access to the bankruptcy system and harming the persons they are meant to protect.

§ 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.

Background. Attorneys must disclose the amounts they receive as compensation for a bankruptcy case, and attorney compensation is subject to court oversight. Section 329 and Federal Rule of Bankruptcy Procedure 2016(b) require attorneys to disclose all compensation received in the year prior to filing a bankruptcy case and the total compensation the debtor has promised to pay. The court can disallow prepetition compensation to the extent it exceeds the reasonable value of the services. Under section 330(a)(4)(B), the court can allow reasonable postpetition compensation to the debtor's lawyer in chapter 13 cases.[22] Rule 2016(a) directs the attorney seeking such compensation "to file an application setting forth a detailed statement of (1) the services rendered, time expended, expenses incurred, and (2) the amounts requested."

With chapter 13 cases being filed at rates of 300,000 to more than 400,000 annually,[23] a detailed scrutiny of the "services rendered, time expended, and expenses incurred" in each and every case is not realistic. Consequently, local rules or norms have largely replaced individual review of fee applications by using presumptively reasonable fees, often called "no look" fees. If the attorney requests payment at or below the presumptive amount, the bankruptcy court generally approves the request without a hearing.

22 The Supreme Court has ruled that in chapter 7, the Bankruptcy Code does not permit postpetition compensation from estate assets for the debtor's lawyer. *See* Lamie v. U.S. Trustee, 540 U.S. 526 (2004). The consequences of the *Lamie* decision and the Commission's recommendations regarding payment of the attorney's fees in a chapter 7 are discussed at § 3.01 Chapter 7 Attorney's Fees.

23 *See* Administrative Office of the U.S. Courts, Just the Facts: Consumer Bankruptcy Filings, 2006-2017 (Mar. 8, 2018), www.uscourts.gov/news/2018/03/07/just-facts-consumer-bankruptcy-filings-2006-2017 (last visited Jan. 21, 2019).

There are many advantages to this system. Presumptively reasonable fees carry benefits for the court, chapter 13 trustees, and debtors and their counsel. Most obviously, presumptively reasonable fees greatly reduce the time and cost that bankruptcy courts and chapter 13 trustees need to expend in reviewing fee applications. Attorneys can provide debtors an accurate estimate of the amount necessary for their legal representation, and debtors' counsel can represent their clients without the necessity of keeping track of their time. Bankruptcy practice often involves multiple short communications along with amendments to schedules and hearings that are brief compared to a nonbankruptcy trial practice. More efficient operations allow debtors' counsel to take time that would otherwise go to tedious and pointless recordkeeping and devote it to client representation. When provided by competent and zealous counsel, presumptively reasonable fees also allow the pooling of risks for both debtor and debtors' attorneys. For example, appeals that would never be in any individual debtor's pecuniary interest can and are brought by attorneys for whom the benefits of a successful appeal will inure throughout a large segment of their clients.

There are, however, disadvantages to the presumptively reasonable fee system. While most debtors' attorneys are diligent and represent their clients well, the flat-fee system provides an incentive to do the minimum amount of work and service for their clients and so maximize the return on this work. Also, because everyone pays the same presumptively reasonable fee, clients who have largely uncomplicated cases — for example, debtors with complete financial records and few claims who timely make all of their plan payments — subsidize those whose financial situations are more complex and who fail to make timely payments. Finally, a debtor in a jurisdiction with a total flat-fee system — one in which there is one flat fee for representation of the debtor from filing to discharge — may find it difficult to substitute attorneys. The "no look" fee is paid to the initial attorney, and only the remainder of the fee may be available for a subsequent attorney. As a result, many substitute attorneys in chapter 13 have an incentive to allow that case to be dismissed so that they are able to claim a full attorney's fee in the new case.

A private study done in 2018 for the National Association of Consumer Bankruptcy Attorneys and provided to the Commission found substantial variation in presumptively reasonable fees in chapter 13 cases.[24] Seventy-three percent of judicial districts were found to have some sort of presumptively reasonably fee structure, meaning a quarter of judicial districts did not. Of the districts with a fee structure, 41% of the districts provided a presumptively reasonable fee only for the work done through confirmation, with procedures for the attorneys to apply for compensation for postconfirmation work. Two judicial districts offer attorneys the option of charging a presumptively reasonable fee for work through confirmation or for the entire case. The remaining districts — 56% of the districts with a fee structure — specify a presumptively reasonable fee for all work done in the case. The study also found variation in how often the local court reviewed the presumptively reasonable fee, with one district having conducted no review of its presumptively reasonable fee in nine years.

24 The study's finding of variation in local practices on presumptively reasonable fees is largely consistent with the findings in two earlier, publicly available studies. *See* U.S. Gov't Accountability Office, Bankruptcy Reform: Dollar Costs Associated with the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 24-27, 46 tbl.6 (2008); Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 Am. Bankr. Inst. L. Rev. 17, 110-19 (2012).

Recommendation — Presumptively Reasonable Fees. The Commission believes that the benefits of presumptively reasonable fees outweigh the costs. Therefore, the Commission recommends that all judicial districts adopt a presumptively reasonable fee. Judicial districts should do so through a transparent process, such as local rulemaking.

The Commission recommends that the presumptively reasonable fee should be for work done through confirmation only. After confirmation, the courts should have a standard "a la carte" fee structure for work commonly done after confirmation, with presumptively reasonable fees for categories of postconfirmation work. Having a flat, presumptively reasonable fee for preconfirmation work and then presumptively reasonable "a la carte" fees for postconfirmation work best balances the interests of the system in administrative feasibility and the interests of debtors.

A presumptively reasonable fee through confirmation recognizes that all debtors require certain preconfirmation work in a chapter 13 case, but postconfirmation work is highly variable. Prior to confirmation, all debtors must provide the same basic information, file the required documents, attend a 341 meeting, and perform other necessary actions. Postconfirmation, some clients can finish their cases with little additional involvement of counsel. Others require substantial additional assistance to defend against motions to dismiss and for relief from the automatic stay, and to propose plan modifications.

Allowing presumptively approved fees for specific categories of work performed after confirmation reduces costs for debtors in uncomplicated cases and appropriately puts the costs on debtors who need extra help. Further, if the debtor hires new counsel, this model compensates the attorneys who actually perform the postconfirmation work.

The bankruptcy court should have a procedure for approval of applications for presumptively reasonable postconfirmation fees. The requesting attorney should send notice of an application for postconfirmation fees and expenses to at least each debtor and the trustee. Each notice should verify completion of the services for which the attorney seeks compensation, set a reasonable deadline to object to the application, and include a certificate of service. After notice and the expiration of the objection deadline, the applications for presumptively reasonable postconfirmation fees should be deemed approved by the court. Of course, the court may set a hearing on any fee request, even without objection, to determine whether the fees should be allowed.

Ethical considerations and fairness require that every attorney for a chapter 13 debtor disclose to the debtor the amount of the attorney's fees, including the potential fees for postconfirmation services, and the court's role in approving the fees. Model Rule of Professional Conduct 1.2(c) requires that the attorney ensure that fees for the attorney's representation, including separate fees for the postconfirmation services, are reasonable and that the client has given informed consent.

These requirements are discussed as part of the Commission's separate recommendation on limited-scope representation or "unbundling."[25]

Attorneys should not be required to use presumptively reasonable fees. In complex chapter 13 cases for which the attorney believes that the presumptively reasonable fee is not adequate compensation, the attorney should be allowed to apply for compensation on a "time and expense" basis through the regular processes in sections 329 and 330 and Federal Rule of Bankruptcy Procedure 2016. These processes permit the court to determine whether the attorney's compensation should be allowed based on time and expense or whether the presumptively reasonable fee is more appropriate.

In determining reasonable compensation, section 330(a)(3)(E) allows a bankruptcy court to consider whether the attorney "is board certified or otherwise has demonstrated skill and experience in the bankruptcy field." The Commission recommends that in setting a presumptively reasonable fee, judicial districts should consider board certification as a factor and increase the presumptively reasonable fee accordingly, as several jurisdictions already do. A slightly higher fee would incentivize bankruptcy attorneys to earn certification and provide clients with more highly qualified attorneys.

Finally, the Commission recommends regular review of presumptively reasonable fees. Presumptively reasonable fees that do not track rising costs or inflation become outdated, leading attorneys to use them less and defeating the purpose of having a presumptively reasonable fee.

Priority of Attorney Fees in a Chapter 13 Plan. Section 1326(b)(1) requires the payment of administrative expenses, including chapter 13 attorney's fees, either before or with each distribution to creditors. At the same time and absent the secured creditor's consent, section 1325(a)(5)(B)(iii)(I) requires that payments to secured creditors be in equal amounts. For attorney's fees paid through the plan, it has been difficult to reconcile these two provisions. Some courts have ruled that section 1326(b)(1) allows a chapter 13 plan to pay attorney's fees first, temporarily decreasing secured creditor payments until the attorney's fees are paid in full, then making increased payments to secured creditors in equal amounts.[26] Such plans are sometimes referred to as "step plans." Other courts have ruled that section 1325(a)(5)(B)(iii)(I)'s requirement of equal payments is paramount and prohibit step plans.[27]

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25 *See* § 3.02 Unbundling of Legal Services.

26 *See, e.g.*, *In re* Carr, 584 B.R. 268 (Bankr. N.D. Ill. 2018); *In re* Marks, 394 B.R. 198 (Bankr. N.D. Ill. 2008); *In re* Erwin, 376 B.R. 897 (Bankr. C.D. Ill. 2007). *Collier* also adopts this position:

> Some courts have promulgated rules or procedures that delay the payment of attorney's fees in chapter 13 cases by spreading them out over some or all of the duration of the plan. However, such delay contravenes section 1326(b)(1). The requirement that these fees be paid first may mean that equal monthly payments to secured creditors required under section 1325(a)(5)(B)(iii)(I) must be deferred, with the secured creditor provided adequate protection during the period administrative expenses are paid.

8 Collier on Bankruptcy ¶ 1326.03[1] (16th ed. Richard Levin & Henry Sommer eds.).

27 *See, e.g.*, *In re* Shelton, 592 B.R. 193 (Bankr. N.D. Ill. 2018); *In re* Micelli, 587 B.R. 493 (Bankr. N.D. Ill. 2018); *In re* Williams, 583 B.R. 453 (Bankr. N.D. Ill. 2018); *In re* Romero, 539 B.R. 557 (Bankr. E.D. Wis. 2015); *In re* Sanchez, 384 B.R. 574 (Bankr. D. Or. 2008).

The Commission discussed this split in the case law, noting that it is tied into a larger debate about the extent to which section 1325(a)(5)(B)(iii)(I) allows uneven or balloon payments to secured creditors. The Commission decided not to take a position on the split in the case law. The Commission believes that a uniform resolution of this issue should develop through the normal appellate process.

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 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 (AO) 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).

Background. Bankruptcy law promises fair and equal treatment to creditors and a fresh start to debtors. Whether bankruptcy delivers on these promises depends largely on whether parties have effective legal representation. Attorneys who do not provide competent services disserve not just their clients but the system as a whole.

The American Bankruptcy Institute's National Ethics Task Force addressed attorney competency in its Final Report and listed core competencies required to represent consumer debtors:

> (1) A lawyer should understand and be able to communicate to his or her client the advantages and disadvantages of bankruptcy as a debt-relief remedy.
>
> (2) A lawyer should be familiar with the information necessary to prepare a bankruptcy case. In addition, the lawyer must have developed efficient and effective systems and procedures to obtain from the client the information and documentation required by the Bankruptcy Code.
>
> (3) A lawyer should be aware of the Bankruptcy Code provisions mandating certain disclosures by the lawyer. A lawyer should also know what types of information he or she is required to communicate to consumer debtor clients.
>
> (4) A lawyer should know how to efficiently and effectively prepare and file a bankruptcy petition and the related schedules, statements and other necessary documents.
>
> (5) A lawyer should understand the consumer bankruptcy case process and system and have the skills to represent the debtor's interests diligently in connection with the case proceedings, keep his or her client informed, provide ongoing advice and responses to the debtor's inquiries, and be responsive to inquiries and requests made by the court and by other professionals in the case.[28]

The Ethics Task Force noted that "many, if not all, of these same competencies and skills are required to represent the other parties in interest in bankruptcy cases."[29]

Although many attorneys practice skillfully, bankruptcy courts often face conduct by lawyers that does not meet reasonable expectations or that is not competent to achieve the aims of the lawyer's clients. The standard method of compensation in a consumer-based practice — a flat fee charged all debtors or cascading fixed fees paid to layers of creditors' attorneys — carries with it incentives to reduce the time spent on matters that cut corners or fail to provide the services that clients and the courts expect.

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28 Final Report of the ABI National Ethics Task Force 68-73 (2013) (available at https://abi-org.s3.amazonaws.com/Endowment/Research_Grants/Final_Report_ABI_Ethics_Task_Force.pdf) (last visited Dec. 27, 2018).

29 *Id.* at 66.

Myriad cases illustrate the gravity of such misbehavior. Attorneys have been found so lacking in ethics that a bankruptcy court has sent them back to law school (not to continuing education) to take an ethics course.[30] A national law firm was found to have, "among other things, systematically engaged in the unauthorized practice of law, provided inadequate representation to consumer debtor clients, and promoted and participated in a scheme to convert auto lenders' collateral and then misrepresented the nature of that scheme."[31] Attorneys have factored their clients' receivables and then charged those clients more for the same representation given to a client who paid all cash, after first improperly segregating and categorizing postpetition work as unconnected with the prepetition retention.[32] Beginning in 2015, the Commission understands that the USTP deployed a national strategy to address the problems caused by underperforming or malfeasant attorneys, resulting in a 30% increase in formal actions against consumer attorneys in the 2016 fiscal year.[33]

Attorneys representing creditors also falter. One creditor's attorney filed a proof of claim for which he should have known that the debtor was not liable, was sanctioned $700 for it, and then compounded the error by filing a 102-page motion to reconsider.[34] In another case, a creditor's attorney refused to communicate with the trustee and another creditor about a motion for relief from the automatic stay, causing parties to fly to Puerto Rico only to find that the creditor had withdrawn the motion hours before it was heard.[35] Finally, creditors' attorneys have been sanctioned for filing meritless nondischargeability proceedings simply to gain an advantage over the debtor by imposing additional costs.[36]

Although bankruptcy courts have many diverse tools to address such misconduct, the responses of the courts and the professional community are often inconsistent and ineffective. The success of remedial efforts requires those with discretion to report and address misconduct to be more vigorous in the exercise of their discretion. In particular, the Commission believes that individual attorneys, case trustees, bankruptcy judges, the Office of the United States Trustee, bankruptcy administrators, state bar disciplinary committees, and even United States Attorneys should be more vigorous in the exercise of their discretion to redress ethical lapses. The Commission also encourages the implementation of complementary measures that would provide positive inducements to ethical practice, such as approving increased fees for attorneys who can demonstrate, by professional certification or otherwise, that they practice in an ethical and professional manner.

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30 *In re* Varan, 2014 WL 2881162 (Bankr. N.D. Ill. 2014).

31 U.S. Dep't of Justice, "National Consumer Bankruptcy Law Firm Sanctioned for Harming Financially Distressed Consumers and Auto Lenders" (Feb. 13, 2018), https://www.justice.gov/opa/pr/national-consumer-bankruptcy-law-firm-sanctioned-harming-financially-distressed-consumers-and (characterizing the court's decision in Robbins v. Delafield (*In re* Williams), 2018 WL 832894 (Bankr. W.D. Va. 2018)).

32 *In re* Wright, 591 B.R. 68 (Bankr. W.D. Okla. 2018).

33 U.S. Dep't of Justice Exec. Office of U.S. Trustees, United States Trustee Program Annual Report of Significant Accomplishments Fiscal Year 2016, at 6, available at https://www.justice.gov/ust/file/ar_2016.pdf/download (last visited Jan. 21, 2019) (reporting a 30% increase in FY 2016 for enforcement actions under section 329, which governs debtors' transactions with attorneys, and under section 526, which limits the conduct of debt-relief agencies).

34 *See In re* Falbo, 560 B.R. 203 (Bankr. W.D.N.Y. 2016).

35 *In re* MJS Las Croabas Prop., Inc., 545 B.R. 401 (B.A.P. 1st Cir. 2016).

36 *See, e.g.,* Weinstein, Pinson & Riley, P.S. v. Nelson (*In re* Nelson), 650 F. App'x 528 (9th Cir. 2016).

Recommendation — More Vigorous Use of Existing Disciplinary Tools. The Commission's first recommendation is more vigorous use of the many existing tools available to address attorney misbehavior. Bankruptcy courts already have many means at their disposal to deal with attorney misconduct, including the court's inherent and statutory powers to regulate proceedings and practice before them (including admission and expulsion from the practice before the bankruptcy court); the civil contempt power; the vexatious litigant statute at 28 U.S.C. § 1927 and Federal Rule of Bankruptcy Procedure 9011; discovery provisions such as rule 7037; provisions regarding prosecuting claims filed in bankruptcy including rule 3002.1; the ability to regulate debtors' attorneys' fees under section 329; the regulation of debtor attorneys provided by section 707(b)(4); and finally the referral of attorney misconduct to other bodies, such as making criminal referrals under 18 U.S.C. § 3057 and the power to refer specific instances of misbehavior to state bar disciplinary proceedings. Each of these tools is discussed below.

First, it is generally recognized that bankruptcy courts have the inherent power to regulate the practice of law before them.[37] It is largely irrelevant whether this power is inherent — with no need for a statutory authorization — or is found in the various words and phrases of section 105.[38] Courts may thus regulate who appears before them, and may sanction attorneys or their clients[39] for abuse of process and other harms.[40] As discussed in the next paragraph, the ability to sanction may take the form of civil contempt, or it may take the form of sanctions not otherwise authorized in the Bankruptcy Code or Federal

37 *See, e.g.*, *In re* Volpert, 110 F.3d 494, 500 (7th Cir. 1997) ("We therefore hold that, under 11 U.S.C. § 105(a), bankruptcy courts may punish an attorney who unreasonably and vexatiously multiplies the proceedings before them."); Peugeot v. U.S. Trustee (*In re* Crayton), 192 B.R. 970, 976 (B.A.P. 9th Cir. 1996) ("A bankruptcy court also has the inherent power to suspend or disbar attorneys."); *In re* MPM Enters., Inc., 231 B.R. 500, 503 (E.D.N.Y. 1999) (bankruptcy court has power to permanently disbar attorney from appearing before it); *In re* T.H., 529 B.R. 112, 133 (Bankr. E.D. Va. 2015) (bankruptcy court has the inherent power to regulate attorneys who appear before it); Walton v. Jones (*In re* Shirley), 184 B.R. 613, 617 (Bankr. N.D. Ga. 1995) ("Ample authority exists for a bankruptcy court to hear a challenge to the unauthorized practice of law in connection with a bankruptcy case.").

38 *See* Ngan Gung Restaurant, Inc. v. Official Comm. of Unsecured Creditors (*In re* Ngan Gung Restaurant, Inc.), 195 B.R. 593, 598—99 (S.D.N.Y. 1996) ("It is generally agreed that bankruptcy courts possess the same inherent sanction powers that district courts enjoy. Some courts have held that these inherent powers are specifically derived from 11 U.S.C. § 105(a). . . . Other courts have held that the inherent powers of a bankruptcy court to sanction arise independently of any statutory authority." (citations omitted)); *In re* Hessinger & Assocs., 192 B.R. 211 (N.D. Cal. 1996) (upholding $100,000 fine imposed by bankruptcy court and suspension of firms from practicing before court until fine paid and noting state bar had sanctioned lawyer for actions in case).

39 *In re* Rimsat, Ltd., 212 F.3d 1039, 1048—49 (7th Cir. 2000) (bankruptcy court may use section 105(a) to impose sanctions on all culpable parties); Yukon Energy Corp. v. Brandon Investments, Inc. (*In re* Yukon Energy Corp.), 138 F.3d 1254 (8th Cir. 1998) (court may, under section 105, eject party from courtroom after party, appearing pro se, asked questions regarding witness's belief in the Easter Bunny and Santa Claus, and after being warned about acting uncivilly); Jones v. Bank of Santa Fe (*In re* Courtesy Inns, Ltd.), 40 F.3d 1084, 1089—90 (10th Cir. 1994) (awarding sanctions against sole shareholder of debtor corporation for bad faith filing).

40 United States v. Mourad, 289 F.3d 174 (1st Cir. 2002) (court has power under section 105 to bar vexatious and obstreperous litigant from entering floor of courthouse where case was being heard; litigant could still file papers and check status by telephone); Karsch v. LaBarge (*In re* Clark), 223 F.3d 859 (8th Cir. 2000) (court has power under section 105(a) to sanction attorney, in the amount of the opposition's attorney's fees, for engaging in course of conduct that resulted in non-attorney handling representation of chapter 13 debtors, with attorney only meeting clients at the meeting of creditors); Caldwell v. Unified Capital Corp. (*In re* Rainbow Mag.), 77 F.3d 278, 284 (9th Cir. 1996) (bankruptcy court has power to sanction beyond that authorized in Federal Rule of Bankruptcy Procedure 9011); Havelock v. Taxel (*In re* Pace), 67 F.3d 187 (9th Cir. 1995) (bankruptcy court has power under section 105 to award damages to trustee for violation of section 362 automatic stay notwithstanding limitation in section 362(h) to "individuals"); Deep v. Danaher, 393 B.R. 51 (N.D.N.Y. 2008) (court enjoined individual debtor from filing documents unless court gave prior approval).

Rules of Bankruptcy Procedure,[41] including general damages.[42] In addition, at least one court has held that section 105 authorizes sanctions in the form of fee disgorgement for practices that the court has expressly prohibited.[43]

Second, the majority of cases conclude that all courts, whether created pursuant to Article I or Article III of the Constitution, have inherent civil contempt power to enforce compliance with their lawful judicial orders, and no specific statute is required to invest a court with civil contempt power.[44] Some have argued that this inherent power extends to all contempt sanctions, civil or criminal,[45] while most courts have held that bankruptcy courts have, at most, civil contempt power and power over only a limited set of criminal contempts (such as contempt committed in the presence of the court).[46] In 1986, Congress amended section 105 to add a second sentence to subsection (a) so that it now reads as follows:

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41 Casse v. Key Nat'l Bank Ass'n (*In re* Casse), 198 F.3d 327 (2d Cir. 1999) (using section 105(a) to affirm order prohibiting individual from continuing in the serial filing of petitions); Caldwell v. Unified Capital Corp. (*In re* Rainbow Mag.), 77 F.3d 278, 284 (9th Cir. 1996) (bankruptcy court has power to sanction beyond that authorized in Fed. R. Bankr. P. 9011); Franklin Credit Mgmt. Corp. v. Cook, 551 B.R. 613, 624, 625 (M.D. Tenn. 2016) ("'[Section] 105(a) grants bankruptcy courts the authority to award mild noncompensatory punitive damages . . . where the violation was 'willful' and reflects a 'clear disregard for the bankruptcy laws.'") (citations omitted); *see also* Knupfer v. Lindblade (*In re* Dyer), 322 F.3d 1178, 1191 (9th Cir. 2003); Ocwen Loan Servicing, LLC v. Marino (*In re* Marino), 577 B.R. 772, 788 (B.A.P. 9th Cir. 2017) ("While the Ninth Circuit has stated that the bankruptcy courts are prohibited from assessing any 'serious' punitive damages, it has left open the possibility of 'relatively mild noncompensatory fines.'").

42 Havelock v. Taxel (*In re* Pace), 67 F.3d 187 (9th Cir. 1995) (bankruptcy court has power under section 105 to award damages to trustee for violation of section 362 automatic stay notwithstanding limitation in section 362(h) to "individuals"); *see also* 56 Assocs. v. Diorio, 381 B.R. 431, 440—41 (D.R.I. 2008) (as part of contempt sanction, court ordered contemnor to pay other side's attorney's fees).

43 Cuevas-Segarra v. Contreras, 134 F.3d 458, 459 (1st Cir. 1998) (court ordered disgorgement of fees related to matter settled by lawyers after court expressly refused to approve settlement; court finds "only a hopelessly strained interpretation of the Code would tie the court's hands while attorneys ignore a direct court ruling, hoping that the statute of limitations will run before the creditors, trustees or judge catch on").

44 Alderwoods Grp., Inc. v. Garcia, 682 F.3d 958, 967 n.18 (11th Cir. 2012) ("Civil contempt power is inherent in bankruptcy courts since all courts have authority to enforce compliance with their lawful orders.") (citation omitted); Price v. Lehtinen (*In re* Lehtinen), 564 F.3d 1052, 1058 (9th Cir. 2009); Joubert v. ABN Mtg. Group, Inc. (*In re* Joubert), 411 F.3d 452, 455 (3d Cir. 2005) (stating that section 105 provides bankruptcy courts with a contempt remedy); Jones v. Bank of Santa Fe (*In re* Courtesy Inns, Ltd., Inc.), 40 F.3d 1084, 1089 (10th Cir. 1994) ("We believe, and hold, that [section] 105 intended to imbue the bankruptcy courts with the inherent power recognized by the Supreme Court in [Chambers v. NASCO, Inc., 501 U.S. 32 (1991)]."); Mapother & Mapother, P.S.C. v. Cooper (*In re* Downs), 103 F.3d 472, 477 (6th Cir. 1996) ("Bankruptcy courts, like Article III courts, enjoy inherent power to sanction parties for improper conduct."). *But see* Ortiz v. Aurora Health Care, Inc. (*In re* Ortiz), 665 F.3d 906, 913 (7th Cir. 2011) (drawing distinction between Article III courts and legislative courts, and questioning whether legislative courts have any powers beyond those granted by statute); Solow v. Kalikow (*In re* Kalikow), 602 F.3d 82 (2d Cir. 2010) (rejecting section 105 as an independent basis for imposing sanction when no other provision of the Bankruptcy Code is violated); In re 1990's Caterers Ltd., 531 B.R. 309, 319—20 (Bankr. E.D.N.Y. 2015) ("It is well settled that bankruptcy courts are vested with the inherent authority to enforce compliance with their orders through the issuance of civil contempt orders.").

The Supreme Court has not committed to either view. It has declined to state affirmatively that a bankruptcy court has such inherent powers. In Law v. Siegel, 571 U.S. 415 (2014), the Court twice referred to inherent powers of bankruptcy courts, but each time conditioned the statement with language indicating that the issue has not yet been decided. *See id.* at 421 (stating that bankruptcy court "*may* also possess 'inherent power . . . to sanction "'abusive litigation practices.'"" (emphasis supplied)); *id.* at 427 ("The court *may* also possess further sanctioning authority under either § 105(a) or its inherent powers." (emphasis supplied)).

45 On the difference between civil and criminal contempt, *see* Stockschlaeder & McDonald, Esqs. v. Kittay (*In re* Stockbridge Funding Corp.), 158 B.R. 914 (S.D.N.Y. 1993). A cogent argument that criminal contempt powers reside in bankruptcy courts is laid out in John A. E. Pottow & Jason S. Levin, *Rethinking Criminal Contempt in The Bankruptcy Courts*, 91 Am. Bankr. L.J. 311 (2017).

46 Cox v. Zale Delaware, Inc., 239 F.3d 910 (7th Cir. 2001); Pertuso v. Ford Motor Credit Co., 233 F.3d 417, 423 n.1 (6th Cir. 2000); Bessette v. Avco Fin. Servs., Inc., 230 F.3d 439 (1st Cir. 2000); Placid Refining Co. v. Terrebonne Fuel & Lube, Inc. (*In re* Terrebonne Fuel & Lube, Inc.), 108 F.3d 609, 613 (5th Cir. 1997); Eck v. Dodge Chem. Co. (*In re* Power Recovery Sys., Inc.), 950 F.2d 798, 802 (1st Cir. 1991); Mountain America Credit Union v. Skinner (*In re* Skinner), 917 F.2d 444, 447 (10th Cir. 1990); Burd v. Walters (*In re* Walters), 868 F.2d 665, 669 (4th Cir. 1989); *see also In re* Hipp, Inc., 895 F.2d 1503, 1515-16 (5th Cir. 1990) (no criminal contempt power in section 105); *In re* Lawrence, 164 B.R. 73 (W.D. Mich. 1993) (following *Hipp*). *But cf.* Brown v. Ramsay (*In re* Ragar), 3 F.3d 1174, 1179 (8th Cir. 1993) ("With all respect, we think [*Hipp*] is simply wrong.").

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent any abuse of process.[47]

Several courts have held that the addition of the second sentence to section 105 indicates that Congress meant section 105 to serve as the statutory basis for the civil contempt power of bankruptcy judges.[48]

Third, the federal vexatious litigant statute is aimed at "penalizing conduct that unreasonably and vexatiously multiplies the proceedings."[49] It provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.[50]

One problem with the application of this statute is that not all circuits recognize bankruptcy courts as "courts of the United States," which is a requirement for the application of the statute. As noted in a recent law review note, "[a] slim majority of circuit courts counts the bankruptcy courts as 'courts of the United States,' while the minority does not grant this status."[51]

Fourth, Federal Rule of Bankruptcy Procedure 9011 governs pleadings filed and positions taken in court. It could come into play if an attorney (or an unrepresented litigant) files foolish or frivolous pleadings. Rule 9011's language is quite broad. If the court finds an attorney or party to have violated the rule's terms, it permits the court to unilaterally impose "directives of a nonmonetary nature, [or] an order to pay a penalty into court." In response to a party's motion, the rule additionally allows an order for payment of the party's reasonable fees and expenses. The text, however, does require that "[a] sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Also, rule 9011's "safe harbor" provisions often

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47 Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 203, 100 Stat. 3088, 3097. In 1984, Congress had previously amended section 105(a) to change "bankruptcy court" to "court." *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 118, 98 Stat. 333, 344.

48 *See In re* Matthews, 184 B.R. 594 (Bankr. S.D. Ala. 1995); *In re* Duggan, 133 B.R. 671 (Bankr. D. Mass. 1991); *In re* Stephen W. Grosse, P.C., 84 B.R. 377, 386 (Bankr. E.D. Pa. 1988); *In re* Miller, 81 B.R. 669, 676-78 (Bankr. M.D. Fla. 1988).

49 Fink v. Gomez, 239 F.3d 989, 991 (9th Cir. 2001).

50 28 U.S.C. § 1927.

51 Angelo G. Labate, Note, *Bankruptcy's Gray Area: Are Bankruptcy Courts "Courts Of The United States"?,* 92 Notre Dame L. Rev. 1815, 1818 (2017). The article cites the following cases as holding that bankruptcy courts are courts of the United States: *In re* Schaefer Salt Recovery, Inc., 542 F.3d 90, 102—05 (3d Cir. 2008); Adair v. Sherman, 230 F.3d 890, 895 n.8 (7th Cir. 2000); Baker v. Latham Sparrowbush Assocs. (*In re* Cohoes Indus. Terminal, Inc.), 931 F.2d 222, 230—31 (2d Cir. 1991). It then notes that these cases hold that bankruptcy courts are not "courts of the United States": Jones v. Bank of Santa Fe (*In re* Courtesy Inns, Ltd.), 40 F.3d 1084, 1086 (10th Cir. 1994); IRS v. Brickell Inv. Corp. (*In re* Brickell Inv. Corp.), 922 F.2d 696, 699 (11th Cir. 1991). One can add the Ninth Circuit to this list as well. Miller v. Cardinale (*In re* DeVille), 361 F.3d 539, 546 (9th Cir. 2004) ("The Ninth Circuit does not regard a bankruptcy court as a 'court of the United States.'").

make it difficult to obtain effective relief, because chronic violators may fix the problem in individual cases while repeating their behavior.

Fifth, Federal Rule of Bankruptcy Procedure 7037 expressly incorporates Federal Rule of Civil Procedure 37, which would include rule 37(a)(3)(A)'s sanctions provisions: "If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions." Rule 37(b) also contains provisions regarding sanctions for failure to comply with a court order. Sanctions are also authorized for failure to disclose or update a disclosure under rule 37(c), and for failure to attend a deposition or provide answers to written discovery under rule 37(d). All of these powers are available to a bankruptcy court.

Sixth, the bankruptcy claims process has provisions authorizing courts to police misconduct. As discussed in more detail elsewhere, Federal Rule of Bankruptcy Procedure 3002.1(g) requires mortgage creditors to file a response to a notice of final cure providing the creditor's accounting of the status of the debtor's mortgage just prior to plan completion.[52] This rule has its own sanctions provision, allowing courts to preclude creditors from presenting evidence of obligations that were not disclosed.[53] It has not been generally interpreted to permit awards of monetary damages in addition.[54] The Commission has recommended amendment of the rule to allow a trustee or debtor to file a motion to compel a statement by a creditor, to provide for payment of attorney's fees to a successful movant, and to treat failure to comply as a contempt of court.[55]

Seventh, section 329 permits a court to monitor the fees charged by debtors' attorneys during the year preceding the filing of a case. If the court believes the "compensation [provided in any retainer agreement] exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive. . . ."[56] As summarized by the Seventh Circuit:

> Section 329(b) authorizes the court to assess the reasonable value of the services counsel provided to the debtor and to compare that value with the amount the debtor paid or agreed to pay for the attorney's services. If the court determines that the fee charged by the attorney is excessive — i.e., that it exceeds the reasonable value of the services provided — then it may cancel any compensation agreement between the attorney and his client, or it may order the return of the excessive portion of the fee to the debtor's estate or to the entity making the payment.[57]

52 *See* § 2.07 Improvements in Federal Rule of Bankruptcy Procedure 3002.1 — Payment Change Notices and Notices of Final Cure.

53 *See* Fed. R. Bankr. P. 3002.1(i).

54 *See* PHH Mtg. Corp. v. Sensenich, 2017 WL 699820, at *5 (E.D. La. 2017) ("The parties have not cited and the court has not found any case from any American jurisdiction in which a bankruptcy court has imposed sanctions on this basis and in this manner."); *In re* Tollstrup, 2018 WL 1384378, at *5 (Bankr. D. Or. 2018) ("I conclude that Rule 3002.1 does not permit me to impose punitive monetary sanctions.").

55 *See* § 2.07 Improvements in Federal Rule of Bankruptcy Procedure 3002.1 — Payment Change Notices and Notices of Final Cure.

56 11 U.S.C. § 329(b); *see also* Fed. R. Bankr. P. 2017 (providing similar authority).

57 *In re* Geraci, 138 F.3d 314, 318 (7th Cir. 1998).

Moreover, as stated by the Ninth Circuit's Bankruptcy Appellate Panel, "The reasonable value of services rendered by a debtor's attorney 'is a question of fact to be determined by the particular circumstances of each case. The requested compensation may be reduced if the court finds that the work done was excessive or of poor quality.'"[58]

Eighth, debtors' attorneys must prepare petitions, statements, and schedules with care. Indeed, section 707(b)(4) allows a court to order the attorney to pay the attorney's fees and other costs of a trustee who successfully prosecutes a motion for dismissal or conversion of a chapter 7 case on the ground the filing constituted an abuse of the Bankruptcy Code under section 707(b). The court must follow the procedures of Federal Rule of Bankruptcy Procedure 9011. The court also can impose a civil penalty on the attorney. The obligations imposed by section 707(b)(4) are not new. As summarized by one bankruptcy court:

> To comply with Section 707(b)(4)(C), the attorney must perform an objectively reasonable investigation into the circumstances giving rise to the petition, assessed at the time the petition was filed. 11 U.S.C. § 707(b)(4)(C) (2012). The attorney cannot take all of the client's assertions at face value nor rely solely upon the information provided by the client. The attorney may rely on her client's objectively reasonable assertions, but where the client-provided information is internally (or externally) inconsistent, materially incomplete, or raises "red flags," the attorney is obligated to probe further — by asking questions, obtaining additional documents, or by some other means. [T]he attorney is the expert and cannot rely upon a client's limited understanding of what constitutes the "complete" or "necessary" information that the attorney must have nor what information is or is not relevant to the client's particular situation.[59]

Ninth, many agencies and organizations outside of the bankruptcy system regulate attorneys. Indeed, the default regulator of attorneys is the local state bar organization. Often, bankruptcy judges can refer instances of misbehavior to these entities so that they can exercise their duties to police attorney behavior.[60] In addition, bankruptcy judges and trustees have a statutory duty to report to the applicable United States attorney when they have "reasonable grounds for believing" a bankruptcy crime has been committed.[61]

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58 *In re* Nakhuda, 544 B.R. 886, 902 (B.A.P. 9th Cir. 2016), *aff'd*, 703 F. App'x 621 (9th Cir. 2017) (quoting *In re* Spickelmier, 469 B.R. 903, 914 (Bankr. D. Nev. 2012)).

59 *In re* Seare, 493 B.R. 158, 211 (Bankr. D. Nev. 2013), *as corrected* (Apr. 10, 2013), *aff'd*, 515 B.R. 599 (B.A.P. 9th Cir. 2014); *see also* Am. Bar. Ass'n Section of Bus. Law, Task Force on Attorney Discipline, *Attorney Liability Under Section 707(b)(4) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 61 Bus. Law. 697, 703-04 (2006).

60 *See, e.g.*, *In re* Irons, 379 B.R. 680, 684 (Bankr. S.D. Tex. 2007) ("The Court could refer counsel who violated State Bar obligations to the appropriate disciplinary authorities."); *see also In re* Brandt, 2017 WL 3382310, at *3 (Cal. Bar Ct. 2017) (noting referral from bankruptcy court had initiated proceeding).

61 The statute provides:

> Any judge, receiver, or trustee having reasonable grounds for believing that any violation under chapter 9 of this title or other laws of the United States relating to insolvent debtors, receiverships or reorganization plans has been committed, or that an investigation should be had in connection therewith, *shall report* to the appropriate United States attorney all the facts and circumstances of the case, the names of the witnesses and the offense or offenses believed to have been committed.

In summary, there is not a need for new substantive provisions to address attorney misconduct. The Commission's recommendation is for more vigorous use of the provisions that already exist.

Recommendation — Creation of Local Disciplinary Tribunals and Procedures. Although there are many tools to combat sloppy, incompetent or unethical practices, these tools each have their own special requirements and often apply only to particular types of parties or in specialized situations. Furthermore, there is no incentive for a bankruptcy judge to actively police attorney conduct (other than the generalized hope that by adjusting the behavior of some attorneys, the average level of representation will rise for all clients). Indeed, given the propensity and incentive for the sanctioned lawyer to appeal, the sanctioning judge may have to work harder. This conundrum was captured by Professor Nancy Rapoport:

> When judges write sanctions opinions, they're writing them after very long days, and they're writing them very carefully. After all, if a lawyer is on the wrong side of a court-initiated sanctions opinion and decides to appeal, the lawyer gets to write a brief, designate the record, and argue the appeal. The judge who wrote the sua sponte sanctions opinion, however, only stands on the opinion — there is no advocate automatically arguing for the judge's view of what happened. . . . If the judge doesn't do a good job of explaining why the sanction was necessary (and assuming that the sanction was necessary), then the opinion will be reversed on appeal, and the misbehaving lawyer will learn nothing from the experience.[62]

The creation of local tribunals would remove the bankruptcy judge from the combined and conflicted roles of investigator, prosecutor, arbiter, jury, and punisher. Some districts have local rules that allow a judge to refer suspected misbehavior to a panel of attorneys or judges. These panels are then empowered to investigate and then, if appropriate, impose a large range of sanctions.

For example, the Northern District of California appoints a standing committee to act as special counsel in disciplinary matters,[63] and judges in the district may refer disciplinary matters to the committee or to the chief judge.[64] After an investigation, the committee can resolve the matter informally or by consent. If the committee recommends public reprimand, suspension, disbarment, monetary sanctions or other formal sanctions and the attorney does not consent, then the committee initiates a civil petition in the district court.[65] The disciplinary process has been made applicable to proceedings in the bankruptcy court.[66] The Bankruptcy Appellate Panel for the Ninth Circuit explained: "The rationale for this

18 U.S.C. § 3057(a) (emphasis supplied).

62 Nancy B. Rapoport, *Through Gritted Teeth and Clenched Jaw: Court-Initiated Sanctions Opinions in Bankruptcy Courts*, 41 St. Mary's L.J. 701, 706 (2010).

63 N.D. Cal. R. 11-6(c).

64 *Id.* R. 11-6(a).

65 *See id.* R. 11-6(d).

66 *See* Bankr. N.D. Cal. R. 1001-2(a) (incorporating local district court rule 11-6).

recommendation is that it 'relieves a court from serving in the dual roles of prosecutor and arbiter in the investigation, prosecution and discipline of attorneys.'"[67]

Another example comes from the Northern District of Illinois, which allows anyone, including one of the court's judges, to file a complaint alleging that an attorney violated a disciplinary rule of the court. After an opportunity for response from the attorney, the bankruptcy court by majority vote determines whether the complaint should be pursued, and if so, the court issues a statement of charges for the attorney to answer. The U.S. Trustee may accept an appointment from the court to investigate and prosecute the charges, and if the U.S. Trustee declines the appointment, the court may request a member of the bar to undertake the investigation and prosecution. The chief judge of the bankruptcy court appoints one of the bankruptcy court's judges to preside over any hearing and issue a written decision, appealable to the executive committee of the district court. This procedure substantially reduces the conflicting disciplinary roles of bankruptcy judges. It removes a complaining judge from the need to prosecute and adjudicate charges of misconduct arising from behavior in that judge's case, and it removes the court from presenting evidence that a judge of the court would have to evaluate.[68]

Creation of disciplinary boards by local rule has many advantages. As the Ninth Circuit's Bankruptcy Appellate Panel noted, such boards relieve the individual bankruptcy judge from being the prosecutor and judge in the same matter, and they can spread the work around available judges or allocate initial work to local attorneys. The participation of local attorneys also provides a visible commitment to the ethical practice of law from the professional community as a whole. The rules themselves serve as notice of how such misbehavior will be treated, and so provide a warning of the potential consequence of the misbehavior.

Recommendation — Recognition of Board Certification. Section 330(a)(3)(E) expressly authorizes a bankruptcy court to consider professional certification in determining whether an attorney's fee is reasonable. The Commission believes that board certification should be considered by courts in policing attorney's fees generally. Indeed, part of the Commission's recommendation on presumptively reasonable attorney's fees is that professional board certification serves as a factor in setting such professional fees.[69] Local rules should specify enhancements allowed for board certification, including provisions adjusting the enhancement when not all attorneys in a firm are board certified. Such provisions would encourage certification, which in turn would encourage attorneys to gain further professional education in bankruptcy law.

Recommendation — Uniform Docketing and Report. The Commission has recommended that the AO promote uniform docketing practices generally, including naming conventions for pleadings, events,

67 Price v. Lehtinen (*In re* Lehtinen), 332 B.R. 404, 413 (B.A.P. 9th Cir. 2005) (quoting *In re* Crayton, 192 B.R. 970, 980 (B.A.P. 9th Cir. 1996)), *aff'd*, 564 F.3d 1052 (9th Cir. 2009).

68 Bankr. N.D. Ill. R. 9029-4B.

69 *See* § 3.03 Presumptive Reasonable Attorney's Fees in Chapter 13s.

and party names.[70] The Commission believes uniform docketing practices are especially important to allow interested parties — including other courts and lawyers, potential clients, disciplinary bodies, and the press — to know about disciplinary orders. Disciplinary orders are entered only after due process in a court, and there is no reason such orders should be difficult to locate.

Uniform docketing also would facilitate the creation of an annual report by the AO documenting the incidence of disciplinary orders, including the type of party — debtor, creditor, government agency, trustee — that the disciplined attorney was representing. Such a report would provide an understanding of the scope of disciplinary problems in bankruptcy court and whether the incidence of disciplinary orders is changing over time. Courts and disciplinary bodies also would have an understanding of the range of sanctions being imposed for categories of misconduct. The spirit of the Commission's recommendation on docketing practices as they relate to disciplinary orders is Justice Brandeis's wisdom that sunlight is the best of disinfectants.[71]

§ 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 USTP, 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.

Background. By "stand-in counsel," the Commission means an attorney engaged by a represented party's attorney to appear in a matter but who does not have authority to act on behalf of the represented party. Stand-in counsel is also referred to as "appearance counsel." The concept of stand-in counsel applies throughout all areas of law, and attorneys use stand-in counsel for many different reasons. In

70 *See* § 5.07 Case Management (CM)/Electronic Case Filing (ECF) & Docketing Improvements.

71 Louis Dembitz Brandeis, Other People's Money: And How the Bankers Use It 92 (1914).

a consumer bankruptcy case, attorneys often engage stand-in counsel to ease scheduling conflicts.[72] Consumer bankruptcy attorneys — both those representing debtors and those representing creditors — often carry considerable caseloads, and the bankruptcy cases often involve proceedings that are routine.

The use of stand-in counsel raises ethical issues. Model Rule of Professional Conduct 1.1 requires that a lawyer provide competent representation. Comment 6 to this rule expands on the duties attorneys must fulfill before retaining a lawyer who is not a member of their firm:

> Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. . . . The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

Whatever benefits come from engaging stand-in counsel, they cannot override the professional obligation to provide competent representation. It is the Commission's sense that bankruptcy courts have become increasingly frustrated with the problems that unprepared stand-in counsel can create. In one case, debtor's counsel had hired stand-in counsel to attend two meetings of creditors in which the debtor truthfully testified about mistakes debtor's counsel had made in the bankruptcy schedules.[73] On both occasions, stand-in counsel had no knowledge about the case and was unable to provide any guidance to the debtor or the trustee. Judge Sean Lane expressed his concern:

> [T]his case starkly highlights the perils of the use of appearance counsel. Such counsel are attorneys who appear at proceedings at the request of, and on behalf of, the debtors' chosen attorney. As other courts have observed, these lawyers are generally not disclosed to the Court or to the Chapter 7 trustee before their appearance, and debtors are usually unaware that an appearance attorney will be representing them until right before the meeting or hearing. . . .
>
> All these significant concerns are only heightened by the apparently widespread (and increasing) use of appearance counsel in Chapter 7 cases. While the Court is not in a position to assess such trends directly — because the Court does not participate in 341

72 The engagement of true local counsel or specialized counsel is not the subject of the recommendations in this section. In chapter 11 cases, engagement of local counsel or specialized counsel is often done for very different reasons than in a consumer case. As discussed in the Foreword, the Commission expresses no opinion on the application of its recommendations outside of consumer bankruptcy.

73 *In re D'Arata,* 587 B.R. 819 (Bankr. S.D.N.Y. 2018).

> meetings — members of the bar who serve as trustees in Chapter 7 cases have helpfully provided information about current trends. They paint a disturbing picture. Indeed, one Chapter 7 trustee in this jurisdiction stated that use of appearance counsel at 341 meetings "has substantially increased in frequency in recent years and has become, unfortunately, a common practice in the Southern District."[74]

Having failed to provide competent representation, the court ordered debtor's counsel to return the entire attorney's fee to the debtor.[75]

In a thorough opinion about attorney misconduct in a case before him, Judge Jeff Bohm expressed similar frustrations about an attorney who routinely used stand-in counsel at section 341 meetings.[76] In that case, the debtor met with stand-in counsel just before the section 341 meeting and discovered forgeries and errors in the documents, including a notice of conversion that the debtor's attorney had prepared. The stand-in counsel had no knowledge about the case and was not prepared to address the deficiencies in the documents. Judge Bohm lamented the "lack of accountability" that stand-in counsel often displayed and that the use of stand-in counsel often leads to "lazy and poor lawyering."[77] After considering all of the facts, Judge Bohm banned the use of stand-in counsel in all future cases before him, commenting, "Attorneys are not fungible."[78]

The problem is not limited to debtor's counsel. In another case, for example, a secured creditor had filed a pro forma objection to confirmation of a chapter 13 plan riddled with mistakes. The firm representing the secured creditor hired stand-in counsel who appeared at the confirmation hearing but was not prepared to prosecute the objection. When the debtor reasserted in open court its written response that the real property in question was not the debtor's principal residence, stand-in counsel said his instructions in that instance were to ask for a continuance.[79] Finding secured creditor's counsel in violation of local rules on stand-in counsel and considering other violations, the court later imposed a fine of $75,000.[80]

Commentators also have highlighted the problems that can come from stand-in counsel. Over two decades ago, Judge Geraldine Mund wrote, "While certain appearance attorneys are extremely capable and ably represent the client, others are mere drones who give inadequate representation."[81] Writing with his law clerk, Judge Alan Trust said he tolerates stand-in counsel for uncontested matters and

74 *Id.* at 825-26, 828.

75 *Id.* at 829.

76 *In re* Bradley, 495 B.R. 747 (Bankr. S.D. Tex. 2013).

77 *Id.* at 804.

78 *Id.* at 808.

79 *See In re* Allen, 2007 WL 115182 (Bankr. S.D. Tex. 2007).

80 *See In re* Allen, 2007 WL 1747018 (Bankr. S.D. Tex. 2007).

81 Geraldine Mund, *Paralegals: The Good, the Bad, and the Ugly*, 2 Am. Bankr. Inst. L. Rev. 337, 343 (1994).

"frowns" on the practice for contested matters, commenting that a colleague will ask stand-in counsel who disclaims knowledge about a case, "'Then why do I care about anything you are about to say?'"[82]

Recommendation. The Commission recommends the adoption of rules to govern stand-in counsel. These rules should have best practices specific to bankruptcy that ensure clients receive competent and ethical representation. Because appropriate use of stand-in counsel promotes the efficient practice of law, which redounds to the benefit of clients, the Commission's recommendation rejects an outright ban on the use of stand-in counsel.

The Commission's approach is consistent with the only formal ethics opinion of which the Commission is aware that addresses the use of stand-in counsel in bankruptcy specifically.[83] This opinion allows the use of stand-in counsel in bankruptcy but requires the attorney to follow ethical safeguards. It states that stand-in counsel must determine whether there are conflicts of interest and must prepare adequately. A recent article by Elizabeth Stephens came to a similar conclusion. After outlining the sanctions that courts can impose for inappropriate use of stand-in counsel, the article concluded that employing stand-in counsel was not unreasonable per se and recommended a number of measures, including advance disclosure of stand-in counsel to make it possible for the client to give informed consent.[84] Stephens also suggests other steps that promote the ethical use of stand-in counsel: (1) sufficiently informing the client of the benefits and disadvantages of stand-in counsel, (2) giving clear communication to the client of how stand-in counsel is compensated, (3) ensuring that the stand-in counsel reviews the petition and case notes at least forty-eight hours in advance, and (4) requiring that stand-in counsel report the results of their work back to the debtor's counsel.[85] The rules on stand-in counsel should consider specifying categories of routine matters, such as uncontested motions to terminate the stay, motions to terminate the section 1301 codebtor stay, and motions to redeem, for which retention of stand-in counsel is most likely to be appropriate.

In addition to rules on stand-in counsel, the Commission recommends that Federal Rule of Bankruptcy Procedure 9010 should be amended to provide that any attorney's entry of appearance must disclose any limitations on the attorney's representation. Rule 9015(b) requires an attorney to file a notice of appearance, "unless the attorney's appearance is otherwise noted in the record." If the attorney made the notice of appearance in open court, the attorney would disclose the limitation verbally as part of the notice of appearance. The failure to disclose a limitation would mean the attorney was deemed to represent the client for all purposes. Requiring disclosure of the limitation would give notice to all parties and the court, as well as focus the attorney's attention on the ethical

82 Alan S. Trust & Michael A. Pantzer, *Does Sending or Being an Appearance Attorney Have an 80 Percent Chance of Success?*, Am. Bankr. Inst. J., July 2017, at 14, 15.

83 N.C. State Bar, "Covering" a Bankruptcy Proceeding for Another Lawyer, 99 Formal Ethics Op. 12 (Jan. 21, 2000), https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/99-formal-ethics-opinion-12/ (last visited Dec. 31, 2018); *see also* W. Va. Legal Ethics Op. 2015-01, Use of Stand-In Counsel, W. Va. Law., Dec. 2015, at 48 (opining about the ethical rules applicable to the use of stand-in counsel generally), available at http://www.wvodc.org/pdf/LEO%202015%20-%2001.pdf (last visited Dec. 31, 2018).

84 *See* Elizabeth Stephens, *Using Appearance Counsel in Court: Risky Business?*, Am. Bankr. Inst. J., Nov. 2018, at 14, 62 (citing *In re* Bernhardt, 2012 WL 646150, at *5 (Bankr. D. Colo. 2012)).

85 *Id.* at 62.

considerations of serving as stand-in counsel. In individual cases, a court could modify the rule in the interest of justice.

The need for stand-in counsel arises, in part, due to the time and expense pressures of travel required for attendance at court hearings and section 341 meetings. Bankruptcy representation, particularly consumer debtor representation, often is conducted with limited resources, and in large federal districts, the cost of travel can be burdensome for matters involving little or no dispute. Travel expenses are also an issue for attorneys representing creditors, and many attorneys hired by large national and regional creditors face additional costs as they often must cover geographic areas encompassing multiple court districts. A more complete solution to the problems of stand-in counsel requires taking measures to reduce the need for stand-in counsel.

Therefore, the Commission recommends that bankruptcy courts adopt local rules to allow appropriate video and telephonic hearings to reduce costs for all litigants, including debtors, and save travel time for court staff, all litigants and attorneys. Technology allows for timely hearings, increases access to the courts, and maximizes the use of court resources. Of course, not all hearings may be appropriately held by video or telephonic means, and when technology is utilized, efforts must be made to ensure that the dignity of the court and its proceedings are maintained.

Another step that would reduce the need to use stand-in counsel is the use of "negative notice," sometimes called "passive motions" or "passive notice." With the most common negative notice procedures, the moving party sets the matter for hearing and gives interested parties notice of the hearing together with a statement warning that if there is no response by a date certain, the movant may file an affidavit of no response with the clerk and tender a proposed default order to the court for its consideration. Bankruptcy courts already have adopted varying approaches to these negative-notice procedures based on their own local practices and interpretations of the Bankruptcy Code.[86]

The Commission encourages the use of negative-notice procedures as another means of reducing the burden and expense of uncontested court hearings for the courts, attorneys and all parties. Recognizing the need for each court to adopt procedures relevant to its local practice, no specific form local rule on negative notice is proposed. However, such rules would typically address the following points:

(1) itemization of the types of matters where negative-notice procedures may be employed;

(2) determination of whether a matter will be docketed for a particular calendar date in the event of opposition or whether such date will only be noticed upon the filing of a responsive pleading;

86 For example, the District of Rhode Island enumerates motions for which opposition must be filed within fourteen days after service, and if no objection is timely filed, then the court may enter an order granting the relief requested in the motion. Bankr. D.R.I. 1005-1, 9013-2(a). The District of Vermont similarly provides that if the respondent fails to respond at least seven days prior to the scheduled date of a hearing, the court may consider the matter on the pleadings. Bankr. D. Vt. R. 9013-4.

(3) inclusion of a specific and clear notice to the recipient of the motion that the court may grant relief in the absence of an affirmative timely response; and

(4) specification as to whether the movant must take further action upon the default of the respondent or whether the court independently monitors the respondent's default for the consideration of a final order.

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.

Credit Counseling. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) added a new eligibility rule that requires an individual to complete a credit counseling course in the 180 days before filing.[87] The credit counseling must be "an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted [the] individual in performing a related budget analysis."[88] Section 111 provides criteria by which the USTP maintains a list of approved providers that can provide the credit counseling.[89]

As an eligibility rule, the credit counseling requirement is a gateway through which all individuals must pass before they are eligible to file bankruptcy, regardless of which chapter they choose. At the time of filing, an individual must file with the court a certificate of completion of the credit counseling course and any debt-repayment plan developed by the credit counseling agency.[90]

87 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 106, 119 Stat. 23, 37-38 (adding section 109(h) to the Bankruptcy Code).

88 11 U.S.C. § 109(h)(1); *see also* 28 C.F.R. §§ 58.12—58.24 (setting forth regulations of the USTP to be an approved credit-counseling agency).

89 *See* U.S. Trustee Program, List of Approved Credit Counseling Agencies Pursuant to 11 USC § 111, https://www.justice.gov/ust/list-credit counseling-agencies-approved-pursuant-11-usc-111.

90 *See* 11 U.S.C. § 521(b).

There are several exceptions. The credit counseling requirement does not apply to a debtor who tried but was unable to obtain credit counseling from an approved agency for seven days and "describes exigent circumstances that merit a waiver" that are "satisfactory to the court."[91] The requirement also does not apply to debtors who are unable to complete credit counseling because of "incapacity, disability, or active military duty in a military combat zone."[92] The USTP also can waive the credit counseling requirement for districts where it determines that approved credit counseling agencies are not "reasonably available."[93] These exceptions are uncommonly used. Expanding the type or availability of the exceptions would not address the Commission's concern that the cost of the credit counseling requirement outweighs its benefit.

BAPCPA added the credit counseling requirement to help individuals consider their options before filing bankruptcy. The House Report explained:

> [BAPCPA] requires debtors to receive credit counseling before they can be eligible for bankruptcy relief so that they will make an informed choice about bankruptcy, its alternatives, and consequences. The bill also requires debtors, after they have filed for bankruptcy, to participate in financial management instructional courses so they can hopefully avoid future financial distress.[94]

A report from the Government Accountability Office (GAO) further elaborated that the required prebankruptcy credit counseling was "to ensure consumers understand the options available to them and the consequence of filing for bankruptcy."[95]

The almost universal experience of professionals in the bankruptcy system is that credit counseling has not furthered these congressional goals. In practice, the credit counseling requirement creates a cost and a hurdle to consumers with little to no corresponding benefit. Public comments to the Commission were numerous and overwhelmingly in favor of eliminating the credit counseling requirement. Whatever benefits prepetition credit counseling might offer in theory, experience has shown differently. Therefore, the Commission recommends Congress eliminate prepetition credit counseling as a requirement to be eligible to file bankruptcy.

Independent research studies describe generally unfavorable impressions of prebankruptcy credit counseling. Professor Michael Sousa states, "The prefiling credit counseling course comes at a point in time when it is too late to remedy the financial storm experienced by most people. Indeed, debtors are simply 'too far gone' financially to utilize bankruptcy alternatives."[96] In a study based on interviews and a review of credit counseling materials, the GAO concluded:

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91 *Id.* § 109(h)(3).

92 *Id.* § 109(h)(4).

93 *Id.* § 109(h)(2).

94 H.R. Rep. No. 109-31, pt. 1, at 2-3 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 89.

95 Gov't Accountability Office, Bankruptcy Reform: Value of Credit Counseling Requirement Is Not Clear 1 (2007).

96 *See* Michael D. Sousa, *Just Punch My Ticket: A Qualitative Study of Mandatory Debtor Financial Education*, 97 Marq. L. Rev. 391, 463 (2013). Professor Sousa also concludes that the prepetition credit counseling requirement should be "repealed *in toto*." *Id.*

> [T]he value of the prefiling credit counseling requirement is not clear. The requirement was intended to provide consumers with information about bankruptcy and its alternatives so they can make informed decisions about their options. In practice, however, anecdotal evidence strongly suggests that most consumers have no realistic alternative to bankruptcy by the time they receive the counseling. As such, a wide range of stakeholders view the prefiling counseling requirement as an administrative obstacle rather than a useful exercise. It is therefore uncertain whether the requirement is achieving its key goal of helping consumers determine whether or not to file for bankruptcy. Better data on the outcomes of prefiling credit counseling would help program managers and policymakers determine its value. In particular, it would be useful to confirm whether, as many believe, nearly all consumers who receive prefiling counseling subsequently file for bankruptcy.[97]

Of the individuals who get a credit counseling certificate of completion, 85-90% then file bankruptcy.[98] These figures suggest that credit counseling is leading some persons to find alternatives to a bankruptcy filing. However, the actual percentage of persons who file bankruptcy after receiving the required credit counseling may be higher than 85-90% because the certificate expires after six months, and the available statistics do not distinguish between persons who get the certification more than once. Lengthy delays in filing bankruptcy are not uncommon even after consultation with a bankruptcy lawyer, meaning debtors may go through the credit counseling more than once and then file. In an interview study, Professor Sousa reports a credit counselor as saying that most individuals contact the agency after a recommendation from a lawyer to file bankruptcy and indicating that "'very few' individuals have opted to pursue an alternative path from bankruptcy when one was even available due to some disposable income to pay down their debts over time."[99] Also, because there are many reasons why people choose to file or not file bankruptcy, it is impossible to say whether required credit counseling is screening people from the bankruptcy system or whether other factors are leading to that decision. Even if credit counseling does screen out some debtors from bankruptcy, there is no way to know whether the decision was in the debtor's best interest.

The average cost for credit counseling is $25 with fee waivers for 19% of the debtors who cannot afford it.[100] Thus, the out-of-pocket cost alone generally will not be a substantial hurdle for most debtors, although the Commission is mindful of Justice Thurgood Marshall's admonition not to dismiss summarily the barriers to justice that even small amounts of money can be to the working poor.[101]

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97 Gov't Accountability Office, *supra* note 95, at 39.

98 *See* U.S. Trustee Program, Director Addresses the 52nd Annual Seminar of Chapter 13 Trustees (July 31, 2017), https://www.justice.gov/ust/speeches-testimony/director-addresses-52nd-annual-seminar-national-association-chapter-13-trustees (reporting 10-15% of debtors do not file after seeking a bankruptcy counseling certificate) [hereafter U.S. Trustee Program 2017 Director Address].

99 Sousa, *supra* note 96, at 437; *see also* National Consumer Law Ctr., New Burdens but Few Benefits: An Examination of the Bankruptcy Counseling and Education Requirements in Massachusetts 24 (2007) (finding in interviews with agency directors that 1-4% of debtors enter into a debt-management plan after undergoing prebankruptcy credit counseling).

100 *See* U.S. Trustee Program 2017 Director Address, *supra* note 98.

101 *See* United States v. Kras, 409 U.S. 434, 460 (1973) (Marshall, J., dissenting) ("It may be easy for some people to think that weekly savings of less than $2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are.").

The biggest barriers come from the practical limitations of how individuals can access required credit counseling. The lowest-cost counseling tends to be limited to debtors with easy internet access, which is in short supply in many low-income households. Also, there is often a not-insignificant expenditure of time from individuals who must go through the counseling. The options narrow further with an individual's language or literacy restrictions.

The credit counseling requirement falls heavily on unrepresented debtors who often may not realize they need a credit counseling certificate to file bankruptcy. Unrepresented debtors who file bankruptcy without a credit counseling certificate will not receive a discharge and will find their case being dismissed.[102] The dismissal will trigger the possibility the debtor will lose the benefit of the automatic stay in a subsequent case filed in the next year.[103] Thus, the credit counseling requirement sets up a trap for the unrepresented debtor not only in the current case, but in a future case that the debtor might file to fix the technical deficiency of not having a credit counseling certificate.[104]

From their experience on the bench, bankruptcy courts have questioned whether the credit counseling requirement delivers on its claim of diverting debtors to bankruptcy alternatives. For example, Judge Cecilia Morris wrote:

> Congress envisioned that credit counseling would provide individuals with the skills necessary to lead financially responsible lives. This facially well-intentioned section of the BAPCPA has evolved into an expensive, draconian gate-keeping requirement that has prevented many deserving individuals from qualifying for bankruptcy relief. The credit counseling requirement has not proven to be of assistance to debtors in seeking relief outside of the bankruptcy context. . . . The requirement that a debtor seek "credit counseling" before being eligible for bankruptcy relief is quickly becoming the most outrageous fleecing of consumer debtors in this Court's memory—a perfunctory exercise with little or no substance which leaves a putative debtor $50—$100 the poorer. The Court has seen at least one example of a "Client Action Plan" provided to a consumer debtor before this Court. The Client Action Plan proposed in that case is repetitive, advising the debtor twice to track expenses, and tends to state the obvious, such as recommending

102 In the years since BAPCPA's passage, the courts have grappled with the question of whether the debtor's failure to have a credit-counseling certificate was jurisdictional in nature, meaning no bankruptcy case had been commenced (which had different negative consequences for the debtor). These courts would strike the bankruptcy petition as a nullity. The majority of courts have settled on a rule that the certificate is not jurisdictional, and the proper procedure is for the court to dismiss the case where appropriate. *See* 2 Collier on Bankruptcy, *supra* note 26, at ¶ 109.09[1].

103 11 U.S.C. § 362(c)(3). The Commission has recommended the repeal of section 362(c)(3). *See* § 2.05 Repeat Filers.

104 Judge Cristol commented on how the credit counseling requirement traps the unwary:

> Is it the intent of Congress that poor, ignorant persons who do not know the law and cannot afford to obtain the advice of counsel are to be denied protection and assistance of the Bankruptcy Code which is available to more affluent and better educated persons? Or, is it the intent of Congress that decent, honest, hardworking persons, who have suffered financial misfortune or tragedy, be educated by budget and credit counseling services to help them determine if there is a more appropriate way to deal with their financial problems? Sadly, the language in the Code does not clearly reveal Congress' intent; either the Code language was inartfully drafted or the congressional intent was indeed the former less compassionate, harsher result, rather than the latter.

In re Valdez, 335 B.R. 801, 803 (Bankr. S.D. Fla. 2005).

> that debtor seek a job making higher wages, and referring debtor to the local library for resources on bankruptcy.[105]

Judge Sidney Brooks quoted Judge Morris and added, "Although certainly not controlling, it is instructive and gives context to this issue to note the developing consensus, since the inception of BAPCPA, that the credit counseling requirement is largely a procedural hurdle without value or consequence."[106] Another court described the credit counseling requirement as "one of the more absurd provisions" of BAPCPA and "inane."[107]

After weighing the pros and cons of the credit counseling requirement, the Commission's recommendation to repeal it comes from practical concerns. The credit counseling requirement imposes both financial and other costs on debtors and creates traps for the unwary. It imposes costs on the judicial system, which must resolve the technicalities that arise from its operation. It imposes costs on the USTP, which must regulate the credit counseling agencies approved to provide it. On the other side of the ledger, the credit counseling requirement provides little to no benefit to the individuals who go through it. The Commission concluded that the system would be better off without it.

Mandatory Postpetition Debtor Financial Management Course. BAPCPA also added a requirement that individual debtors complete an "instructional course concerning financial management" as a condition of receiving a discharge in either chapter 7 or chapter 13.[108] The debtor must complete the course postpetition. If a debtor does not complete the financial management course, the case is closed without a discharge. Like the prepetition credit counseling course, the USTP approves and regulates providers who are authorized to offer the financial management course.[109]

The scholarly literature on the link between financial education and positive financial outcomes is mixed at best. Studies do establish a link between financial education and financial literacy, but it is more difficult to establish a link to later changes in behavior.[110] A meta-analysis of 168 papers covering 201 studies found that "interventions to improve financial literacy explain only 0.1% of the variance" in later financial behaviors.[111] A different meta-analysis of 188 papers found financial education improved some behaviors such as savings and record-keeping, but not others, including loan defaults.[112]

105 *In re* Elmendorf, 345 B.R. 486, 490 (Bankr. S.D.N.Y. 2006) (citations omitted), *vacated on other grounds*, 619 F.3d 156 (2d Cir. 2010).

106 *In re* Enloe, 373 B.R. 123, 127 (Bankr. D. Colo. 2007).

107 *In re* Sosa, 336 B.R. 113, 114 (Bankr. W.D. Tex. 2005).

108 11 U.S.C. §§ 727(a)(11), 1328(g). Although these provisions apply generally to all "debtors," the practical effect is that it only requires individuals to undertake a financial management course. Only individuals are eligible for a chapter 7 discharge, *id.* § 727(a)(1), and only individuals can file chapter 13 bankruptcy, *id.* § 109(e).

109 *See id.* § 111; *see also* 28 C.F.R. §§ 58.25 — 58.36 (setting forth requirements for providers of the financial management course).

110 The literature is well summarized in two articles from Professor Lauren Willis. *See* Lauren Willis, *Evidence and Ideology in Assessing the Effectiveness of Financial Literacy Education*, 46 San Diego L. Rev. 415 (2009); Lauren Willis, *Against Financial-Literacy Education*, 94 Iowa L. Rev. 194 (2008).

111 Daniel Fernandes, John G. Lynch, Jr., & Richard G. Netemeyer, *Financial Literacy, Financial Education, and Downstream Financial Behaviors*, 60 Mgmt. Sci. 1861 (2013).

112 Margaret Miller, Julia Reichelstein, Christian Salas & Bilal Zia, *Can You Help Someone Become Financially Capable? A Meta-Analysis of the Literature*, 30 World Bank Research Observer 221 (2015).

The postpetition financial management course presents fewer access-to-justice concerns than the prepetition credit counseling requirement. Because the postpetition course is not a gateway into bankruptcy, it is not a barrier to entry. The consumer has more time to pursue the postpetition course and is not doing so in the teeth of a financial emergency. At the same time, the postpetition course is the gateway to the bankruptcy discharge. It can be a trap for the unwary, causing a denial of discharge to a deserving debtor.

It is difficult to argue against programs that make people more informed about any topic, but the postpetition financial management course is not costless. It costs debtors money. It costs debtors time, substantially more time than the prepetition credit counseling requirement. It creates regulatory burdens to oversee. It creates litigation costs over whether the requirement has been timely met. The question is not whether the financial management course has no faults or has only faults. The question is whether on balance the benefits of the financial management course exceed its costs.

The Commission concluded that for chapter 7 debtors, the benefits of the financial management course do not exceed its costs. The experience of the Commission is similar to Professor Sousa's conclusions from his interviews with bankruptcy debtors and education providers.[113] The vast majority of bankruptcy debtors end up in chapter 7 because of circumstances outside their control, such as illness, job loss, and divorce. Even if a financial management course changed behaviors, it would not likely change future outcomes for these debtors.

The Commission had a long debate on the benefits of the financial management requirement for chapter 13 debtors. Ultimately, the Commission decided not to recommend repeal of the financial management course as a condition for a chapter 13 discharge. Anecdotal evidence suggests a financial management course may be helpful for the specific purpose of helping chapter 13 debtors complete their plans, which is a requirement for the chapter 13 discharge.[114] Chapter 13 debtors can take the financial management course early in their cases, and some chapter 13 trustees operate their own financial management courses to help debtors complete the plan. The Commission encourages further development of financial management courses aimed at debtors during a chapter 13. The Commission also encourages scholars to study — and the funding of these studies — whether these courses result in higher chapter 13 completion rates.[115]

Fair Credit Reporting Act Amendment: The Commission also recommends that Congress amend the Fair Credit Reporting Act to require consumer reporting agencies to report — if they report any bankruptcy case information regarding a debtor — the debtor's successful completion of a financial management course after the debtor's discharge from bankruptcy. Such a notation would let the market price the value of the financial management course. If a postpetition financial management course changed and improved

113 *See* Sousa, *supra* note 96, at 463-65.

114 *See* 11 U.S.C. § 1328(a). Under some circumstances, the court can grant a "hardship discharge" to a chapter 13 debtor who does not complete all the plan payments. *Id.* § 1328(b).

115 The ideal study would compare two groups of chapter 13 debtors randomly assigned to one of at least two conditions: a group that takes the postpetition financial management course and a group that does not. Such a study might also have a placebo group that receives a course on a topic unrelated to financial management. The USTP might explore with one or more judicial districts whether such a study could be run consistent with the legal requirements of the Bankruptcy Code.

consumers' postbankruptcy financial lives, that improvement would presumably be reflected in better credit scores and lower costs of credit for these consumers. Bankruptcy debtors would then be incentivized to take the course. By amending the Fair Credit Reporting Act to require the notation, Congress would be implementing a market-based rather than regulatory solution. The amendment would also provide an opportunity for research about the efficacy of financial management education.

§ 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 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 that may be deducted from a debtor's CMI pursuant to section 707(b)(2)(A)(iii) as being 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).

History of the Means Test. The means test was at the heart of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.[116] The policy goal was to identify chapter 7 debtors who "can pay" and generally require those debtors, if they wanted bankruptcy relief, to file under chapter 13, which requires the debtor to devote all disposable income to repayment under a plan. The means test applies only to individual debtors whose debts are primarily consumer debts.[117]

The means test begins with section 707(b)(1). It provides that if the court finds a chapter 7 filing to be an "abuse," the court may dismiss the case or, with the debtor's consent, convert the case to one under chapter 13.

"Abuse," in turn, may be presumed under a complex statutory formula that requires data from various government agencies that the USTP helpfully compiles.[118] The first step in the formula is to determine the debtor's "current monthly income" (CMI), which is defined, basically, as the average of the debtor's

116 Pub. L. No. 109-8, 119 Stat. 23.

117 *See* 11 U.S.C. § 707(b)(1) (specifying court may dismiss a case for abuse for debtors whose debts are primarily consumer debts).

118 *See* U.S. Dep't of Justice, Census Bureau, IRS Data, and Administrative Expense Multipliers, https://www.justice.gov/ust/means-testing (last visited Jan. 20, 2019).

monthly income for the six months preceding the bankruptcy filing but excluding benefits under the Social Security Act. (CMI also excludes payments to victims of war crimes, and payments resulting from crimes against humanity or domestic terrorism.)

Next, CMI must be compared to the state median income for a household of the same size as the debtor's household. If the debtor's current monthly income is at or below the applicable state median, the debtor passes the means test and can file chapter 7.[119] Bankruptcy professionals use the terms "above-median debtor" and "below-median debtor" in specifying whether the debtor's CMI falls above or below the applicable median income.

An "above median" debtor goes through additional calculations, initially subtracting a list of expenses specified in section 707(b)(2)(ii). The list of expenses is long and detailed. Three expense categories are germane to the Commission's recommendation.

First, the debtor deducts "applicable monthly expense amounts specified under the National Standards and Local Standards" of the Internal Revenue Service (IRS). The IRS developed these standards as part of an internal guide to calculating repayment of delinquent tax debts by specifying set deductions from the taxpayers' income that should be allowed. For example, at the time of this writing, the National Standard for a debtor living alone allows the deduction of $647 per month for living expenses (food, housekeeping supplies, apparel & services, personal care products & services, and miscellaneous expenses) regardless of the debtor's actual expenses, which might be higher or lower than this amount.

Second under section 707(b)(2)(ii), the debtor also can deduct the actual expenses for "Other Necessary Expenses" as defined by the Internal Revenue Service. Examples of Other Necessary Expenses includes taxes, union dues, and certain child-care expenses.

Third, in addition to deducting amounts allowed by the IRS (and by a number of other statutory provisions), the means test allows the debtor to deduct payments on secured debts "contractually due" to secured creditors during the sixty months following the filing of the bankruptcy petition.

After deducting expenses from CMI, an above-median debtor multiplies the result by sixty to come up with the total amount the debtor could pay over a five-year chapter 13 plan. If the amount is (i) less than $8,175, or (ii) between $8,175 and $13,650 and less than 25% of the debtor's unsecured debts, the above-median debtor passes the means test and can file chapter 7.[120] (The amounts are adjusted every three years for inflation under section 104.)

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119 This rule results from 11 U.S.C. § 707(b)(7), which specifies that no "judge, United States Trustee (or bankruptcy administrator, if any), trustee, or other party" may move to dismiss the case for failing the means test if the debtor is below the state median income. This part of the statute is not a model of clarity, as it refers to a motion under "paragraph (2)" — i.e., § 707(b)(2) — which only establishes the means-test calculations and does not provide the court with the substantive authority to dismiss, which instead comes from paragraph (1) — i.e., § 707(b)(1).

120 *See* 11 U.S.C. § 707(b)(2)(A)(i).

If an above-median debtor does not pass the means test, then a presumption of abuse arises that "may only be rebutted by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative."[121] These additional expenses must be documented and be accompanied by a detailed explanation of the special circumstances.[122] If the debtor cannot establish special circumstances, the courts have split over whether to give primacy to the statutory language that the presumption may "only" be rebutted by special circumstances — leaving dismissal or conversion mandatory — or to give primacy to the discretionary language in section 707(b)(1) that the court "may" dismiss for abuse.[123]

The "means test" is the gateway into chapter 7, but its calculations are also critical for higher-income debtors in chapter 13. For all chapter 13 debtors, monthly income is calculated using the average, six-month prebankruptcy income calculation for "current monthly income."[124] The debtor then deducts amounts reasonably necessary for the support of the debtor or the debtor's dependents. But for an above-median debtor, the only expense deductions are those allowed under the means test, which are generally IRS allowances rather than the amount the debtor actually spends. (For a below-median debtor, the court does not use the means test and has substantial discretion to determine what amounts are "reasonably necessary" for the support of the debtor or the debtor's dependents.[125]) Whatever is left after deducting expenses is "disposable income," the entirety of which the debtor must devote to repaying creditors under the plan (unless the plan provides for 100% repayment).[126] An above-median debtor also must have an "applicable commitment period" — the time over which the debtor must pay disposable income — of not less than five years.[127]

Evaluating the Means Test. The 2005 amendments have been the subject of several academic papers studying the amendments' effects. Professors Christopher Cornell and Bing Xu found the means test shifted the percentage of chapter 13 cases by three percentage points in states most sensitive to the means test — that is, states with a larger fraction of the population just above the state median income.[128] In a working paper, Professors Stefania Albanesi and Jaromir Nosal found that BAPCPA led to a 50% drop

121 *Id.* § 707(b)(2)(B)(i).

122 *See id.* § 707(b)(2)(B)(ii).

123 Cases holding that special circumstances are the exclusive means to rebut the presumption of abuse and that a court must dismiss if special circumstances are not present include Robbins v. Alther (*In re* Brown), 537 B.R. 262 (Bankr. W.D. Va. 2015); *In re* Maura, 491 B.R. 493 (Bankr. E.D. Mich. 2013); and *In re* Woodruff, 416 B.R. 369 (Bankr. D. Mass. 2009). Courts holding that use of the word "may" gives discretion not to dismiss even when special circumstances are not present to rebut the presumption of abuse include *In re* Jenkins, 2012 WL 2564901 (Bankr. W.D.N.C. 2012); *In re* Mravik, 399 B.R. 202 (Bankr. E.D. Wis. 2008); and *In re* Skvorecz, 369 B.R. 638 (Bankr. D. Colo. 2007).

124 *See* 11 U.S.C. § 1325(b)(2) (stating "the term 'disposable income' means current monthly income" less specified expense deductions).

125 The Commission explains these different approaches to expenses in its recommendation on reserve funds in chapter 13 plans. *See* § 4.03 Reserve Fund in Chapter 13 Cases.

126 *See* 11 U.S.C. § 1325(b)(1) (stating that, if there is an objection to confirmation, the plan cannot be confirmed unless it provides for full payment of claims or for all of the debtor's disposable income during the applicable commitment period to be applied to repayments to unsecured creditors under the plan).

127 *See id.* § 1325(b)(4)(ii).

128 *See* Christopher Cornell & Bing Xu, *Effects of the BAPCPA on the Chapter Composition of Consumer Bankruptcies*, 124 Econ. Letters 439 (2014).

in chapter 7 filings but a 25% increase in insolvency generally (where "insolvency" is defined as having at least one loan that is 120+ days overdue and no loans overdue for shorter periods). Their evidence showed that the decrease in filings came from debtors not being able to afford the higher filing costs after the 2005 changes.[129] "Taken together, these findings suggest the main effect of the 2005 bankruptcy reform was to shift financially stressed individuals from Chapter 7 bankruptcy to insolvency."[130]

These findings are echoed in earlier studies closer to the time of BAPCPA's enactment. Using data from 2007, a group of researchers concluded, "[I]nstead of functioning as a sieve, carefully sorting the high-income abusers from those in true need, the [2005] amendments' means test functioned more like a barricade, blocking out hundreds of thousands of struggling families indiscriminately, regardless of their individual income circumstances."[131] In another study, Professor Michael Simkovic found that the cost of borrowing increased after the 2005 amendments and concluded that the amendments "benefited credit card companies and hurt their customers."[132] Finally, the ABI Consumer Bankruptcy Fee Study found the additional administrative burdens imposed by the 2005 amendments, including the increased documentation requirements from the means test, raised costs to debtors, with a 51% increase for a no-asset chapter 7 and a 24% to 27% increase for a chapter 13.[133]

Although the means test was at the heart of BAPCPA's reforms, it is difficult to separate its effects from the effects of other provisions in the 195-page-long statute. The Commission considered the scholarly evidence about BAPCPA, as well as the diverse experience of the commissioners about how debtors experience the means test on the ground. The Commission weighed all of the options, including repealing the means test. In the end, the Commission decided it could be most effective by recommending specific reforms that would improve the administration of the means test. As with many of the Commission's recommendations, some commissioners preferred more extensive changes, while others might not have gone as far as the recommendations do. But, as discussed in the Foreword, the Commission's means test recommendations represent its "collective professional judgment about the best ways to improve the consumer bankruptcy system for all its stakeholders."

Recommendation — Reducing Documentation Requirements. As discussed above, the means test begins with a calculation of CMI. Procedurally, all individual debtors in chapter 7 and 13 cases must prepare and file a Statement of Current Monthly Income. In chapter 7 cases, the debtor calculates CMI based on the statutory definition and reports the income information on Official Form 122A-1. If the CMI amount is below the applicable state median income, as reflected in Part 2 of the statement, the debtor checks the box on the top of the form stating that "there is no presumption of abuse" and is not required to complete the remaining means test calculations in Official Form 122A-2.

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129 *See* Stefania Albanesi & Jaromir Nosal, *Insolvency after the 2005 Bankruptcy Reform*, working paper (2018), available at https://www.nber.org/papers/w24934 (last visited Jan. 21, 2019).

130 *Id.* at 32.

131 *See* Robert M. Lawless, Angela K. Littwin, Katherine M. Porter, John A. E. Pottow, Deborah K. Thorne, and Elizabeth Warren, *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 Am. Bankr. L.J. 349, 353 (2008).

132 Michael Simkovic, *The Effect of BAPCPA on Credit Card Industry Profits and Prices*, 83 Am. Bankr. L.J. 1, 17, 22 (2009).

133 Lois Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 Am. Bankr. Inst. L. Rev. 17, 30 (2012).

A similar process is used in chapter 13 cases. Chapter 13 debtors must calculate CMI based on the statutory definition and report the income information on Official Form 122C-1. Debtors whose incomes are below the applicable state medians do not use the means test to calculate their disposable income and so do not complete the other means test form, Official Form 122C-2.

Consistent with the means test, section 521(a)(1)(B)(iv) requires, unless the court orders otherwise, that every employed debtor file copies of all payment advices or other evidence of payment received from employers within sixty days before the petition was filed. Federal Rule of Bankruptcy Procedure 1007(b)(1)(E) and (c) specify compliance with this requirement. Because section 521(a)(1)(B) applies only if the court does not order otherwise, some courts have used their power to "order otherwise" to adopt local rules or general orders providing that payment advices are to be delivered to the trustee at or before the meeting of creditors rather than filed with the court.

Compliance with these paperwork requirements imposes substantial burdens on debtors and their attorneys and has increased the cost of fling bankruptcy for consumer debtors. To properly calculate CMI, the attorney must collect detailed wage and other income information for the entire prepetition six-month period. In a joint case, this information must be collected for both debtors. Many individual debtors work several jobs or supplement their wage employment with self-employment, which requires additional document collection and makes the CMI calculation more complex. Because the appropriate median family income is determined based on household size, which may include nonrelated individuals living in the household, income information also may need to be collected and analyzed from other household members for the prepetition six-month period.

Debtors rarely provide to their attorneys all needed information at one time. They also often struggle to come up with the funds needed to file, including filing, credit counseling and attorney fees. As a result, an anticipated filing date is often postponed, requiring the attorney to recalculate the CMI and collect additional documentation based on a new filing date. For some debtors, such recalculations may be required multiple times.

The vast majority of consumer debtors have income that is below the state median income. A USTP report to Congress following BAPCPA estimated that approximately only about 8% of chapter 7 debtors and 27% of chapter 13 debtors are above-median.[134] The median CMI for chapter 7 debtors in 2016 was $2,996, and debtors' CMI has changed little over the past decade.[135] As a result, few bankruptcy filings result in the USTP filing a motion to dismiss or convert under section 707(b). In fiscal year 2016, the USTP brought 1,738 actions under the general "for cause" dismissal rules of section 707(a) and 1,417

134 Executive Office of U.S. Trustee, Impact of the Utilization of Internal Revenue Standards for Determining Expenses on Debtors and the Court 3-4 (2007), https://www.justice.gov/sites/default/files/ust/legacy/2011/07/13/Rpt_to_Congress_on_IRS_Standards.pdf (last visited Jan. 21, 2019).

135 Ed Flynn, *The Changing Profile of Chapter 7 Debtors*, Am. Bankr. Inst. J., Sept. 2018, at 30, 75 exh.3.

actions under the means-test dismissal rules of section 707(b) — less than 0.3% of the 482,693 chapter 7 cases filed during that year.[136]

In most cases, the debtor's income is far below CMI. Even where a presumption of abuse arises, very few bankruptcy filings result in the USTP filing a motion to dismiss or convert under section 707. The USTP annual report for fiscal year 2016 states: "In FY 2016, the USTP declined to file a motion to dismiss in about 63 percent of presumed abusive cases. The percentage of declinations has grown from less than 35 percent in FY 2006 to more than 60 percent in recent years. This suggests that the objective criteria of the means test are now well-established and that most debtors' attorneys file presumed abusive cases only if the cases satisfy statutory exceptions."[137]

The Commission recommends statutory changes that would reduce the documentation requirements that have added substantial costs to every individual bankruptcy case, while still requiring sufficient documentation to corroborate the debtor's sworn statement of income in Schedule I. Rather than file sixty days of payment advices, below-median debtors should be permitted to file other forms of documentation, such as a recent pay stub showing the debtor's year-to-date income or a tax return. The current requirements in section 521(a)(1)(B)(iv) would remain unchanged for above-median-income debtors.

In the small number of cases in which the debtor's income has changed significantly, or where the exact amount of the debtor's income is critical to determining whether the case is an abuse — because the CMI or calculations under section 707(b)(2) are close to the amounts that would give rise to a presumption of abuse — the trustee or U.S. Trustee may request additional documentation. Consistent with the Commission's proposal for trustee best practices,[138] such a request should only be made in individual cases that warrant further information.

The safe harbor in section 707(b)(7)(A) should also be amended to delete the requirement for calculating CMI for below-median debtors. If the debtor's monthly income as reported on Schedule I, multiplied by twelve, is equal to or less than the highest median-income figure for the debtor's state, the section 707(b)(7)(A) protections should apply without the need for a CMI calculation. Again, in appropriate cases the trustee or U.S. Trustee could request additional information.

Recommendation — Excluding Public Assistance, Government Retirement, and Disability Benefits. As discussed above, section 101 excludes from CMI "benefits received under the Social Security Act." Reducing CMI means a debtor is more likely to pass the means test in a chapter 7, lowers "disposable income" that must be paid under a chapter 13 plan, and makes it more likely that the applicable commitment period for a chapter 13 plan will be three years rather than five. The exclusion of Social

136 U.S. Dep't of Justice Exec. Office of U.S. Trustees, United States Trustee Program Annual Report of Significant Accomplishments Fiscal Year 2016, at 4-5, available at https://www.justice.gov/ust/file/ar_2016.pdf/download (last visited Jan. 21, 2019).

137 *Id.* at 6.

138 *See* § 3.09 Document-Production Requests by Bankruptcy Trustees.

Security benefits from CMI derives from the statutory prohibition on assignment of Social Security benefits, specifically as to the "operation of any bankruptcy or insolvency law."[139]

Congress traditionally has prevented the assignment of Social Security benefits out of concerns for the elderly and disabled. In discussing a predecessor bill to what became the 2005 amendments, Senator Kennedy offered the amendment to exclude Social Security benefits and described the reasons for doing so:

> The amendment I have offered will protect a debtor's Social Security benefits during bankruptcy. This amendment is very important to older Americans. . . .
>
> My amendment excludes Social Security benefits from the definition of "current monthly income" and ensures that those benefits will never be used to repay credit card debt and other debt.
>
> This amendment is particularly important to seniors. Between 1991 and 1999 the numbers of people over 65 who filed bankruptcy grew by 120 percent. . . .
>
> One can ask, why are we doing this now rather than before? The reason it was not necessary before is because the Social Security effectively was protected with a series of protections that were included in the existing bankruptcy law which have not been included in this legislation. Therefore, without this kind of an amendment, they would be eligible for creditors. We think protecting our senior citizens, those on Social Security, as a matter of both public policy and the fact of the importance of their contributions, obviously, in terms of society, should be protected during their senior years. . . .
>
> The bottom line is that bankruptcy shouldn't be made more difficult for those who are depending on Social Security for their livelihood. Social Security was developed to ensure that seniors can live their golden years in dignity. If we allow Social Security income to be considered while determining whether someone is eligible for bankruptcy, a portion of those benefits could be used in a manner inconsistent with Congress' intent.[140]

The federal and state governments provide numerous public-assistance benefits programs that can supplement or supplant Social Security benefits, whether for retirement or disability, often based on the type of employment. Examples include programs for veterans[141] or railroad workers.[142] Generally speaking, these programs take the place of Social Security benefits, at least for the period during which the worker held the type of employment covered under the program. These programs almost always

139 42 U.S.C. § 407(a).

140 145 Cong. Rec. 29,929 (1999).

141 *See* 38 U.S.C. §§ 1101-1163 (service-connected military disability benefits); *id.* §§ 1501-1543 (nonservice-connected disability benefits).

142 42 U.S.C. §§ 231-231v (Railroad Retirement Act of 1974).

contain protections similar to the Social Security Act, preventing assignment or seizure of these benefits by creditors.[143]

Although the definition of CMI excludes some rare sources of income,[144] the more common sources of public assistance or retirement benefits are not excluded, although they serve a purpose comparable to Social Security benefits, which are excluded. Despite their prohibitions on assignability, most courts have declined to exclude "Social Security-like" benefits in the face of clear and unambiguous language, despite the prohibitions on assignability of these benefits under nonbankruptcy law.[145]

The disparate treatment of similar benefits programs can lead to a situation where the nature of a retired or disabled debtor's previous employment results in dramatically different CMI calculations. A disabled railroad worker's benefits are swept into CMI, making it more likely the worker fails the means test, but an identically disabled person receiving Social Security disability benefits can exclude them.

The disparate treatment of disability benefits is especially pronounced in the case of veterans' disability benefits. The ABI has a Task Force for Veterans and Servicemembers whose mission is to focus attention on financial distress in veterans and servicemembers and "to financially strengthen those that strengthen us with the respect and dignity they deserve."[146] As three of its members observed about the treatment of veterans' disability benefits: "There is no sensible basis for the Bankruptcy Code treating benefits paid to veterans through the Department of Veterans Affairs differently than benefits received by individuals from the Social Security Administration. The disparate treatment results in systematic discrimination against veterans, even if wholly unintentional."[147] Senator Baldwin introduced legislation in 2018 that would have eliminated the disparate treatment of veterans' disability benefits, but the legislation was not passed.[148] The Commission agrees with this legislation but would go further.

Debtors receiving income from public retirement and disability benefit programs outside the Social Security Act should not be disadvantaged relative to those receiving Social Security benefits. At the same time, debtors should not be advantaged merely because they receive public retirement and disability benefits. Therefore, the Commission recommends that public and disability benefits comparable to Social Security — including those for veterans, railroad workers, and state and federal civil servants

143 *See* 5 U.S.C. § 8346 (exempting civil service retirement benefits from legal process); 22 U.S.C. § 4060(c) (exempting foreign service retirement and disability payments from attachment); 33 U.S.C. § 916 (exempting longshoremen's and harbor workers' pensions from assignment and legal process); 38 U.S.C. § 1562 (exempting Congressional Medal of Honor pension from legal process); 38 U.S.C. § 5301(a)(1) (exempting veterans' benefits from assignment and legal process); 45 U.S.C. § 231m (exempting railroad retirement benefits from assignment).

144 Specifically, CMI excludes income for "victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism. . . ." 11 U.S.C. §101(10A).

145 *See, e.g.*, *In re* Brah, 562 B.R. 922 (Bankr. E.D. Wis. 2017) (holding veterans' disability benefits are not excluded); *In re* Waters, 384 B.R. 432 (Bankr. N.D. W. Va. 2008) (same).

146 Jay Bender, Elizabeth Gunn & John H. Thompson, *Defending Our Veterans: Excluding Veterans' Benefits from Current Monthly Income*, Am. Bankr. Inst. J., Nov. 12, 2018, at 12, 12.

147 *Id.* at 13.

148 *See* 164 Cong. Rec. S3633 (daily ed. June 11, 2018) (introducing an amendment to the John S. McCain National Defense Authorization Act for Fiscal Year 2019, H.R. 5515, 115th Cong., 2d Sess.).

— should be excluded from CMI, but that the exclusion be capped at the maximum allowed for Social Security benefits, which is currently $2,788.00 a month.[149]

The rationale for excluding from CMI public assistance retirement and disability benefits comparable to Social Security does not apply to privately funded retirement and disability income. Unlike public assistance benefits, privately funded retirement and disability income is generally derived from contributions made or purchased by the debtor (including employer matches and benefits) to supplement the applicable public assistance benefits. Further, unlike public assistance benefits, debtors often have a greater degree of control over any income distributions from those funds, and, by delaying distributions, can retain the funds intact and exempt during bankruptcy.[150]

Recommendation — Best Interpretation of CMI for Unemployment Benefits. The definition of CMI "excludes benefits *received under* the Social Security Act" (emphasis added). In addition to traditional Social Security, Social Security Disability, and Medicare, there are clear public assistance benefits that are "received under" the Social Security Act and thereby excluded from CMI.[151]

Beyond these benefits, the question has arisen of whether unemployment benefits are "received under" the Social Security Act as well as state unemployment benefits funded to differing degrees with federal monies under the Social Security Act. In the case of *In re Kucharz*, Judge Thomas Perkins succinctly outlined the history of the unemployment program and the relationship between the federal Social Security Act and state law:

> Enacted as part of President Roosevelt's New Deal legislation, the Social Security Act of 1935 incentivized the states to adopt conforming laws to pay unemployment insurance benefits to their involuntarily unemployed citizens. The Congress rejected the alternative of a uniform national unemployment insurance system, preferring instead to preserve the autonomy of the states to adopt their own systems. The states were given a wide range of judgment and broad freedom to set up the type of unemployment compensation system they preferred.
>
> The incentive for the states to act was a financial one, provided through the Federal Unemployment Tax Act (FUTA). FUTA imposes an excise tax on wages paid by employers. An employer, however, is allowed a credit of up to 90% of the federal tax for

149 By "maximum," the amount intended is the maximum benefit for any individual, not the maximum benefit to which a specific debtor might have been entitled if all of his or her work had been done for an employer covered under the Social Security Act. Such a determination would not be practical.

150 11 U.S.C § 522(b)(4).

151 *See, e.g.*, Adinolfi v. Meyer (*In re* Adinolfi), 543 B.R. 612 (B.A.P. 9th Cir. 2016) (holding adoption-assistance payments are "benefits received under the Social Security Act").

Other benefits provided under the Social Security Act include Medicaid, 42 U.S.C. § 1396b; programs in Guam, Puerto Rico, and the Virgin Islands providing old age benefits, *id.* §§ 301-306; the Stephanie Tubbs Jones Child Welfare Services Program, *id.* §§ 620-628; programs for family support, family preservation, family reunification, and adoption-support services, *id.* §§ 629-629i; foster care and adoption assistance, *id.* §§ 670-679c; and aid to the blind in Puerto Rico, Guam, and the Virgin Islands, *id.* §§ 1201-1206.

> contributions the employer pays to a state fund established under a federally approved state unemployment compensation law. All 50 states have unemployment insurance laws implementing the federal mandatory minimum standards of coverage. The conditions attached to allowance of the credit are designed to assure that each state's program contains basic standard provisions.
>
> In order to protect the employer contributions against loss, the states are required to invest the funds with the U.S. Treasury. The states' funds are deposited and held in an "Unemployment Trust Fund." Although the funds are aggregated for investment purposes, the U.S. Treasury maintains separate accounts for the deposits made by each state and the earnings on the deposits. The U.S. Treasury remits the funds back to the states upon request on an as-needed basis.
>
> In order for a state to retain its program certification, it must use the trust funds solely for the payment of unemployment compensation benefits, exclusive of expenses of administration. . . .
>
> The Unemployment Trust Fund includes an extended unemployment compensation account to provide funding for payment of extended benefits during times of high unemployment. . . . From time to time, Congress legislates additional weeks of extended benefits on top of the 26 weeks provided by most states. . . .
>
> Unemployment insurance claims are submitted to, evaluated and paid or denied by state officials implementing state law. Appeals are heard by state officials. Illinois, for example, has enacted a comprehensive code of intricate unemployment insurance laws. The Illinois Department of Employment Security was created to administer those laws and to adopt regulations to effect such administration. Benefits are payable as determined under state law and the regulations promulgated thereunder, independent of the SSA and FUTA.[152]

A majority of courts join *Kucharz* in holding that, despite the intertwining of federal and state laws, unemployment benefits are not received "under" the Social Security Act within the meaning of section 101 of the Bankruptcy Code and therefore are not excluded from CMI.[153]

As *Kucharz* notes, the language is reasonably admissible of either interpretation,[154] and the best interpretation is not just a matter of counting cases. The Commission agrees with the courts that have found that unemployment benefits are received "under" the Social Security Act and therefore are

152 *In re* Kucharz, 418 B.R. 635, 637-39 (Bankr. C.D. Ill. 2009) (citations omitted).

153 *See In re* Washington, 438 B.R. 348 (Bankr. M.D. Ala. 2010); *In re* Baden, 396 B.R. 617 (Bankr. M.D. Pa. 2008); *In re* Overby, 2010 WL 3834647 (Bankr. W.D. Mo. 2010); *In re* Winkles, 2010 WL 2680895 (Bankr. S.D. Ill. 2010); *In re* Nance, 2010 WL 2079653 (Bankr. S.D. Ind. 2010); *In re* Rose, 2010 WL 2600591 (Bankr. N.D. Ga. 2010).

154 *Kucharz*, 418 B.R. at 640; *see also Baden*, 396 B.R. at 622 (the provision is open to "varying interpretations").

excluded from CMI.[155] As one of these courts noted, this interpretation advances the purpose of the Social Security Act as identified by the Supreme Court:

> The purpose of the [Social Security] Act was to give prompt if only partial replacement of wages to the unemployed, to enable workers "to tide themselves over, until they get back to their old work or find other employment, without having to resort to relief." Unemployment benefits provide cash to a newly unemployed worker "at a time when otherwise he would have nothing to spend," serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity.[156]

Given the ambiguity in the statute, the Commission agrees it is best interpreted to further the policies of the Social Security Act and the Bankruptcy Code in a way that is consistent with the usual rules in the Bankruptcy Code and across federal and state law that protect public assistance benefits from being used for repayment of private debts. Although the Commission believes this result is the best interpretation of the existing statute, it would welcome a clarifying amendment to the same effect from Congress.

Recommendation — Interpreting "Special Circumstances." As explained above, if the amount remaining after deductions is above certain thresholds, a presumption of abuse arises that allows the court to dismiss a chapter 7 case. Debtors have sought to avoid the presumption of abuse in some cases by arguing that certain expenses not covered by the means test may still reduce current monthly income as a "special circumstance."

Section 707(b)(2)(B) defines these "special circumstances" only generally. The circumstances must "justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative." As examples of acceptable "special circumstances," section 707(b)(2)(B) mentions obligations that result from "a serious medical condition or a call or order to active duty in the Armed Forces."

Several courts have said that an obligation to pay a nondischargeable student loan can be a "special circumstance" similar to a serious medical condition or a call to military service.[157] For example, in *In re Delbecq*, the means test left the debtor with $304 in disposable monthly income, and she faced a motion to dismiss by the U.S. Trustee asserting the presumption of abuse. In response, the debtor argued that her monthly student loan payment of $350 was a "special circumstance" that rebutted the presumption.[158]

155 *See In re* Munger, 370 B.R. 21 (Bankr D. Mass. 2007); *In re* Sorrell, 359 B.R. 167 (Bankr. S.D. Ohio 2007).

156 *Sorrell*, 359 B.R. at 182 (quoting California Dept. of Human Resources Development v. Java, 402 U.S. 121, 131—32 (1971)).

157 *See In re* Howell, 477 B.R. 314, 316-17 (Bankr. W.D.N.Y. 2012) (debtor rebutted presumption of abuse when magnitude of student loan debt would allow only nominal payments to other unsecured creditors); *In re* Edwards, 2012 WL 3042233 (Bankr. N.D. Ala. 2012) (agreeing that in some cases student loan payments may constitute special circumstances, but not in this case because debtors incurred other high unnecessary expenses); *In re* Sanders, 454 B.R. 855 (Bankr. M.D. Ala. 2011) (debtors who "either directly or on guarantor basis" were responsible for their son's student loan could claim the expense as a "special circumstance" under section 707(b)(2)(B)); *In re* Martin, 371 B.R. 347 (Bankr. C.D. Ill. 2007); *In re* Delbecq, 368 B.R. 754 (Bankr. S.D. Ind. 2007); *In re* Haman, 366 B.R. 307 (Bankr. D. Del. 2007) (debtor's obligation to pay as co-signor on son's student loan is "special circumstance"); *In re* Templeton, 365 B.R 213 (Bankr. W.D. Okla. 2007); *see also* Anthony P. Cali, Note, *The "Special Circumstance" of Student Loan Debt Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 52 Ariz. L. Rev. 473 (2010) (reviewing decisions and policies related to issue and generally supporting treatment of student loans payments as "special circumstance").

158 *Delbecq*, 368 B.R. at 755.

In agreeing with the debtor, the court in *Delbecq* looked to the legislative history of the means test. The court referred to a Senate Judiciary Committee Report issued in 1999 in connection with the proposed legislation that first introduced "special circumstances" as a part of the means test. The Senate Report noted that the purpose of the provision was to "protect debtors from rigid and arbitrary application of a means-test," and that the "Committee adopted the 'special circumstances' standard, rather than the 'extraordinary circumstances' standard included in the Conference Report. . . ."[159] The *Delbecq* court also noted that the legislative history does not indicate that the specific examples provided in § 707(b)(2)(B) were intended to "define, qualify or otherwise limit the meaning of 'special circumstances.'"[160]

Delbecq concluded that the debtor did not have a meaningful ability to pay her debts. If her case had been dismissed, the debtor would likely have been forced to defer repayment of her student loans to pay her other unsecured debt and thereby incur additional indebtedness. The court did not find this to be a reasonable alternative. On the other hand, forcing the debtor into chapter 13 would do nothing to advance the goal of the means test. Because separate classification of student loan debts was permitted in the district,[161] the non-student loan creditors would receive nothing under any plan the debtor was likely to propose. Thus, the debtor did not have any meaningful ability to repay her debts either inside or outside of bankruptcy.[162]

A similar analysis was applied in a chapter 13 case. Finding that monthly payments of $450 toward a nondischargeable student loan were "special circumstances," the court in *In re Knight* held that a downward adjustment of the debtor's projected disposable income in the amount of his scheduled student loan payments was appropriate.[163] The court found that the debtor had no reasonable alternative to payment of his student loans, and that it would be unfair to the debtor if completion of a chapter 13 plan left him in default on his student loans and subject to garnishment or tax offsets.[164]

Some courts have rejected debtors' arguments that student loan payments can be "special circumstances" because they do not involve an involuntary hardship.[165] According to these courts, student loans are a routine obligation that individuals take on voluntarily, and "they are not unforeseeable, unavoidable, or beyond a debtor's control."[166] Under this view, payments toward a nondischargeable student loan would never be a special circumstance.

159 S. Rep. No. 106-49, at 2 (1999).

160 *Delbecq*, 368 B.R. at 758.

161 The Commission has recommended that the best interpretation of chapter 13 is to allow separate classification of student loans in the plan and that Congress should pass a clarifying amendment to this effect. *See* § 1.01 Student Loans.

162 *Delbecq*, 368 B.R. at 761-62.

163 370 B.R. 429 (Bankr. N.D. Ga. 2007).

164 *Id.* at 437; *see also In re* Howell, 477 B.R. 314, 317 (Bankr. W.D.N.Y. 2012) (discussing the negative impact of chapter 13 on debtor's student loan debt as factor under section 707(b)(2)(B)(i) rebutting claim of abuse of chapter 7).

165 *See In re* Zahringer, 2008 WL 2245864 (Bankr. E.D. Wis. 2008); *In re* Pageau, 383 B.R. 221 (Bankr. D.N.H. 2008).

166 *In re* Brown, 500 B.R. 255, 261 (Bankr. S.D. Ga. 2013).

The decisions that give substantial weight to the reasons why the debtor incurred a particular debt, such as a student loan, ignore the relevant statutory language. By its terms, the statute requires only that the debtor demonstrate that certain circumstances are "special" to the extent that they require additional expenditures from current monthly income and there is no reasonable alternative to payment of these expenditures. There is nothing in the statutory language suggesting that the past circumstances that created the obligation should control the determination of a special circumstance. The relevant factor is whether there is presently a reasonable alternative to the necessary expenditure.[167] The standard should be met when there is nothing within the debtor's power to avoid paying the debt or otherwise avoid an additional expense. The means-testing system was intended to direct debtors with truly discretionary income or an extravagant lifestyle into some form of debt repayment. The lack of alternatives for repayment of student loan debt or other obligations should focus on the debtors' resources, expenses, and economic circumstances and not on whether student loans are a common or "voluntary" form of debt.[168]

For all of these reasons, the Commission recommends that, under the best interpretation of current law, the presence of "special circumstances" should depend on the circumstances at the time of the administration of the means test and not on whether the obligation at issue was incurred involuntarily. The Commission also would support a clarifying amendment from Congress to reach the same result.

Recommendation — Calculating Deductions from CMI. Both for purposes of the chapter 7 means test and determining a chapter 13 debtor's disposable income, an above-median debtor first calculates CMI and then deducts expenses, with two of the main categories of expenses being the amounts allowed under the IRS's National Standards and the Local Standards. The National Standards serve as an allowance on expenses for food, clothing, and other expenses, such as a 5% additional allowance for food and clothing.[169] As recognized by the USTP, the allowances under the National Standards are granted "without questioning the amount actually spent."[170] The debtor takes the specified National Standard deductions whether the debtor actually spends more or less than the amount on the item in question.

In *Ransom v. FIA Card Services, Inc.*, the Supreme Court ruled that an above-median debtor can only take a transportation ownership deduction under the Local Standards to the extent the debtor actually makes loan or lease payments on a motor vehicle.[171] The court expressly reserved ruling on the question of whether the debtor was entitled to take deductions under the Local Standards beyond the amount actually spent.[172] The U.S. Trustee and some courts, however, have interpreted the Local Standard deductions for transportation and housing expenses (other than the payments of secured

167 *See In re* Haman, 366 B.R. 307, 313-14 (Bankr. D. Del. 2007) (rejecting view that circumstances must result from events outside debtor's control).

168 *See In re* Sanders, 454 B.R. 855 (Bankr. M.D. Ala. 2011) (student loan repayment is "special circumstance" rebutting presumption of abuse; allowing indebtedness to increase under long-term payment program not a reasonable alternative).

169 *See* § 707(b)(2)(A)(ii)(I).

170 U.S. Dep't of Justice, Means Testing, https://www.justice.gov/ust/means-testing/20181101 (last visited Jan. 21, 2019).

171 562 U.S. 61 (2011).

172 *Id.* at 75 n.8.

debt) as limited to the "amounts actually spent" by the debtor, not to exceed the allowance.[173] Other courts have disagreed.[174]

The differing treatment of the National Standards and the Local Standards has a practical justification. National standards cover a broad spectrum of living expenses. Local standards, however, are focused. For example, the Local Standard for transportation divides into two categories: an allowance for operating a motor vehicle and an amount for the "ownership allowance" of an automobile. The intent was to segregate the expenses involved with a motor vehicle to the cost of maintenance, repair, and fuel from the costs of acquiring or leasing a motor vehicle. Given the statutory ambiguity, the Commission again believes that the best interpretation is the one that furthers the policy behind the statute and recommends that courts interpret the National Standards as allowing a deduction regardless of actual expense and the Local Standards as a cap, allowing a deduction in the amount actually spent for the category of expense up to the amount specified in the Local Standards. Again, the Commission supports a clarifying amendment to this effect.

An above-median debtor also may deduct secured-debt payments that are contractually due in the five-year period after the bankruptcy filing, which can prevent a presumption of abuse under the means test in chapter 7 or lower the "disposable income" that the debtor must pay to creditors in chapter 13.[175] In contrast, a below-median chapter 13 debtor may only deduct such payments to the extent they are reasonably necessary for the support of the debtor or the debtor's dependents.[176] So a question arises as to whether there is any restriction on an above-median debtor's deduction of secured-debt payments, even payments that go beyond those reasonably necessary for support. Without any restriction, an above-median debtor could deduct secured-debt payments on a luxury home or car where the "reasonably necessary" test would bar the below-median chapter 13 debtor from doing the same. For example, the Ninth Circuit found that Congress had removed the "reasonably necessary" component from the secured-debt payments as applied to above-median debtors in the means test. The result was that the debtor could deduct from CMI the mortgage payments on a $400,000 luxury home.[177]

Although the Commission recognizes that section 707(b) does not expressly have a "reasonably necessary" standard, not having such a standard for the debt repayments of above-median secured creditors leads to the absurd result of above-median-income debtors with huge secured debts for luxury items being able to deduct the full payment on those debts. Prior to the 2005 amendments, a wealthy debtor who sought to keep luxury items would be met in a chapter 7 with a claim of substantial abuse and in a chapter 13 with the "reasonably necessary" requirement. In adopting the means test to channel

173 *See, e.g., In re* Cooper, 2015 WL 1545282, at 9 (Bankr. E.D.N.C. 2015); *In re* Harris, 522 B.R. 804 (Bankr. E.D.N.C. 2014).

The USTP position is shown on the webpage with the means-testing information: U.S. Dep't of Justice, Means Testing, https://www.justice.gov/ust/means-testing/20181101 (last visited Jan. 21, 2019).

174 *See, e.g.*, *In re* O'Neill Miranda, 449 B.R. 182 (Bankr. D.P.R. 2011); *In re* Young, 392 B.R. 6 (Bankr. D. Mass. 2008).

175 *See* § 1325(b)(3) (incorporating § 707(b)(2)(b)(2)(A)(iii)(I) into chapter 13 in determining the disposable income of above-median debtors).

176 *See* 11 U.S.C. § 1325(b)(2).

177 *See* Drummond v. Welsh (*In re* Drummond), 711 F.3d 1120 (9th Cir. 2013).

"can pay" debtors into chapter 13, Congress could not have intended to create a loophole for higher-income debtors.

Therefore, the Commission believes the better interpretation of the means test is that an above-median debtor can deduct payments on secured debt only if the payments are reasonably necessary for the support of the debtor or the debtor's dependents.[178] For an above-median debtor, this interpretation should apply both under the chapter 7 means test and in the calculation of disposable income for a chapter 13 debtor. The Commission believes this interpretation is best under the existing statute, but, as with its other recommendations for "best interpretations," supports a clarifying statutory amendment implementing this result.

§ 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.

Background. Elsewhere, the Commission has made recommendations regarding changes to the computations for the means test, which serves as a regulatory gatekeeper for chapter 7.[179] As part of those recommendations, the Commission has explained the origin and operation of the means test in detail. Generally speaking, the means test requires a chapter 7 debtor to calculate currently monthly income (CMI) using a statutory formula and then deduct specified expenses. If the remaining amount falls above certain thresholds, a presumption of abuse arises, and unless the debtor shows "special circumstances," the court can dismiss the chapter 7 (or convert it to chapter 13 with the debtor's permission).[180]

The issue arises whether the means test applies when a chapter 13 debtor converts the case to a chapter 7.[181] Section 707(b) applies the means test to "a case filed by an individual debtor under this chapter whose debts are primarily consumer debts." The interpretive question is whether the phrase "filed . . . under this chapter" describes a case originally filed under chapter 13.

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178 *Cf. In re* Kramp, 2011 WL 4002614 (Bankr. N.D. W. Va. 2011) (holding it was not good faith to propose a chapter 13 plan paying creditors less than 100% while making secured-debt payments on a Harley Davidson motorcycle); *In re* Allwas, 2008 WL 6069662 (Bankr. D.S.C. 2008) (same, including a plan that also involved a Harley Davidson motorcycle); *In re* LaSota, 351 B.R. 56, 59 (Bankr. W.D.N.Y. 2006) (in dicta, suggesting a chapter 13 plan cannot propose to keep an expensive Harley Davidson if creditors are not paid in full).

179 *See* § 3.07 Means Test Revisions & Interpretations.

180 *See* 11 U.S.C. § 707(b). The subsection also allows conversion to chapter 11, but this is not a practical option for most consumer debtors.

181 *See id.* § 1307(a) ("The debtor may convert a case under this chapter to a case under chapter 7 of this title at any time.").

If the means test does apply, a related question is whether the debtor uses the means-test calculations as of the date of filing or the date of conversion. Stated differently, can a chapter 13 debtor convert to chapter 7 if the debtor was eligible for chapter 7 on the date of the bankruptcy petition, or is the debtor's qualification for chapter 7 measured as of the date of conversion?

Recommendation. Some courts have adopted a literalist approach to parse the language of section 707(b). Under this approach, the answer is simple: a converted case is "filed under" its original chapter.[182] Under this reading, section 707(b) and the means test do not apply to a converted case because it is "filed under" chapter 13 and not chapter 7 as section 707 requires.[183]

There are many responses to this literalist reading of section 707(b). First, section 348(a) expressly states that a converted case "constitutes an order for relief under the chapter to which the case is converted." Under this language, a converted chapter 13 is deemed to be a chapter 7 case, thus the conversion is filed under chapter 7. Also, Federal Rule of Bankruptcy Procedure 1019(2) extends the time in a converted case to move for dismissal under section 707(b), a provision that would be unnecessary if section 707(b) did not apply in converted cases. Although the Federal Rules of Bankruptcy Procedure cannot contradict or change the statute,[184] rule 1019 suggests the Advisory Committee on Rules of Bankruptcy Procedure believes section 707(b) applies to a converted case. Also, before the 2005 amendments, there was no question that section 707(b) could apply in a converted case, and it is unlikely in adopting the means test that Congress intended to change that rule.

Most significantly is the absurdity and huge loophole that could result from not applying the means test to a converted case. To avoid section 707(b) and the means test, all a debtor would have to do is file chapter 13 and then immediately convert to chapter 7. Although such a move might be grounds to dismiss "for cause" under section 707(a), "for cause" dismissal requires a case-by-case discretionary adjudication — exactly the opposite of the mechanical statutory formula Congress put in place with the means test. Considering the entirety of the statutory scheme, the Commission agrees with the majority of courts that the best interpretation of section 707(b) is that it applies to converted cases.[185]

As to the second question of when to apply the means test, section 101(10A) states that CMI is the average monthly income from all sources "derived during the 6-month period" before the bankruptcy filing. Section 348(a) states that conversion is deemed an order for relief under the new chapter but also that the conversion does not change the original filing date. The statute thus expressly directs that the CMI is from the six months before filing date, regardless of the date of conversion. The expense

182 The cases on both sides of the issue are usefully collected and categorized in Anna Haugen & James C. Eldson, *Should Section 707(b) Apply in Chapter 7 Cases Converted from Chapter 13?*, Am. Bankr. Inst. J., Apr. 2014, at 48.

183 *See, e.g.*, *In re* Layton, 480 B.R. 392 (Bankr. M.D. Fla. 2012); McDow v. Dudley (*In re* Dudley), 405 B.R. 790 (Bankr. W.D. Va. 2009); *In re* Fox, 370 B.R. 639 (Bankr. D.N.J. 2007).

184 *See* 28 U.S.C. § 2075 (providing the bankruptcy rules "shall not abridge, enlarge, or modify any substantive right").

185 *See, e.g.*, Fokkena v. Chapman (*In re* Chapman), 447 B.R. 250 (B.A.P. 8th Cir. 2011); *In re* Burgher, 539 B.R. 868 (Bankr. D. Colo. 2015); *In re* Croft, 539 B.R. 122 (Bankr. W.D. Tex. 2015); *In re* Davis, 489 B.R. 478 (Bankr. S.D. Ga. 2013); *In re* Willis, 408 B.R. 303 (Bankr. W.D. Mo. 2009); Justice v. Advanced Control Solutions, 2008 WL 4368668 (Bankr. W.D. Ark. 2008); *In re* Kellett, 379 B.R. 332 (Bankr. D. Or. 2007); *In re* Perfetto, 361 B.R. 27, 30 (Bankr. D.R.I. 2007).

calculations for the means test in section 707(b)(2)(A)(i)(I) specify to use the National Standards and Local Standards as of the order for relief, which section 348(a) again directs is the original filing date in a converted case. Similarly, section 707(b)(2)(A)(iii) allows a debtor to deduct payments "contractually due" for the six months after the filing of the petition. In addition, there is the common-sense concern that it would make little sense to apply deductions to income for a time period other than when that income is calculated. For all of these reasons, the Commission believes the statute clearly directs that the means test should be applied as of the date of the original filing — namely, that the debtor should be able to convert from chapter 13 only if the debtor would have been eligible to file chapter 7 on the original petition date.

The Commission also believes these interpretations represent sound policy and would support a clarifying amendment from Congress to implement them. Section 704(b)(1) gives the US. Trustee (or bankruptcy administrator) ten days after the meeting of creditors to review all materials filed by the debtor and file with the court a statement on whether the debtor's case would be presumed an abuse under section 707(b) (i.e., fails the means test). The U.S. Trustee then has seven days to provide a copy of the statement to all creditors. In making clarifying amendments to implement the Commission's recommendation, Congress should consider whether it would need to address the deadlines in section 704(b)(1).

§ 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*.

Background. Section 521(a) requires a debtor to make many disclosures at the time of filing:

- bankruptcy schedules detailing assets, liabilities, income, and expenses;
- a statement of financial affairs;
- payment advices received within 60 days of filing;
- a statement of net monthly income, itemized to show how the amount is calculated;
- a statement disclosing any reasonably anticipated increases in income for one year after filing; and
- a statement of intention with regard to property that secures a debt.

In addition, section 521(e) requires the debtor to provide the trustee a copy of the debtor's most recent federal income tax return, and section 521(a)(3) imposes a duty on debtors to cooperate with the bankruptcy trustee, which may require the debtor to provide further documentation that the bankruptcy trustee requests. These statutory provisions are supplemented by Federal Rule of Bankruptcy Procedure 4002, which requires the debtor to provide to the trustee at the meeting of creditors evidence of current income and statements for each of the debtor's depository and investment accounts for the time period that includes the date of the petition.

In its public meetings and through written submissions, the Commission received negative comments about document requests from some bankruptcy trustees that routinely go beyond the requirements of section 521, rule 4002, and the official bankruptcy forms. These comments gave examples of requests the commenter believed were unreasonable. The comments also discussed the burden of having to comply with routine extra documentation requests that varied not just from district to district but from trustee to trustee within a district. Other comments discussed burdens that arose from the formatting that some trustees demanded for submitted documentation. Excessive routine document requests waste resources across the entire system — those of trustees, debtors, and even the courts.

Recommendation. The Commission acknowledged the validity of the comments it had received but also recognized that many documentation requests from trustees are necessary to verify information the debtor has provided. Debtors' attorneys also can fail to act with alacrity in response to legitimate document requests that would allow trustees to value assets. The challenge is to draw lines between unreasonable routine requests and appropriate requests when the trustee needs the information.

The Commission observed it is not breaking new ground on this issue. Acting in consultation with the National Association of Bankruptcy Trustees, the National Association of Chapter 13 Trustees, and the National Association of Consumer Bankruptcy Attorneys, the USTP has developed a document titled, "Best Practices for Document Production Requests by Trustees in Consumer Bankruptcy Cases."[186] The document begins with an example of an unreasonable document-production request:

> A trustee asks every debtor to supply copies of automobile titles, copies of a county treasurer's tax statement for real property, six months of bank statements, three years of tax returns, an itemized inventory of household goods, copies of divorce decrees or property settlements entered in the last three years, and copies of the complaint and answer in any legal proceeding to which the debtor is a party. This request is excessive. There may be good reasons to make any or all of these requests in an individual case, but a blanket request for all of these documents should not be made in all cases.

186 U.S. Dep't of Justice, Best Practices for Document Production Requests by Trustees in Consumer Bankruptcy Cases," https://www.justice.gov/sites/default/files/ust/legacy/2012/07/23/best_practices.pdf (last visited Jan. 13, 2019); *see also* U.S. Dep't of Justice, Director Addresses the 35th Annual Convention of the National Association of Bankruptcy Trustees, https://www.justice.gov/ust/speeches-testimony/director-addresses-35th-annual-convention-national-association-bankruptcy-trustees (last visited Jan. 28, 2019) (reporting comments of Director Clifford J. White about the best-practices document and reports received through the Commission expressing concerns about overly burdensome document requests).

The document continues with other examples of unreasonable document requests. As noted above, there are often legitimate reasons for a trustee to request additional documentation, and the "Best Practices" document also has examples of reasonable trustee requests for extra documentation, as in situations of an expensive home value accompanied by very nominal household furnishings or a home value for a residence that the trustee knows is inconsistent with home prices in that area.

The comments the Commission received and the experience of the commissioners themselves suggested that the "Best Practices" document is not always followed. The Commission has concluded, however, that the "Best Practices" document provides sound guiding principles for document-production requests. The Commission recommends that the USTP incorporate the guidelines from the "Best Practices" document into the *Handbook for Chapter 7 Trustees*. Having the document as a formal part of the *Handbook for Chapter 7 Trustees* will make its guidance more prominently available, as well as aid in enforcement both against trustees who make unreasonable documentation requests and against debtors who fail to provide reasonable documentation.

§ 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.

Amount of Debt Cap. Currently, an individual is eligible for chapter 13 relief if that person has "noncontingent, liquidated, unsecured debts of less than $419,275 and noncontingent, liquidated, secured debts of less than $1,257,850."[187] These amounts are automatically adjusted for inflation every three years.[188]

The Commission believes the chapter 13 debt limits no longer work well given the amounts of outstanding household debt and that the debt limits sometimes lead to satellite litigation that often does not advance any core bankruptcy policy. Therefore, the Commission recommends that Congress amend section

187 11 U.S.C. § 109(e).

188 *See id.* § 104(a).

109(e) so that an individual is eligible for chapter 13 relief if that individual has less than $3,000,000 in total debts. The Commission's recommendation would eliminate the distinction between unsecured and secured debt but keep the rule that only noncontingent, liquidated debts count against the debt cap.

Congress added the debt limits in 1978 when it replaced chapter XIII of the Bankruptcy Act of 1898 with the present-day chapter 13. Under the Bankruptcy Act, any "wage earner" was eligible for chapter XIII.[189] The then-new chapter 13 expanded eligibility to any "individual with regular income." Persons on pensions or Social Security became eligible for relief. More significantly for present purposes, the old "wage earner" limitation also had excluded "small businessmen from the cheap and expeditious remedy of a wage earner plan."[190] Under the new eligibility rules, "many self-employed individuals, from the house painter and Maine worm digger, to the barber or independent carpenter will be permitted to use chapter 13."[191]

Congress saw the debt limits as a way to make the new chapter available only to those who were appropriate for the broader relief it offered than its predecessor. Congress set the original 1978 debt limits at $100,000 in unsecured debt and $350,000 in secured debt.[192] These amounts permitted "the small sole proprietor, for whom a chapter 11 reorganization is too cumbersome a procedure, to proceed under chapter 13" while preventing "sole proprietors with large businesses from abusing creditors by avoiding chapter 11."[193] In 1994, Congress adjusted the original debt limits to an amount to account for inflation in the intervening sixteen years and provided the debt limits would be inflation-indexed every three years going forward.[194]

The debt cap has become outdated because home prices have exceeded the rate of inflation. The Bankruptcy Code does inflation-indexing using the Consumer Price Index for All Urban Consumers, more commonly known as the CPI-U.[195] In calculating the CPI-U, the Bureau of Labor Statistics excludes home purchases.[196] The most commonly used index to track residential real estate prices is the S&P CoreLogic Case-Shiller Home Price Index. Using data from the Federal Reserve Bank of St. Louis, the Commission's reporter graphed in Figure 1 the relative changes since 1994 in the CPI-U and the national Case-Shiller Home Price Index. Since 1994, the CPI-U has risen 71.4%, but the Case-Shiller Home Price Index has risen 156.9%, a rate more than double the CPI-U.

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189 Section 606 of the Bankruptcy Act of 1898 defined a "debtor" for purposes of chapter XIII as a "wage earner," which in turn the section defined as "an individual whose principal income is derived from wages, salary or commissions."

190 H.R. Rep. No. 95-595, at 119 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6079.

191 *Id.*

192 Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 109(e), 92 Stat. 2549, 2557. According to the inflation calculator on the website at the Bureau of Labor Statistics, these amounts would be approximately $374,000 and $1,309,000 as stated in June 2018 dollars.

193 H.R. Rep. No. 95-595, at 119 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6080.

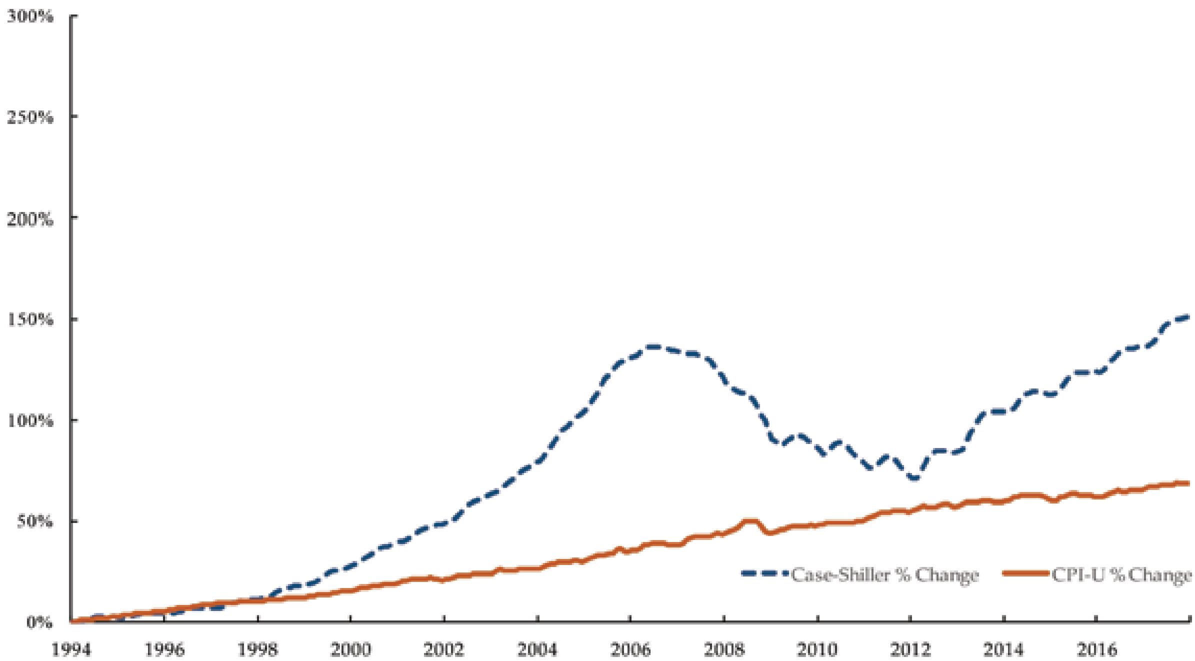
194 Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 108, 108 Stat. 4106, 4111-13 (codified at 11 U.S.C. §§ 104(a), 109(e)). The 1994 amendments reset the unsecured-debt cap to $250,000 and the secured-debt cap to $750,000.

195 *See* 11 U.S.C. § 104(a).

196 *See* Bureau of Labor Statistics, Handbook of Methods, ch. 17, at 2 (2018), https://www.bls.gov/opub/hom/pdf/homch17.pdf. The CPI-U is a measure of consumption, and in calculating the index, the Bureau of Labor Statistics excludes purchases with investment value like homes. *See id.*

For many consumers, their biggest debt will be their home mortgage. When home prices rise, the amount a consumer needs to borrow for a mortgage rises, possibly putting the consumer over the secured-debt cap. In a few locales, even the median home price would put a consumer at or near the chapter 13 secured-debt limit.[197] When home prices fall, existing mortgages can create large deficiency claims on the unpaid balance, possibly putting a consumer over the unsecured-debt cap. The exploding amount of student loan debt also will push increasing numbers of consumers toward and over the debt cap.[198]

Figure 1: Case-Shiller National Home Price Index vs. CPI-U, 1994–2017



For an "over the cap" consumer in financial distress, the alternatives to chapter 13 are poor substitutes. Perhaps most obviously, the consumer can file chapter 11, but chapter 11 is a more cumbersome, lengthier, and costlier procedure. Chapter 11 has higher filing fees, usually requires a disclosure statement and creditor voting on the chapter 11 plan, and allows creditors to file competing plans.[199] The attorney's fees will usually be much higher in chapter 11. The application of the absolute priority rule in chapter 11 is not clear and can produce unusual results if the debtor loses the ability to retain property that would be

197 *See* National Ass'n of Realtors, County Median Home Prices and Monthly Mortgage Payment (2017), https://www.nar.realtor/sites/default/files/documents/2017-q2-county-median-home-prices-monthly-mortgage-payment-by-price-10-03-2017.pdf.

198 *See* § 1.01 Student Loans (discussing increasing student loan debt).

199 *See In re* McStay, 82 B.R. 763, 767 (Bankr. E.D. Pa. 1988).

exempt under another chapter.[200] Also, chapter 11 creates a new taxable entity in the bankruptcy estate, causing the individual debtor's tax preparation to be expensive and complicated.[201]

Another alternative for an "over the cap" individual debtor is to file chapter 7, but a debtor will lose nonexempt assets in a chapter 7 as well as other benefits of a chapter 13, such as the ability to deal with the repayment of certain debts over time. In reality, the alternatives for an "over the cap" individual debtor present the Hobson's choice of an inappropriate chapter or not filing bankruptcy at all. Many individuals over the cap simply might not file.

A Bankruptcy Code that directs people away from the appropriate relief they need through artificially low debt caps is poor public policy. The Commission received many written comments and heard from speakers at its public meetings about the need for a revision in the debt caps. Where chapter 13 is the appropriate remedy, not only consumers, but their lenders as well, benefit from chapter 13's orderly reorganization and accounting.

The Commission considered and rejected several alternatives to raising the debt cap. Eliminating the debt cap would open chapter 13 to possible abuse by persons who own large business enterprises. This was exactly the evil that Congress was trying to prevent in adopting a debt cap. The more elaborate, lengthier, and costlier chapter 11 procedures are cost-justified in large cases for the protections these procedures provide to creditors.

The Commission also considered narrowly tailored rules that might serve as a gateway to let "good" cases into chapter 13 and keep out "abusive" cases. Such rules might look at the types of debts the person has, whether the person has primarily household debts or could be characterized as a "consumer," or a combination of these rules. Narrowly tailored solutions are tempting because they promise to provide results that perfectly filter out bad cases. These sorts of rules always have tradeoffs in mistakes and costs. No filter would be perfect, and courts would invariably differ about which cases belonged in chapter 13. Also, the bankruptcy system would experience costly litigation at the beginning of a case about which cases should pass through whatever gateway was set up. The debt limit provides an admittedly rough but bright-line and cost-effective rule.

For similar reasons that it rejected complex gateway rules, the Commission recommends eliminating the distinction between secured and unsecured debts. The current separate debt caps can create litigation over what counts as an unsecured debt and what value attaches to the collateral securing a debt.[202] This

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200 Whether the absolute priority rule applies to an individual debtor in chapter 11 has split the courts. *See* Stanley E. Goldich, *Plain-Meaning Rules: Did BAPCPA Abolish the Absolute Priority Rule*, Am. Bankr. Inst. J., June 2012, at 34; David S. Jennis & Kathleen L. DiSanto, *Application of Absolute Priority Rule and New-Value Exception in Individual 11s*, Am. Bank. Inst. J., July/Aug. 2011, at 56.

201 26 U.S.C. § 1398(a). Although a separate taxable entity also is created in a chapter 7 case, *see id.*, the typical consumer debtor is not likely to experience complications at tax-preparation time unless there are significant income-producing assets. *Cf.* 11 Collier on Bankruptcy, *supra* note 26, at ¶ TX3.02.

202 Most courts have decided that what counts as "unsecured" for the debt cap is calculated using the bifurcation principle of section 506(a), where a debt is unsecured to the extent it exceeds the value of the collateral. *See, e.g.*, Scovis v. Henrichsen *(In re* Scovis*)*, 249 F.3d 975 (9th Cir. 2000); *In re* Ficken, 2 F.3d 299 (8th Cir. 1993); Hines v. Scottsboro Investment Group, 2014 WL 6886717 (N.D. Ala.

litigation does not serve the public interest in screening debtors from abusing chapter 13. Instead, what falls into the secured and unsecured categories rests on formalistic legal distinctions that have little to do with the policies behind chapter 13.[203] The secured/unsecured debt distinction creates delay as well as unnecessary expenses at the beginning of the case for debtors, creditors, and trustees. In contrast, a total debt cap in most every case can usually be administered simply by reference to the amount of the debts listed in the schedules.

The Commission believes $3,000,000 in total debt is the right amount at which to set a new debt cap, subject to section 104's three-year inflation adjustments going forward.[204] Although any figure is necessarily arbitrary, the experience of the commissioners suggests that $3,000,000 is an appropriate dividing line for cases that belong in chapter 13 and those that do not, keeping with the original congressional goal of allowing "the small sole proprietor . . . to proceed under chapter 13" while preventing "large businesses from abusing creditors by avoiding chapter 11," except that today's "sole proprietor" is just as likely to be a consumer with a large home mortgage.[205] A $3,000,000 limit takes into account that both student loans and mortgage debt have risen faster than inflation and that the trend will probably continue.

Married Debtors and the Debt Cap. Married debtors, either filing jointly or alone, can raise complicated issues both for the existing debt cap and the Commission's proposal for a new debt cap. Section 109(e) currently provides that an individual debtor with regular income is eligible for chapter 13 if the debts of the "individual . . . and such individual's spouse . . . *aggregate*" less than the cap.[206] The statute thus appears to direct that a married couple is treated as an economic unit for purposes of the debt cap. The result can be that neither spouse can file chapter 13, although if they were unmarried they could do so.

2014); *In re* Claro-Lopez, 2010 WL 2787621 (Bankr. S.D. Fla. 2010); *In re* Werts, 410 B.R. 677 (Bankr. D. Kan. 2009); *In re* Grenchik, 386 B.R. 915 (Bankr. S.D. Ga. 2007); *In re* Nepple, 2000 WL 35798576 (Bankr. S.D. Iowa 2000).

The Commission does not recommend changing the requirement that a debt be noncontingent and liquidated to count against the debt cap. Counting contingent or unliquidated debts would allow speculative obligations to keep a debtor out of chapter 13. These rules do serve core chapter 13 policies.

203 For example, one case that went to the court of appeals required the court to decide whether the debtor could deduct the costs of sale in determining the extent to which the debt exceeded the value of the collateral. *See* Brown & Co. Sec. Corp. v. Balbus (*In re* Balbus), 933 F.2d 246 (4th Cir. 1991). Another case revolved around whether nonrecourse debt is counted as "unsecured." *See* Free v. Malaier (*In re* Free), 542 B.R. 492 (B.A.P. 9th Cir. 2015). Still other cases have grappled with whether the debt is "secured" for purposes of the debt cap if the debtor did not own the collateral. *See* Branch Banking Trust Co. v. Russell, 188 B.R. 542 (E.D.N.C. 1995); *In re* Bosserman, 2018 WL 2186974 (Bankr. N.D. Ohio 2018); *In re* Green, 574 B.R. 570 (Bankr. E.D.N.C. 2017); *In re* Fuson, 404 B.R. 872 (Bankr. S.D. Ohio 2008); *In re* Lower, 311 B.R. 888 (Bankr. D. Colo. 2004); *In re* Brown, 250 B.R. 382 (Bankr. D. Idaho 2000); *In re* Belknap, 174 B.R. 812 (Bankr. W.D.N.Y. 1994). A more recent case ruled that so-called 910 claims — claims secured by a motor vehicle purchased within 910 days of filing and so cannot be bifurcated into secured and unsecured portions under the hanging paragraph of 11 U.S.C. § 1325(a) — were entirely secured debts for purposes of the debt cap. *See In re* Wilkins, 564 B.R. 419 (Bankr. E.D. Cal. 2017).

204 Although the Case-Shiller Home Price Index is a better inflation index for the chapter 13 debt limits, the Commission recommends that going forward, the debt limits continue to be indexed by the CPI-U as section 104 currently directs. The Case-Shiller Home Price Index is widely used, but it is a nongovernmental index. Changes to how that index is computed or even its future discontinuance are outside the control of the government. As a product of the Department of Labor, the CPI-U is more properly incorporated as part of the statutory law. If future experience shows that the Case-Shiller Home Price Index continues to outpace the CPI-U, a simple statutory fix would be to raise the chapter 13 debt limits again.

205 H.R. Rep. No. 95-595, at 119 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6080.

206 11 U.S.C. § 109(e) (emphasis added).

Suppose Drew and Jamie are jointly liable on an unsecured debt of $300,000 and are each individually liable on separate unsecured debts of $75,000. If Drew and Jamie are unmarried business partners, they each can file chapter 13 because the amount of their unsecured debt is $375,000, which is under the current unsecured debt cap of $419,275. If Drew and Jamie are married persons, however, their debts "aggregate" to $450,000. Many courts have held the plain language of the statute means they cannot file chapter 13 individually or jointly.[207] Other courts, relying on policy concerns, have held that the debt caps should apply separately to each spouse.[208]

The Commission does not take any position on the correct resolution of this split in the case law based on the language of the current statute. On one hand, the word "aggregate" in the statute does suggest that the debts of both spouses should be summed for purposes of the statute. On the other hand, this result makes no policy sense, making one wonder whether this one word in the statute bears the meaning it appears to have.

The Commission does recommend that Congress clarify the statute going forward so that the debt cap counts only the debts of a spouse on which the spouse is liable and that each spouse get the benefit of the debt cap. A spouse would be charged with the debts on which he or she is jointly liable and individually liable. The principle would apply both when only one spouse files and when both spouses file.

A few examples will illustrate the working of the proposed rule. Suppose again Drew and Jamie are jointly liable on an unsecured debt of $300,000 and are each individually liable on separate unsecured debts of $75,000. Under the current unsecured debt cap of $419,275, both Drew and Jamie could file chapter 13 individually or jointly. Each would get the benefit of the unsecured debt cap of $419,275, because each has only $375,000 in unsecured debts on which he or she is liable.

Now suppose Drew and Jamie are jointly liable on an unsecured debt of $300,000 but that Drew is separately liable on a $75,000 unsecured debt and that Jamie is separately liable on a $125,000 unsecured debt. Under the Commission's proposal, Drew would be eligible to file chapter 13 because Drew's unsecured debts of $375,000 are under the unsecured debt cap. Jamie would not be eligible to file chapter 13 because Jamie is liable on unsecured debts of $425,000, which is above the unsecured-debt cap. They cannot file a joint chapter 13 because Jamie is not eligible for chapter 13 relief. If Drew and Jamie instead owed joint unsecured debts of $425,000, they would not be eligible for chapter 13 either individually or jointly, as they both would be above the debt cap.

Although the above examples use the existing separate cap for unsecured debts, the same principles would apply to the Commission's proposal of a total debt cap of $3,000,000. Indeed, the principles would apply to any rate cap Congress chose.

207 *See In re* Allegretti, 582 B.R. 735 (Bankr. N.D. Ill. 2018); *In re* Pete, 541 B.R. 917 (Bankr. N.D. Ga. 2015); *In re* Miller, 493 B.R. 55 (Bankr. N.D. Ill. 2013); *In re* Martz, 293 B.R. 409 (Bankr. N.D. Ohio 2002); *In re* Marchetto, 24 B.R. 967 (Bankr. 1st Cir. 1982); Shelton v. Correa (*In re* Correa), 15 B.R. 195 (Bankr. D. Md. 1981).

208 *See In re* Werts, 410 B.R. 677 (Bankr. D. Kan. 2009); *In re* Hannon, 455 B.R. 814 (Bankr. S.D. Fla. 2011); *In re* Scholz, 2011 WL 9517442 (Bankr. M.D. Fla. 2011); *In re* Bosco, 2010 WL 4668595 (Bankr. E.D.N.C. 2010).

If a married couple had only separate debts, the principles could result in a theoretical doubling of the debt cap. For example, under the Commission's proposal, a married couple, each of whom were liable on separate $2,999,999 debts, would be eligible to file a joint chapter 13. The Commission believes it will be rare for married debtors to have completely separate debts. The overriding principle is that two married persons should not be barred from chapter 13 where the same two persons would be eligible individually if they were not married.

§ 3.11 Translation Services

(a) 28 U.S.C. § 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.

Background. Currently, the bankruptcy forms, schedules, and instructions are only available in English, which can create a barrier to access for individuals with limited English proficiency (LEP). A few courts provide some translated materials. The U.S. Bankruptcy Court for the Central District of California maintains a media webpage with almost thirty videos in Spanish explaining the bankruptcy process.[209] The same court also maintains a "Frequently Asked Questions" page in Spanish with over ninety questions and answers.[210] The U.S. Bankruptcy Court for the Southern District of Florida has posted nine of those videos on its own website,[211] as well as a Spanish-language pamphlet on reaffirmation procedures prepared by the Public Counsel Law Center.[212] Both the U.S. Bankruptcy Courts for the Central District of California and the Southern District of Florida also make it easy for visitors to navigate their websites in other languages using Google Translate.

Perplexingly, no statute or regulation appears to require translators in bankruptcy court or translations of the bankruptcy forms. The Civil Rights Act of 1964 prohibits discrimination on the basis of national origin in any program receiving "Federal financial assistance,"[213] and the Supreme Court has held that

209 U.S. Bankruptcy Court for the Central District of California, Spanish Media Gallery, https://www.cacb.uscourts.gov/media-gallery/Spanish (last visited Jan. 2, 2019).

210 U.S. Bankruptcy Court for the Central District of California, FAQs (ES), https://www.cacb.uscourts.gov/es/faqs (last visited Jan. 2, 2019).

211 U.S. Bankruptcy Court for the Southern District of Florida, Bankruptcy Basics Videos, https://www.flsb.uscourts.gov/bankruptcy-basics-videos-spanish (last visited Jan. 2, 2019).

212 Public Counsel Law Center, Información Sobre la Reafirmación de Deudas, https://www.flsb.uscourts.gov/sites/flsb/files/documents/prose/PublicCounsel_ReaffInfo_SPAN.pdf (last visited Jan. 2, 2019).

213 42 U.S.C. § 2000d.

the provision of English-only educational services can constitute national-origin discrimination.[214] As a branch of the federal government, however, the judiciary likely does not receive "Federal financial assistance" within the meaning of the statute.[215]

Executive Order 13,166 directs, "Each Federal agency shall prepare a plan to improve access to its federally conducted programs and activities by eligible LEP persons."[216] The Department of Justice implemented an LEP guidance program to effectuate the executive order.[217] Under the executive order, the Commission understands that the USTP developed a language-access plan in 2008 and updated it in 2012. The bulk of the USTP plan involves making simultaneous telephonic translations available to trustees and individuals at section 341 meetings. The USTP also translated a two-page bankruptcy information sheet into eighteen languages.[218] Again, though, the executive order does not apply to the judiciary.

28 U.S.C. § 1827(b) provides that all federal courts, including bankruptcy courts, make sign language interpreters available as needed, and section 1827(d) directs courts to provide interpreters in judicial proceedings instituted by the United States. However, the *Guide to Judiciary Policy* makes it clear that there is not currently a general right to interpreter services at court expense in bankruptcy cases.[219]

The need for such translation services has been evident in many courts that have struggled to provide access to debtors for whom English is not their first language. To ensure that individuals with limited English proficiency can fully participate in section 341(a) meetings, the USTP makes translation services available via telephone. The Commission was informed that the USTP provided such services in more than 13,000 calls in nearly eighty languages at a cost of about $135,000 in fiscal year 2017. The top three languages requested using the USTP's simultaneous-translation phone lines nationwide were Spanish, Korean, and Vietnamese.[220]

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214 *See* Lau v. Nichols, 414 U.S. 563 (1974). The court later recognized that *Lau* had been abrogated on the question of whether that section covers disparate-impact, as opposed to intentional, discrimination. *See* Alexander v. Sandoval, 532 U.S. 275 (2001). As a policy recommendation to best increase access to justice, the Commission's recommendation in no way depends on the scope of liability or the coverage of the Civil Rights Act of 1964.

215 *See* U.S. Dep't of Transp. v. Paralyzed Veterans of America, 477 U.S. 597, 612 (1986) (holding the federal air traffic control system does not receive "Federal financial assistance" within the meaning of the Rehabilitation Act of 1973 and citing legislative history for the proposition that the phrase does not reach "Activities wholly carried out by the United States with Federal funds").

216 Exec. Order 13,166, 65 Fed. Reg. 50,121 (Aug. 16, 2000).

217 *Id.* at 50,123-25.

218 The bankruptcy information sheet is currently available in Spanish, Vietnamese, French, Chinese, Korean, Hmong, Tagalog, Arabic, Russian, Mandarin, Bengali, Portuguese, Laotian, Khmer/Cambodian, Haitian Creole, Polish, and Ukrainian. *See* U.S. Dep't of Justice, Bankruptcy Information Sheet, https://www.justice.gov/ust/bankruptcy-information-sheet-0 (last visited Jan. 2, 2019).

219 Admin. Office of U.S. Courts, Guide to Judiciary Policy § 240, available at http://www.uscourts.gov/sites/default/files/guide_vol05_0.pdf (last visited Jan. 2, 2019). The judiciary policy implements the directive of 28 U.S.C. § 1827 to provide interpreter services for bankruptcy proceedings instituted by the United States, which the policy considers to include section 341 meetings in the six judicial districts with bankruptcy administrators. *See id.*

220 Information and data about the USTP's language-assistance services is available at U.S. Dep't of Justice, Information for Individuals with Limited English Proficiency, https://www.justice.gov/ust/information-individuals-limited-english-proficiency (last visited Jan. 10, 2019).

Recommendation — Amendment of 28 U.S.C. § 1827. To ensure meaningful access to all parties, including those for whom English is not their primary language, the Commission recommends that 28 U.S.C. § 1827(d) should provide that courts may provide translation services to all parties, that such services may be telephonic as well as through in-person interpreters, and that appropriated funds may be used for this purpose. In addition, the law should make clear that a court may use nonappropriated funds to translate written materials, provided that the appropriate entity approves the use of funds for that purpose.

The Commission recognizes that section 1827 applies to the entire federal judiciary and takes no position on whether its recommendations should apply outside the consumer bankruptcy system. The consumer bankruptcy system, however, is the part of the federal courts with which everyday citizens are most likely to have contact.[221] The federal courts are most likely to feel the need for translation services in consumer bankruptcy cases.

Recommendation — Translation of Forms. Of the 134 separate bankruptcy forms listed on the United States Courts website, 115 of them might be relevant in the bankruptcy cases of individuals.[222] Many of these forms have their own set of multipage instructions. The translation task is daunting.

The formatting and layout used in the current forms also adds a challenge because not only must the translation be correct, it also must fit in the correct space in the form. And of course, there is a very large number of languages into which the forms would need to be translated. Given these obstacles, it is not surprising that there are very few federal courts that provide any kind of translated materials. The Commission also could not locate any unofficial translations of the bankruptcy forms.

Technology should play a role in facilitating bankruptcy court access to LEP individuals. In a separate recommendation, the Commission is proposing that the AO, the FJC, and the Advisory Committee on Rules of Bankruptcy Procedure encourage and work with for-profit and nonprofit actors in the private marketplace to develop electronic methods to assemble the information for a bankruptcy filing.[223] These methods might be based on the ability of individuals to fill out bankruptcy forms through an interface, often through a webpage, simply by answering the questions posed on a computer screen. Much like the popular TurboTax software for income-tax returns, the answers to the questions could then be transferred into the official bankruptcy forms.

Unfortunately, as the technology currently stands, such an interface cannot solve the LEP issue, even if someone had translated the interface into the LEP individual's language. The problem lies with the bankruptcy forms. Currently, would-be bankruptcy filers must review the filled-out forms to sign

221 The number of consumer bankruptcy filings dwarfs the annual number of federal civil and criminal cases combined. In 2017, when bankruptcy filing rates were at 25-year lows, there were twice as many bankruptcy cases as civil and criminal cases. *See* U.S. Courts, Judicial Business 2017, https://www.uscourts.gov/statistics-reports/judicial-business-2017 (last visited Jan. 2, 2019) (reporting for the fiscal year ended September 30, 2017, there were 344,787 civil and criminal cases combined versus 790,830 bankruptcy filings).

222 *See* U.S. Courts, Bankruptcy Forms, https://www.uscourts.gov/forms/bankruptcy-forms (last visited Jan. 27, 2019). This webpage lists both official forms, required to be used under rule 9009(a) of the Federal Rules of Bankruptcy Procedure, and director's forms, whose use is optional under rule 9009(b).

223 *See* § 5.06 Bankruptcy Forms.

them under penalty of perjury. This presents a significant barrier for LEP bankruptcy filers. Because the bankruptcy forms are English-only, a person who filled out forms using an interface system in a language other than English would nonetheless be required to sign English-only forms under the penalty of perjury.

To address this situation, the Commission recommends that the judiciary commission translations of the bankruptcy forms that are not bound to the formatting of the current forms. These translated forms could be adapted by third-party interface systems to print out two copies to filers: one copy in English that looks like the current forms, and a second copy in the filer's language. Both copies would be filed with the court, if desired.

§ 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.

Background. A body of academic literature ties mental health problems to financial distress. The causality is difficult to disentangle — i.e., does financial distress make mental health problems more likely, or is it the opposite? Regardless of the direction of causality, there is little doubt that mental health issues arise in many bankruptcy proceedings. To design effective health care interventions, the direction of causality is important. For questions of bankruptcy reform, however, the important fact is that mental health problems arise in the bankruptcy system and affect debtors' legal and life outcomes.

There is little research about the incidence of mental health issues during a bankruptcy case itself. As part of a research paper looking at the division of financial management labor in households that had filed bankruptcy, Professor Deborah Thorne found that 57% of women and 42% of men characterized themselves as "very depressed" before the bankruptcy case.[224] Thorne also reported that 93% of women and 79% of men said they were "very stressed" before filing bankruptcy.[225]

A broader literature looks at the links between financial distress and mental health generally. Professor Melissa Jacoby surveyed the literature on the link between debt and health in a 2002 paper and found two primary themes. First, financial debt is linked to stress, which in turn is linked to risk for both physical and mental disorders. Second, debt tends to prevent people from having the resources needed to maintain health.[226]

Research since Professor Jacoby's paper has only built upon this earlier literature. A meta-analysis of sixty-five papers found significant links between unsecured debt and mental disorders, including neurotic and psychotic disorders, depression, suicide completion or attempt, problem drinking, and drug dependence.[227] Different researchers, using the National Longitudinal Study of Adolescent Health, found that higher debt-to-asset ratios were associated with higher self-reported stress and depressive symptoms.[228] A broad study using United Kingdom data found that persons with debt were more likely to have a mental disorder, even after adjusting for income and other socioeconomic variables.[229] Another study examined 180 Alabamans who had defaulted on their home mortgage or gone through foreclosure. Using a standardized assessment tool for stress that considers both psychological and physical factors, this study found that 80% of the respondents experienced "moderate to high levels of stress after default or foreclosure."[230]

The bankruptcy system has been slow to react to issues surrounding mental health. In light of the academic literature establishing links between household financial distress and mental health, the Commission believes that addressing these issues should be a priority for the bankruptcy system.

Recommendation — Protecting Health Information in Bankruptcy. Mental health can be germane to legal issues in a bankruptcy case. For example, a debtor might claim that a mental illness prevents gainful employment in a way that is relevant for the chapter 7 means test or the dischargeability of a student loan. A debtor, however, might be reluctant to reveal evidence of mental illness if that evidence becomes part of the public record. Outside of bankruptcy, health information is generally subject to stringent privacy protections.

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224 *See* Deborah Thorne, *Women's Work, Women's Worry? Debt Management in Financially Distressed Families* in Broke: How Debt Bankrupts the Middle Class 136, 146 tbl. 8.3 (Katherine Porter ed., 2011).

225 *See id.* at 142 tbl 8.1.

226 *See* Melissa B. Jacoby, *Does Indebtedness Influence Health? A Preliminary Inquiry*, 30 J.L. Med. & Ethics 560 (2002).

227 *See* Thomas Richardson, Peter Elliott & Ronald Roberts, *The Relationship Between Personal Unsecured Debt and Mental and Physical Health: A Systematic Review and Meta-Analysis*, 33 Clinic Psychol. Rev. 1148 (2013).

228 *See* Elizabeth Sweet, et al., *The High Price of Debt: Household Financial Debt and Its Impact on Mental and Physical Health*, 91 Soc. Sci. & Med. 94, 97 tbl.3 (2013).

229 *See* R. Jenkins, et al., *Debt, Income and Mental Disorder in the General Population*, 38 Psychol. Med. 1485 (2008).

230 *See* Ariane Prohaska & Bronwen Lichtenstein, *Losing a Home to Mortgage Foreclosure: Temporary Setback or Chronic Stressor?*, 40 Soc. Justice 65, 72 (2014).

The Bankruptcy Code already protects some information. Section 107(b) allows a court to seal court records to protect trade secrets or "scandalous or defamatory matter." Section 107(c) authorizes a court to protect information that would pose an undue risk of identity theft or other unlawful actions that would harm a person or property. Federal Rule of Bankruptcy Procedure 9018 provides procedural rules to implement these provisions. The Commission recommends an amendment to section 107(b) to expand the information a court may protect to include information about the person's physical or mental health. The Advisory Committee on Rules of Bankruptcy Procedure should propose coordinating amendments to rule 9018.

In addition, rule 9037 should be amended to require the redaction of physical and mental health information in bankruptcy court filings. Rule 9037 implements section 205(c)(3) of the E-Government Act of 2002,[231] which requires the Supreme Court to promulgate rules protecting privacy in electronic court records. The rule requires that any paper or electronic filing have (1) only the last four digits of any Social Security Number, (2) only the year of an individual's birth, (3) only the initials of any minor, and (4) only the last four digits of any financial account number.[232] The Commission recommends that physical and mental health information be added to this list.[233] Where the information would be needed for administration of the case, the rule allows a court to order the filing of the information under seal.[234]

Recommendation — Pro Bono and Reduced-Fee Representation. The U.S. Bankruptcy Court for the Eastern District of North Carolina has been a pioneer on the issue of mental health issues in bankruptcy. Under the leadership of Judge Thomas Small, that district formed a mental health committee to explore how the court could educate lawyers and debtors about the effects of mental illness and direct them to professional resources that might provide help during the case.[235] The committee, with the help of a mental health professional, developed a brochure that described various mental illnesses and where mental health assistance was available. The brochures, in addition to being on the court's website,[236] have been made available to attorneys for use in their practice and to debtors at meetings of creditors.

The committee also recognized and addressed the practical problem that debtors face when trying to prove a mental illness defense in a bankruptcy proceeding. Although expert testimony is not needed to prove a mental illness, without expert testimony it will often be difficult for a debtor to prevail. Because most debtors cannot afford to hire a mental health professional, the committee solicited a panel of volunteer professionals who were willing to provide mental health evaluations for free or at reduced costs. These professionals appear as witnesses for the court, rather than as experts for the debtor. As is

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231 Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913-15.

232 *See* Fed. R. Bankr. P. 9037(b).

233 In any rules amendment, the Advisory Committee should consider how to implement the Commission's recommendation while allowing trustees access to unredacted proofs of claim for purposes of administering the estate.

234 *See* Fed. R. Bankr. P. 9037(c).

235 A description of the program can be found at U.S. Bankruptcy Court for the Eastern District of North Carolina, Mental Health Project, https://www.nceb.uscourts.gov/mental-health-project (last visited Feb. 4, 2019).

236 *See* U.S. Bankruptcy Court for the Eastern District of North Carolina, Mental Health Project Brochure & Resource Guide, https://www.nceb.uscourts.gov/sites/nceb/files/MentalHealthBrochure2017.pdf (last visited Feb. 4, 2019).

appropriate given the facts and circumstances, the professionals testify by affidavit, by tele- or video-conference, or in court. The voluntary program, initiated by a request from a debtor who cannot afford an evaluation, is described on the court's website.[237]

The Commission recommends that all judicial districts adopt a program that has the features of the mental health program for the U.S. Bankruptcy Court for the Eastern District of North Carolina.

Recommendation — ABI Programming. As the largest organization of bankruptcy professionals in the United States, the Commission believes the ABI should play a leadership role on issues at the intersection of mental health and bankruptcy. The actions could include any or all of the following: (1) forming a mental health committee; (2) promoting research on mental illness and household financial distress; (3) encouraging ABI's continuing legal education planners to include programs on mental health (including ethics credit programming for panels related to the mental health of attorneys); and (4) doing outreach to other organizations of bankruptcy professionals to encourage action in the public interest about mental health and bankruptcy.

237 *See* U.S. Bankruptcy Court for the Eastern District of North Carolina, Application for Approval of Mental Health Evaluation, https://www.nceb.uscourts.gov/sites/nceb/files/Application%20for%20Mental%20Health%20Evaluation.pdf (last visited Feb. 4, 2019).

IV: 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 (AO).

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

Background. Numerous academic studies establish that African American debtors are overrepresented among chapter 13 filers. Over half of African American bankruptcy debtors file chapter 13 cases, compared to just over one-quarter of other filers, a disparity that remains even after controlling for factors such as assets and income.[1] Chapter 13 can be the better choice for some debtors, but there is no apparent reason for a racial disparity after controlling for financial and personal circumstances. Because

1 *See* Dov Cohen, Robert M. Lawless & Faith Shin, *Opposite of Correct: Inverted Insider Perceptions of Race and Bankruptcy*, 91 Am. Bankr. L.J. 623, 631, 633 (2017) (reporting a study where 55.0% of African American filers were in chapter 13 as compared to 26.3% for debtors from households where no debtor identified as African American); Jean Braucher, Dov Cohen & Robert M. Lawless, *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 J. Empirical Legal Stud. 393, 398, 402 (2012) (reporting a study where 54.7% of African American filers were in chapter 13 compared to 26.7% for debtors from households where no debtor identified as African American).

chapter 13 is more expensive, requires repayment of income over a period of three to five years, and grants a discharge only after successful completion of the proposed payments, the racial disparity in chapter 13 filers raises concerns about equal access to justice.

Academic papers first noted the racial disparity in chapter 13 filers thirty years ago. The initial reports of racial disparity, however, were not widely noticed, likely because the racial disparity finding was a byproduct of a different research question or because the papers used procedures that limited their ability to draw statistical inferences. In a paper published in 1987, Professor Michelle White explored whether the increase in bankruptcy filings after the 1978 passage of the Bankruptcy Code was due to increases in exemptions or general economic factors. Using a data set of 75,000 cases provided by the AO, she found that the percentage of African Americans in a county increased the number of chapter 13 cases filed in that county.[2]

As part of her pioneering work on the concept of local legal culture, Professor Jean Braucher did in-depth qualitative interviews with bankruptcy professionals in Ohio and Texas. In these interviews, two chapter 13 trustees in Ohio said they thought African Americans were overrepresented in chapter 13, with one of the trustees commenting that he was worried these debtors were "being taken advantage of."[3]

Several later papers, more specifically mentioning racial disparities in bankruptcy, were based on data from the long-running Consumer Bankruptcy Project (CBP).[4] In a study using 2001 data from the CBP and using households as the unit of analysis, Professor Robert Chapman stated that over half of the African American debtors in the data filed for chapter 13.[5] In a study based on the same 2001 data, Professor Rory Van Loo explored racial disparities in bankruptcy discharge rates. As part of that study, he found that 61.8% of African Americans "chose Chapter 13, compared to 28.4% of Hispanics and 20.5% of whites."[6]

As technology changed, it became easier for researchers to create data sets that allowed for more robust statistical techniques. These techniques built on the earlier findings; evidence accumulated that the racial disparity in bankruptcy chapter choice in prior work was not an artifact of the earlier research designs. Professors Jean Braucher, Dov Cohen, and Robert Lawless used the nationally representative 2007 CBP data to explore more fully the overrepresentation of African Americans in chapter 13. They

2 Michelle J. White, *Personal Bankruptcy Under the 1978 Bankruptcy Code: An Economic Analysis*, 63 Ind. L.J. 1, 45, 47 (1987).

3 Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 Am. Bankr. L.J. 501, 559-60 (1993).

4 The CBP has collected data on U.S. bankruptcy filers in waves in 1981, 1991, 2001, and 2007, and began continuous data collection in 2013. The CBP collects court-record data and does surveys and telephone interviews with bankruptcy filers. Information about the CBP's methodologies can be found at Robert M. Lawless, Angela K. Littwin, Katherine M. Porter, John A.E. Pottow, Deborah K. Thorne & Elizabeth Warren, *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 Am. Bankr. L.J. 349, 387-98 (2008), and Pamela Foohey, Robert Lawless, Katherine Porter & Deborah Thorne, *"No Money Down" Bankruptcy*, 90 S. Cal. L. Rev. 1055, 1072-74 (2017).

5 Robert B. Chapman, *Missing Persons: Social Science and Accounting for Race, Gender, Class, and Marriage in Bankruptcy*, 76 Am. Bankr. L.J. 347, 387 n.266 (2002) (finding that 42.6% of African American filers went into chapter 7 and therefore implying that over half filed chapter 13).

6 Rory Van Loo, *A Tale of Two Debtors: Bankruptcy Disparities by Race*, 72 Alb. L. Rev. 231, 234 (2009). A limitation on the Chapman study and this study was that, because of the technology of the time, the CBP drew on five judicial districts that together were believed to be nationally representative but were not true national random samples. *See* Lawless, et al., *supra* note 4, at 389-90.

found that 54.7% of African American bankruptcy filers were in chapter 13, compared to 28.2% of filers of all other races.[7] The differences remained even after regressions that statistically controlled for (1) legal and financial variables such as attorney representation, income, and assets; (2) prebankruptcy workout efforts such as attempts to consolidate debts, attempts to "work with" creditors, and attempts at refinancing; (3) demographic variables such as educational level, occupational prestige, and number of dependents; and (4) the rate at which non-African Americans filed under chapter 13 in the district.[8] After controlling for these variables, the regressions estimated an African American bankruptcy filer was about twice as likely to be in chapter 13 compared to a similarly situated debtor of another race.

Braucher, Cohen, and Lawless also sent an experimental vignette to a random sample of consumer bankruptcy attorneys. The vignette described a couple who had come to an attorney for bankruptcy advice. The researchers designed the vignette to be a close question as to whether chapter 7 or chapter 13 was a better choice. The responding attorneys, without being told, each received one of several different versions of the vignette. In one version, the clients had names and church denominations that were stereotypically African American, while another version included stereotypically white names and church denominations. There also was a control group for which the vignette used only initials and gave no cues about the likely race of the client. Different versions also specified whether the clients stated a preference for chapter 7 or chapter 13 or, as a control condition, the clients did not state a preference.[9]

If the attorney had received a vignette with stereotypical African American names, the attorney recommended a chapter 13 filing 47% of the time while recommending that chapter only 36% of the time for the control condition and only 32% of the time if the vignette had stereotypical white names.[10] Moreover, attorneys were more likely to override the stated preference of the client to file chapter 7 if the vignette used the stereotypical African American names.[11] Attorneys also viewed the fictitious African American couple as being more "competent" and having "good values" if the couple had expressed a preference for chapter 13 but had the opposite reaction for the fictitious white couple.[12]

Cohen and Lawless were joined by Faith Shin in a partial replication of their earlier work using 2013-15 data from the CBP. Again, African American bankruptcy filers were in chapter 13 at higher rates

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7 Braucher, et al., *supra* note 1, at 400. Preliminary findings from this paper were published at Dov Cohen & Robert M. Lawless, *Less Forgiven: Race and Chapter 13 Bankruptcy*, in Broke: How Debt Bankrupts the Middle Class 175 (Katherine Porter ed., 2012).

The American Bankruptcy Institute sponsored a symposium about the paper for which the authors shared their data with other researchers who confirmed the study's findings. *See* Symposium, *Bankruptcy and Race: Is There a Relation?*, 20 Am. Bankr. Inst. L. Rev. 611 (2012) (publishing articles by A. Mechele Dickerson, Joseph W. Doherty, Theodore Eisenberg, Daniel Keating, and Stephen Lubben).

8 Braucher, et al., *supra* note 1, at 402.

9 *Id.* at 406-09. In research terms, the different versions of the vignette were two experimental manipulations of three possibilities that were "fully crossed" such that there were nine versions of the vignette.

10 *Id.* at 412.

11 *Id.*

12 *Id.* at 413-16.

(55.0%) than persons of other races (26.3%).[13] The differences again remained even after regressions controlling for legal and financial variables, prebankruptcy workout efforts, demographic information, and the overall chapter 13 rate in the district.[14] Cohen, Lawless, and Shin also gave consumer bankruptcy lawyers a survey asking them to make estimates about bankruptcy chapter choice. The attorneys overestimated the propensity of whites to file chapter 13, guessing that 46.3% of the time they filed chapter 13, compared to the real-world rate at the time of the survey of 28.6%. At the same time, they underestimated the propensity of African Americans to file chapter 13, stating that the rate was 22.0%, compared to the real-world rate of 54.6%.[15] Attorneys also made large overestimates for homeowners and large underestimates for prior bankrupts. In the authors' words:

> The attorney estimates appear to line up with American stereotypes of who is a responsible person. Attorneys see homeowners and whites as more likely to attempt repayment to creditors through chapter 13 whereas they see African Americans and prior bankrupts as more likely to seek a full discharge in chapter 7. There is no reason to think that attorneys, as a group, should not hold prevailing American cultural biases about who is a responsible person. That the attorneys are the system's insiders and have a front-row seat to witnessing a 2:1 racial disparity is not enough to overcome the bias.[16]

Professor Edward Morrison and Antoine Uettwiller used a data set from Cook County, Illinois, to explore the relationship between the overrepresentation of African Americans in chapter 13 and parking fines. They find that in Cook County, African Americans not only are overrepresented among chapter 13 filers but also are overrepresented among bankruptcy filers with more than $500 of government fines.[17] Because governmental fines are dischargeable in chapter 13, Morrison & Uettwiller observe that such filers have a greater incentive to choose chapter 13. After excluding African Americans with more than $500 in governmental fines, the disparity in chapter choice remains but is "substantially smaller."[18] In a working paper, Morrison & Uettwiller joined Belisa Pang to look at African American debtors in Atlanta, Chicago, and Memphis. They find that African Americans with longer commuting times in those three cities are more likely to file chapter 13.[19] Using a subset of their data for Chicago only, they find that the beginning of more aggressive parking enforcement and fines was more likely to lead to

13 Cohen, et al., *supra* note 1, at 631.

Given the publicity of the prior work, it was likely that many bankruptcy professionals were aware of it, and it was possible that practices had changed to erase the disparity. For example, the Braucher, Cohen & Lawless paper received substantial media attention, including a front-page story in the *New York Times*. *See* Tara Siegel Bernard, *Blacks Face Bias in Bankruptcy, Study Suggests*, N.Y. Times, Jan. 20, 2012, at A1. Thus, it was somewhat surprising that not only had the overall picture remained basically the same but also that the disparities remained almost exactly in the same percentages. *See id.* at 632 (commenting the results in the replication are "strikingly similar" to the results from the earlier paper).

14 *Id.* at 633.

15 *Id.* at 637.

16 *Id.* at 639.

17 Edward R. Morrison & Antoine Uettwiller, *Consumer Bankruptcy Pathologies*, 173 J. Institutional & Theoretical Econ. 174 (2017).

18 *Id.* at 185-86.

19 Edward R. Morrison, Belisa A. Pang & Antoine Uettwiller, *Race and Bankruptcy* (Columbia Law and Economics Working Paper), available at https://ssrn.com/abstract=3137112.

an increase in chapter 13 filings in zip codes with predominately African American residents. They summarize this line of research as saying, "Among those who file, African Americans are more likely than other debtors to select Chapter 13. This preference is due, at least in part, to systematic differences by race in the value of cars and driver licenses." Whether this work generalizes beyond Chicago is yet to be explored. A *ProPublica Illinois* news story details the link between aggressive parking enforcement in Chicago and bankruptcy filings.[20]

Professors Pamela Foohey, Robert Lawless, Katherine Porter, and Deborah Thorne used CBP data from 2007 and 2013-15 to examine the phenomenon of "no money down" chapter 13s where the bankruptcy filer funds the attorney's fees through the chapter 13 plan. African American debtors were more likely to file a "no money down" chapter 13 than debtors of other races, a result that held up even after statistically controlling for other factors through regression analysis.[21] Indeed, the two most important factors that determined whether a debtor filed a "no money down" chapter 13 were the debtor's race and the percentage of chapter 13s in the district.[22] The authors summarized their findings as follows: "[T] hese two characteristics align with prior research about bankruptcy attorneys' role in creating regional and racial disparities in debtors' chapter choice, further suggesting that attorneys play a very important, though likely unintentional, role in facilitating people's use of bankruptcy."[23]

In an extensive piece of data journalism for *ProPublica*, Paul Kiel and Hannah Fresques matched zip code-level data with bankruptcy-filing data. They found that persons living in majority African American zip codes were twice as likely to file chapter 13 than persons of other races. They then used Census-tract data to drill down into the data for the Northern District of Illinois and the Western District of Tennessee, two districts with high chapter 13 rates where they found the pattern remained even after controlling for income and assets.[24]

Most recently, Professors Robert Lawless and Angela Littwin used a similar methodology to Kiel & Fresques, matching the Federal Judicial Center's (FJC) national bankruptcy petition database containing data on all bankruptcy filings to zip code-level data from the Census. Using all chapter 7s and chapter 13s filed across the country from 2012-2016, they find that case-level characteristics (e.g., assets and income) and zip code-level characteristics (e.g., mean income, presence of payday lending, and percentage of African Americans) drive chapter 13 rates. After controlling for judicial district, however, the only zip code-level variable that remained significant was the percentage of African Americans living in the zip

20 *See* Melissa Sanchez & Sandhya Kambhampati, *Driven to Bankruptcy: How Chicago Debt Sends Black Motorists into Bankruptcy*, ProPublica Ill., Feb. 27, 2018, https://features.propublica.org/driven-into-debt/chicago-ticket-debt-bankruptcy/.

21 *See* Foohey, et al., *supra* note 4, at 1082, 1087 tbl.3.

22 *See id.* at 1089, fig. 4.

23 *Id.* at 1106.

24 *See* Paul Kiel & Hannah Fresques, *Data Analysis: Bankruptcy and Race in America*, ProPublica, Sept. 27, 2017, https://projects.propublica.org/graphics/bankruptcy-data-analysis. A shorter narrative describing the data analysis and including interviews with bankruptcy filers and bankruptcy attorneys was simultaneously published. *See* Paul Kiel & Hannah Fresques, *How the Bankruptcy System Is Failing Black Americans*, ProPublica, Sept. 27, 2017, https://features.propublica.org/bankruptcy-inequality/bankruptcy-failing-black-americans-debt-chapter-13/ [hereafter, Kiel & Fresques, *How the Bankruptcy System Is Failing*].

code area.[25] Lawless & Littwin considered their findings significant because they were consistent with prior studies based on the CBP data set but used different, nonsurvey techniques.

Because a chapter 13 discharge comes only after completion of plan payments and with only 38.8% of chapter 13s having a completed plan,[26] the disparity in chapter choice means African Americans are less likely to receive a discharge. Even among chapter 13 filers, however, research suggests African Americans are less likely to receive a discharge. Braucher, Cohen, and Lawless noted that, in their data, African American chapter 13 filers were more likely to have their cases dismissed as compared to other debtors.[27] Using 2007 data from the CBP, Professors Sara Green, Parina Patel, and Katherine Porter looked at the determinants of successful completion for chapter 13 plans. Using regression analysis, they identified several variables that affect plan completion: the amount of unsecured and priority debt, housing affordability, dependents, prior bankruptcies, attorney representation, saving a home as a reason for the filing, the availability of health insurance, and household employment.[28] But race also mattered: "Blacks have less than half the chance of bankruptcy success as non-blacks. . . . More than amount of debt, prior bankruptcies, or having a job — all features that the bankruptcy system does account for in considering a person's eligibility for chapter 13 — race matters."[29]

Recommendations. After considering the evidence on racial disparities in chapter 13, the Commission decided it was important both to acknowledge the empirical fact of the disparities and to make a strong statement regarding the issue. Although the studies have focused on the role of attorneys, the dramatic variation in racial disparities among judicial districts suggests that one group of actors cannot be driving the entire effect. It may be the complex interactions among debtors, attorneys, trustees, judges, and other system actors that are creating the context for the disparities.[30] The mechanisms that create the disparities are still being explored, and the Commission encourages scholars to continue to study the intersection of race and bankruptcy. Regardless of the precise causes, consumer bankruptcy professionals should do whatever they can to help to ensure that everyone has an equal opportunity to achieve a fresh start.

As part of its recommendations, the Commission has issued a statement of nondiscrimination in the bankruptcy system, not just against racial discrimination but against all forms of discrimination based on legally irrelevant factors. The Commission's statement is consistent with lawyers' professional duties to assist in providing access to the legal system and the administration of justice.[31] The Commission's commitment to nondiscrimination is the one recommendation that every reader of this report can

25 *See* Robert M. Lawless & Angela Littwin, *Local Legal Culture from R2D2 to Big Data*, 96 Tex. L. Rev. 1352, 1368 tbl.1 (2018).

26 *See* Ed Flynn, *Success Rates in Chapter 13*, Am. Bankr. Inst. J., Aug. 2018, at 38 tbl.1.

27 Braucher, et al., *supra* note 1, at 405.

28 *See* Sara S. Greene, Parina Patel & Katherine Porter, *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 Minn. L. Rev. 1031, 1087 tbl. 1 (2017).

29 *Id.* at 1036, 1087 tbl. 1.

30 *See* Braucher, *supra* note 3, at 503 (describing local legal culture as "the context created by" the local "administrative practices of judges and trustees, and prevailing professional attitudes" that varied "dramatically" across the four cities she studied).

31 *See* Model Rules of Prof'l Conduct prmbl. ¶ 6.

implement on his or her own and indeed will only be effectively implemented through the individual commitment of bankruptcy professionals to equal access to justice.

At its most basic level, the Commission's recommendation is a call for a commitment to the rule of law that respects everyone's right to access the bankruptcy system and to have all the actors in the bankruptcy system base their decisions only on legally relevant factors.

None of the studies discussed above have identified conscious racism as the culprit for the disparities. Rather, implicit racial bias may lie beneath the disparities observed in the studies. Implicit bias refers to the unconscious attitudes and stereotypes that studies suggest are pervasive in the population. These biases are involuntary and can contradict a person's consciously held beliefs in equality. Studies suggest that implicit bias is associated with widespread discriminatory outcomes, including poor social interactions, constricted job opportunities, "a decreased likelihood of receiving life-saving emergency medical treatments,"[32] and negative outcomes throughout the U.S. legal system.[33] The goal of the Commission is to provide equality-minded bankruptcy professionals with the opportunity to live up to their consciously held beliefs. Implicit biases are pervasive across all societies. The disparities in bankruptcy chapter choice give consumer bankruptcy professionals an opportunity to provide leadership across the legal profession by creating examples of how to combat implicit bias.

The Commission therefore recommends that bankruptcy organizations conduct sessions on implicit racial bias as part of their continuing legal education (CLE) offerings. State bars should approve such panels for ethics CLE credits and consider going further to require implicit racial bias training as its own class of CLE credit, similar to the rules in many states for ethics, mental health, or substance-abuse training. Sessions dedicated to implicit racial bias training already are occurring at bankruptcy CLEs. At the risk of omission, the Commission is aware of such panels at meetings of the American Bankruptcy Institute, the National Conference of Bankruptcy Judges, the National Association of Consumer Bankruptcy Attorneys, the National Association of Chapter 13 Trustees, and the FJC, as well as meetings of state and local bar associations. In addition to continuing legal education panels, the Commission recommends that bankruptcy groups offer training to their members to assist them in overcoming implicit bias.

Finally, the commissioners believe that the disparities in treatment based on race might have been less pronounced had the data cited here been more widely available. As the saying goes, sunlight is the best disinfectant. At the least, the availability of bankruptcy data on race and ethnicity (and perhaps other demographic information) would give researchers opportunities to better understand who files bankruptcy and how the system can be improved. The Commission therefore recommends that Congress amend 28 U.S.C § 159 to authorize the collection of race and ethnicity information as part of the bankruptcy petition process. Congress should require the AO to disseminate statistics on the race

32 Patricia G. Devine, Patrick S. Forscher, Anthony J. Austin & William T.L. Cox, *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention,* 48 Experimental Soc. Psychol. 1267, 1267 (2012).

33 Jerry Kang, Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124 (2012).

and ethnicity of bankruptcy filers. If Congress does not act, the Advisory Committee on Bankruptcy Rules of Procedure should work with the AO to consider implementation of the recommendation through the rules process.

The Commission recognizes that collecting race and ethnicity information may raise privacy issues. Race and ethnicity should not be relevant to the legal issues in bankruptcy cases, but putting such information in the bankruptcy filing might be understood as suggesting that these pieces of information somehow are considered in administering a case and perhaps might be especially confusing for pro se filers. It is not unusual, however, for many organizations to collect demographic information for statistical purposes, and the forms could simply state the information would not be used in the case and is being requested only to better track who comes into contact with the bankruptcy system. It would also be important that the statistical information on race and ethnicity be stored separately from the rest of the information in the case. The Commission decided it was best to leave the precise implementation of this recommendation to the expertise of the AO. The Commission does not intend to downplay the costs and risks of collecting race and ethnicity information, but in light of the evidence and history of racial disparities in the bankruptcy system, it believes that the benefits of collecting the information outweigh these costs and risks.

§ 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 their 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 (USTP), the FJC, and other professional associations to promote uniformity in the bankruptcy system.

Background. Variations in local practices have many benefits, such as tailoring procedures to local needs and piloting innovations that can spread to other localities across the country and even prompt a change in national practice. Indeed, chapter 13 itself began this way.[34] By "local practices," the Commission is referring to local court rules, standing orders, or even unwritten norms that "everyone" knows they must follow in the local bankruptcy court.

34 *See* Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 Harv. J. L. & Pub. Pol'y 801, 842 (1994) (explaining that the origins of chapter 13 came from the Northern District of Alabama and judges who followed the innovations in that district).

On the other hand, local practices can cause problems. Local practices can deviate from the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure.[35] Perhaps most troublingly, these practices can override choices that the statute or national court rules leave to the debtor. Such practices can lead to unequal results for debtors based on where they live and interfere with the ability of debtors to obtain a fresh start. Even where local practices are consistent with national law, they create burdens on all parties to know the local practice. As both debtor and creditor lawyers increasingly work in multiple judicial districts, local practices are increasingly raising costs.

Federal Rule of Bankruptcy Procedure 9029 authorizes bankruptcy courts to adopt local rules and standing orders "which are consistent with — but not duplicative of — Acts of Congress and these rules and which do not prohibit or limit the use of the Official Forms." The Advisory Committee note cautions the courts about excessive reliance on local rules and standing orders:

> This rule recognizes that courts rely on multiple directives to control practice. Some courts regulate practice through the published Federal Rules and the local rules of the court. Some courts also have used internal operating procedures, standing orders, and other internal directives. Although such directives continue to be authorized, they can lead to problems. Counsel or litigants may be unaware of various directives. In addition, the sheer volume of directives may impose an unreasonable barrier. For example, it may be difficult to obtain copies of the directives . . . .
>
> There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular judge unless the party or attorney has actual notice of those requirements.

Appellate litigation can resolve geographic inconsistencies in the law, but, for several reasons, appellate litigation is an incomplete solution to the problems caused by local practices. First, although an appellate court might consider whether a local rule or standing order exceeds the authority of the court,[36] nonuniformity alone would not be grounds to void a local rule or court order. Second, informal, unwritten norms generally do not create a record that can be addressed through appellate litigation. Third, practical barriers may limit appellate litigation on local rules. For example, consumer bankruptcy attorneys working on a flat-fee structure or any party without financial resources or lacking a large pecuniary interest often cannot afford to bring appeals. Finally, attorneys for all types of parties may be concerned that appealing established local rules or standing orders might cause resentment in judges and trustees in their communities.

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35 *See, e.g.*, Roseberry v. U.S. Trustee (*In re* Roseberry), 2018 WL 6624202 (S.D. Ill. 2018) (local rule requiring chapter 13 plans to contain language treating postpetition acquired property as disposable income improperly imposed confirmation requirements beyond those in section 1325).

36 *See* Coffey v. Marina Mgmt. Serv. (*In re* Kool, Mann, Coffee & Co.), 23 F.3d 66 (3d Cir. 1994) (invalidating local rule that allowed appeals to bypass bankruptcy appellate panel); Roseberry v. U.S. Trustee, 2018 WL 6624202 (S.D. Ill. Dec. 18, 2018) (holding local rule that required amendment of schedules during chapter 13 improperly added nonstatutory confirmation requirements).

Recommendations. Through written statements and in-person testimony as well as its committee process, the Commission heard how nonuniform practices can burden debtors, creditors, and practitioners. These statements were consistent with the personal experiences of the commissioners. Examples of nonuniform practices include:

- requirements that debtors pay a minimum dividend to general unsecured creditors beyond the amounts mandated under the disposable income and best-interest tests;[37]

- local forms for chapter 13 plans that do not permit debtors to include lien avoidances or collateral valuations in their plans, despite permission to do so as set forth in Federal Rules of Bankruptcy Procedure 4003(d) and 3012(b), respectively incorporated in Official Form 113, and required to be included in any local form adopted pursuant to Federal Rule of Bankruptcy Procedure 3015.1;

- significant disparities across localities in the percentage of chapter 13 cases in which debtors pay no attorney fees before filing for bankruptcy; [38]

- differences in case management (CM) and electronic case filing (ECF) practices from district to district, both in docketing practices and rules about file size and attachments;[39]

- varying time limits in a chapter 13 case during which a secured creditor can file a deficiency claim;[40]

- different deadlines for objections to a chapter 13 plan other than the seven-day deadline before the date set for confirmation as provided in Federal Rule of Bankruptcy Procedure 3015(f);[41] and

- provisions resulting in the automatic dismissal of cases, despite a statutory requirement for a hearing.[42]

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37 An older example of this phenomenon comes from Braucher, *supra* note 3, *passim*. Professor Braucher documents four judicial districts with preset "floors" requiring a minimum distribution to creditors for routine confirmation to occur. The floors ranged from 10% repayment to 100%. *Id.* at 532.

38 Pamela Foohey, *supra* note 4, at 1081 (2017) (noting judicial districts with a high percentage of chapter 13 cases tend to have more chapter 13s where debtors pay no attorney's fees before filing).

39 These differences are documented at § 5.07 Case Management (CM)/Electronic Case Filing (ECF) & Docketing Improvements, where the Commission has made several specific recommendations to promote uniformity in CM/ECF practices.

40 *See, e.g.*, Bankr. E.D. Ky. R. 4001-1(e)(i)-(ii) (if a secured claim is paid through the plan, 90 days after order terminating stay for personal property and 210 days for real property); Bankr. E.D. Tenn. R. 3002-1(a)-(b) (60 days after rejection of a lease, 120 days from confirmation if debtor surrenders the collateral). The U.S. Bankruptcy Court for the Northern District of West Virginia has a form order that imposes a limit of 90 days from the liquidation of the collateral. *See* BANKR. N.D. W. VA. R. App. K-2. The nonuniform location of these filing deadlines in the local rules makes it even more difficult for attorneys to inform themselves of the local requirements.

41 The District of Arizona's official local chapter 13 plan form provides that objections are due not less than 14 days after the date set for the first meeting of creditors or 28 days after service of the plan, whichever deadline is later. The official local chapter 13 plan form for the Western District of Texas requires plan objections to be filed at least 14 days before the confirmation hearing date.

Because Federal Rule of Bankruptcy Procedure 3015(f) provides that objections must be filed *at least* 7 days prior to the confirmation hearing, these local forms arguably do not conflict with the national rule by providing longer time frames. But regardless of whether these local forms are authorized by rule 3015(f), their nonuniformity is problematic.

42 *See* No v. Gorman, 891 F.3d 138 (4th Cir. 2018).

The long-standing, widespread geographic variation in bankruptcy chapter use also can be seen as a problem of nonuniform local practices.[43] The major differences in chapter 13 rates suggest that informed choice by the debtor may not be the driving factor in chapter selection. Attorneys' values and incentives, as well as local legal expectations regarding which chapter is appropriate under a given set of circumstances, may have an important effect on this crucial decision.[44] "Given the law's technical complexities, lawyers' income expectations and clients' mixed needs,"[45] some lawyers do not counsel each client to the point of being fully informed. Some attorneys may be so wedded to a particular chapter that they may not provide their clients with enough information to make a choice at all.[46] (By making these observations, the Commission does not intend to suggest they excuse the ethical obligation of consumer bankruptcy attorneys to fully and properly counsel their clients.) To point out that there is variation in chapter 13 rates is not to say the rates are too high or too low, but only that the widespread differences in chapter use suggest that similarly situated debtors are obtaining very different outcomes in a national bankruptcy system based on where they live.

Recommendations. The Commission believes that nonuniform practices are a problem in the bankruptcy system that should be minimized to the greatest extent possible. Although nonuniformity is a problem across consumer bankruptcy, it is particularly a problem in chapter 13 practice, perhaps because chapter 13's complexity and the lengths of chapter 13 plans create more opportunities for nonuniform local practices to arise. In discussing this problem, the Commission recognized that nonuniformity cannot simply be eradicated by declaration. Also, as this section noted at the start, local practices can bring innovation and are often necessary to adapt to local conditions. Some amount of nonuniformity is not only inevitable but also desirable.

The Commission's primary recommendation is an encouragement of uniformity in the bankruptcy system. The recommendation is hortatory to all actors in the bankruptcy system, setting uniformity as an ideal the bankruptcy system should pursue. The scope and limits of the recommendation should be understood in light of the discussion in this section.

The Commission recommends several steps to promote uniformity. First, judges in multi-judge districts should confer and reduce nonuniformity within the district. Second, national bankruptcy organizations — including, without limitation, the American Bankruptcy Institute, the National Conference of

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43 Jeffrey A. Logan, *The Troubled State of Chapter 13 Bankruptcy and Proposals for Reform*, 51 SMU L. Rev. 1569, 1583 (1998); Scott F. Norberg & Nadja Schreiber Compo, *Report on an Empirical Study of District Variations, and the Roles of Judges, Trustees, and Debtors' Attorneys in Chapter 13 Bankruptcy Cases*, 81 Am. Bankr. L.J. 431, 432 (2007); Sullivan et al., *supra* note 34, at 828-29; William C. Whitford, *The Ideal of Individualized Justice*, 68 Am. Bankr. L.J. 408-09 (1994).

44 The most in-depth research on local legal culture remains Professor Jean Braucher's qualitative study of four cities, where she interviewed 45 bankruptcy attorneys as well as trustees and judges. Braucher, *supra* note 3, at 504. She found that each city had a distinctive local legal culture that was, in three instances, shaped by a veteran standing chapter 13 trustee. *Id.* at 560. Individual lawyers also played a major role in chapter selection. *Id.* at 582. She explored the financial and social interests of both lawyers and clients and concluded that these factors interacted with each other in a complex way and were difficult to tease apart. *Id.* at 509.

45 *Id.* at 510.

46 *See* Kiel & Fresques, *How the Bankruptcy System Is Failing*, *supra* note 24 (interviewing a lawyer who "was not troubled" to learn that a former client had not understood the difference between the two chapters: "As required by law, he said, he provides clients with documents explaining the difference, but any client who asks about Chapter 7 will get an argument from him.").

Bankruptcy Judges, the National Association of Chapter 13 Trustees, and the National Association of Consumer Bankruptcy Attorneys — should work to promote uniformity. These organizations should include uniformity issues in their continuing legal education programming, as well as create working groups that can reach out to one another to promote uniformity. The judiciary also should coordinate through the AO and take advantage of national and circuit judicial conferences to confer about uniform practices. Finally, through its oversight function, the USTP and bankruptcy administrators should also promote uniformity.[47]

47 The director of the USTP has advocated for more uniformity in chapter 13 practice:

> In so many ways chapter 13 practices diverge from district to district, and even from judge to judge. For example, local practices vary with respect to the re-vesting of estate property at confirmation, use of conduit or non-conduit plans, and varying applications of confirmation standards. Sometimes, this may place chapter 13 trustees in the crossfire between disagreeing judges. Some suggest the USTP should take a more active role in forging consistent chapter 13 practice. That is advice we will keep in mind. . . .
>
> Overwhelmingly, chapter 13 trustees perform superbly and with great efficiency. I would ask all of you to consider whether there is maximum coordination and consistency within your district and how the USTP may promote greater consistency that makes sense.

U.S. Dep't of Justice, "Director Addresses the 52nd Annual Seminar of the National Association of Chapter 13 Trustees" (July 17, 2017), https://www.justice.gov/ust/speeches-testimony/director-addresses-52nd-annual-seminar-national-association-chapter-13-trustees.

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.

(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 fourteen 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.

Background. Bankruptcy debtors are economically fragile, and their chapter 13 plans often teeter on the edge of feasibility. Car repairs, home repairs, and medical emergencies can put a chapter 13 plan in jeopardy when they put the debtor in the dilemma of missing a plan payment or failing to meet a crucial nonrecurring household need. For most households, financially draining unanticipated events are almost certain to occur during the three- to five-year life of a chapter 13 plan. Often, the only means of addressing these emergencies is through a modification of a chapter 13 plan, seeking reduced or waived payments. Such modifications cannot necessarily, despite the emergency, be speedily granted and carry additional costs for debtors, both in terms of time and additional attorney's fees.

Almost universally, financial management counseling services recommend that families seeking to stabilize their family budgets establish a fund to pay for unanticipated and nonrecurring expenses, thereby preventing a small problem from becoming a crisis. Indeed, the USTP mandates that the personal financial management courses required for an individual's discharge include discussions on the importance of "saving for emergencies."[48] An academic paper found that households that save for emergencies "experienced slightly less overall hardship and were less likely to report several specific hardships, such as food insecurity and having a phone disconnected, three years later."[49] An unpublished paper found that income earners in the bottom quintile on average experience unanticipated expenses of $2,000 annually.[50] Outside of academic research, a Wells Fargo website recommends an emergency fund and states that three to six months of salary is a reasonable size.[51] Dave Ramsey, a widely followed author and radio host who offers financial advice, suggests $1,000 is a good starter emergency fund and, for those holding a steady job, recommends a fund with three months of salary.[52]

48 28 C.F.R. 58.33(f)(2)(iv); *see also* 11 U.S.C. § 727(a)(11) (requiring a bankruptcy debtor to complete a personal financial management course as a condition of discharge).

49 Leah Gjertson, *Emergency Saving and Household Hardship*, 37 J. Family & Econ. Issues 1 (2016).

50 Stephen Brobeck, "The Essential Role of Banks and Credit Unions in Facilitating Lower-Income Household Saving for Emergencies," at 2 (2008), available at https://consumerfed.org/wp-content/uploads/2010/08/Essential_Role_of_Banks_June_2008.pdf.

51 *See* Wells Fargo Bank, "Saving for an Emergency," available at https://www.wellsfargo.com/financial-education/basic-finances/manage-money/cashflow-savings/emergencies/ (last visited Nov. 18, 2018).

52 *See* Dave Ramsay, "A Quick Guide to Your Emergency Fund," available at https://www.daveramsey.com/blog/quick-guide-to-your-emergency-fund (last visited Nov. 18, 2018).

Several commentators commended the example of the U.S. Bankruptcy Court for the Southern District of Texas, whose uniform local plan allows for an emergency savings fund.[53] In a law review article, Judge David Jones discussed this plan provision, including a random sample of pending cases to consider the effects of the provision.[54] (The provision had not been in effect long enough to have a sufficient sample of completed cases.) The data suggested that the pending cases with reserve funds were lasting longer in the process.[55] Judge Jones concluded:

> The savings program implemented in the Southern District of Texas is a practical tool for increasing the viability of chapter 13 plans. From an economic perspective, it provides a legal means of assisting debtors in dealing with financial shocks that inevitably occur during the term of a chapter 13 plan. . . .
>
> As demonstrated by the above study, the program's effects are not limited to providing an economic buffer. To the contrary, if properly implemented, the program serves as an incentive not only to debtors but to creditor constituents as well. A chapter 13 plan that runs its term is a positive impact on society. A debtor receives a discharge and goes on to immerse herself in the commercial world, while creditors minimize their losses with meaningful distributions.
>
> A proper implementation of the savings program is dependent upon sufficient and repeated exposure of debtors' counsel to the program and its benefits. First, this necessitates educational programs that involve interaction with the judiciary. Second, chapter 13 trustees must embrace the program and encourage its use. Finally, all members of the judiciary must be knowledgeable about the savings program and actively promote its use.[56]

The Commission debated the merits of a fund for nonrecurring expenses and concluded both that all stakeholders could benefit from a such a fund in a chapter 13 case and that debtors in chapter 13 should be allowed to propose the creation of such funds in their plans. Given the likelihood that nonrecurring expenses will be experienced at some point, the Commission prefers the term "reserve fund" to "emergency fund." A reserve fund would make it more likely that chapter 13 debtors will complete their plans and achieve a discharge, without the need for unnecessary and expensive modifications of their plans. By increasing completion rates, a reserve fund also would provide a greater recovery to creditors in the chapter 13 process.

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53 U.S. District & Bankruptcy Court for the Southern District of Texas, Uniform Plan and Motion for Valuation of Collateral ¶ 22 (effective Dec. 1, 2017), http://www.txs.uscourts.gov/content/new-uniform-chapter-13-plan-plan-summary-and-related-documents-plan-modification-documents.

54 David R. Jones, *Savings: The Missing Element in Chapter 13 Bankruptcy Cases?*, 26 Am. Bankr. Inst. L. Rev. 243 (2018).

55 *See id.* at 256-67.

56 *Id.* at 271-72.

At the same time, it is not reasonable for a bankruptcy debtor to have a fund large enough to cover any contingency. The Commission discussed the appropriate size for a reserve fund and, given the wide variety of chapter 13 debtors, decided against a rigid amount. Rather, the Commission decided that in most cases one month of expenses as shown on Schedule J would be a reasonable figure for the reserve fund. Calculations from the 2016 data for the bankruptcy cases at FJC's Integrated Database[57] suggested that the mean figure on Schedule J is around $3,200, with a median figure of $2,700. These amounts are generally in line with the financial advice for the size of a reserve fund. But the Commission determined that the Schedule J amount should only be a starting point; the ultimate test should be reasonableness. Where unusual situations indicate that the Schedule J figure would be too low or too high, the figure should be subject to change.

The Commission discussed the best way of providing for reserve funds and concluded that statutory and rule amendments should expressly authorize the funds and provide for the means of using them. But the Commission also concluded that existing statutory provisions allow the creation of reserve funds, though they require different disposition of the funds depending on the debtor's income level.

Statutory Amendments. The Commission proposes an amendment to section 1322(b) that would allow, but not require, the debtor to make contributions from postconfirmation income to a reserve fund that would be held by the trustee and that would pay reasonable amounts for necessary nonrecurring expenses. To be an eligible use of the fund, it would not be enough just that the expense is nonrecurring; the expense would also need to be necessary. A debtor could use the fund to meet unanticipated expenses that threaten the ability of the debtor to maintain his or her chapter 13 case. Examples include home repairs, car repairs, or medical expenses. Any individual disbursement would need to be "reasonable," as would the overall size of the fund. As discussed above and in the absence of unusual circumstances, the Commission believes that one month of a debtor's scheduled expenses would typically be a reasonable amount. If the debtor used the fund, the debtor could replenish it. The trustee's custody of the fund would shield it from unnecessary uses or unreasonable payment amounts.

Although the Commission believes the existing statutory language authorizes the creation of a reserve fund, the cleanest implementation of a reserve fund would be through amending section 1325. The existing provisions do not provide clear guidance on how to avoid any conflict between a reserve fund and the disposable-income provisions of chapter 13 or on the disposition of the fund at the end of a case.

As a condition for confirmation, section 1325(b)(1) requires that a debtor's plan devote the debtor's disposable income to payments under the plan. Section 1325(b)(2) defines "disposable income" as "current monthly income"[58] less amounts reasonably necessary to be expended for the support and maintenance of the debtor and the debtor's dependents.[59] The Bankruptcy Code does not impose any

57 Federal Judicial Center, Integrated Database, https://www.fjc.gov/research/idb, (last visited Nov. 18, 2018).

58 "Current monthly income" is statutorily defined as the debtor's average monthly income for the six months preceding the filing of the bankruptcy petition. 11 U.S.C. § 101(10A).

59 The debtor also can subtract payments on a postpetition domestic support obligation, charitable contributions not exceeding 15% of gross income, and any business expenditures if the debtor is engaged in business. *Id.* § 1325(b)(2).

restrictions on the debtor's use of income that a debtor may expend for support and other allowed purposes, or "nondisposable income."

The Commission proposes that section 1325(b) should provide that in determining disposable income, there should be an additional deduction for contributions to a reserve fund. The deduction would be available to debtors who are both above and below the median income for their state. Under these amendments, contributions to the reserve fund would not be disposable income, thus any balance remaining in a reserve fund at the termination or conversion of the case would be returned to the debtor. The return of the reserve fund would encourage debtors to maintain the fund after the bankruptcy case concludes.

Rules and Form Amendments. The Commission believes that the best procedure for disbursements from a reserve fund would be through "negative notice," with the debtor filing a notice proposing a disbursement and the trustee disbursing the funds absent an objection. Accordingly, the Federal Rules of Bankruptcy Procedure should provide for the debtor to file a notice setting out the funds reasonably needed to address a nonrecurring necessary expense. Absent objection from the trustee or an unsecured creditor, the trustee must disburse the requested funds fourteen days later.

The Commission also recommends conforming amendments to the bankruptcy forms. First, Official Form 122C-2 should provide a deduction for contributions to a reserve fund in determining the disposable income of an "above median" debtor. Second, Federal Rule of Bankruptcy Procedure 3015.1, which sets out requirements for local chapter 13 plan forms, should require these forms to include a paragraph providing for debtor contributions to a reserve fund. Finally, the Official Form and the local forms for chapter 13 plans should be amended to include a paragraph providing for reserve fund contributions.

Best Interpretation of Existing Law — "Below Median" Debtors. The Commission believes that existing law is best interpreted as allowing a debtor to make contributions to a reserve account, but that the treatment of funds in the account depends on whether the funds are contributed from disposable or nondisposable income. In making this recommendation, the Commission intends no changes to the law regarding formal modification of the plan for reduced or waived payments. Section 1325(b)(1) allows a chapter 13 trustee or any unsecured creditor to require that disposable income be used to make payments on unsecured claims. As discussed above, section 1325(b)(2) defines disposable income as current monthly income less allowed deductions, including deductions for necessary support. How the allowed deductions are determined depends on whether the debtor's income is above or below the state median income for the debtor's size of household, as set out in section 1325(b)(3).

The court determines a "below median" debtor's deductions under section 1325(b)(2), which affords substantial discretion to the court to decide what are the reasonably necessary support expenses that can be deducted from current monthly income. Many courts start with the monthly expenses listed on Schedule J filed with the bankruptcy petition. Nonrecurring expenses are unanticipated in the sense that one does not know when the expense will occur or the form that the expense will take. At the same time, however, nonrecurring expenses are virtually certain to occur. As the financial advice discussed above recognizes, budgeting for nonrecurring expenses is reasonably necessary. The Commission believes, therefore, that the best interpretation of § 1325(b)(2) would be to treat reasonable contributions to a reserve fund as allowed deductions from current monthly income, resulting in these contributions being treated as nondisposable income. If payments under the plan are completed with a balance of nondisposable income remaining in the reserve fund, the plan should provide for the balance to be returned to the debtor.

Best Interpretation of Existing Law — "Above Median" Debtors. The calculation of disposable income for above-median debtors diverges on how to determine the expenses that can be deducted from current monthly income.[60] Rather than allowing the court to determine the appropriate expense amounts, section 1325(b)(3) provides that section 707(b)(2)(A) and (B) determine the expenses for above-median debtors. These provisions are used in the chapter 7 means test and determine expenses, in part, under guidelines used by the Internal Revenue Service for the payment of delinquent taxes.[61] However, section 707(b)(2)(B) allows a court to find that a debtor may use current monthly income to pay for itemized expenses that are due to "special circumstances." The Commission believes that section 707(b)(2)(B) is best interpreted as allowing the creation of a reserve fund with disposable income and that this income may be used to pay a reasonable amount to cover necessary nonrecurring expenses, because these would be expenses arising from special circumstances. But if disposable income contributed to the fund is not required for the payment of such expenses, it would remain disposable, and the plan should provide, pursuant to § 1325(b)(1), that any balance of this income remaining in the fund after plan payments are completed will be paid on unsecured claims.[62] The Commission's recommendations about how "special circumstances" allow creation of a reserve fund in a chapter 13 case is not intended to take any position on whether the need for savings can be "special circumstances" in a chapter 7 case for purposes of rebutting the means test.

Best Interpretation of Existing Law — Additional Plan Provisions. To comply with section 1325(a)(3)'s confirmation requirement that the debtor propose the plan in good faith, the reserve fund needs to be in a reasonable amount. Absent unusual circumstances, a reasonable amount in the fund would be one month of expenses as scheduled by the debtor. Good faith also would require a reasonable mechanism for the debtor to access the fund. Consistent with its recommendation for a statutory amendment, the Commission believes a reasonable procedure would be the debtor's notice to creditors specifying the nonrecurring, necessary expense to be paid and a reasonable amount for the payment, all subject to the ability of the trustee or unsecured creditors to object.

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60 *See id.* § 1325(b)(3).

61 For more background on the means test and the Commission's recommendations relating to the means test, see § 3.07 Means Test Revisions & Interpretations.

62 If the case is dismissed or converted with a balance in the fund, the trustee would be required to dispose of the balance consistent with sections 348 and 349 and the Supreme Court's decision in *Harris v. Viegelahn,* 135 S. Ct. 1829 (2015), regardless of contrary plan provisions.

§ 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.

Background. Debtors often come to bankruptcy court with property that they no longer want and that is only creating more liabilities through real estate taxes or homeowners association (HOA) fees.[63] Judge Eugene Wedoff described a common scenario:

> A couple with only moderate income has had to relocate, and the mortgage on their vacated home is underwater, with a balance greater than the home's value. The homeowners can't sell the home unless their mortgage lender agrees, and the mortgage lender won't agree to a sale and chooses not to foreclose the mortgage. So the homeowners still have the obligation to make mortgage payments on the vacated home — and insure it, and maintain it, and pay its property taxes, and (if it's a condo) pay their homeowners' assessments — but now they also have whatever costs are incurred in their new living space. They don't have enough income to cover all of these expenses.[64]

63 The Commission has made a recommendation to broaden the dischargeability of HOA fees that should work together with the recommendations in this section to reduce the incidence of the problems described in the text. *See* § 1.03 Dischargeability of Homeowners Association (HOA) Fees.

64 Eugene R. Wedoff, *Underwater Homeowner to Uncooperative Lender Mortgage Lender: Take My Home, Please! Does Dirt for Debt Work in Chapter 13?*, Bankr. L. Letter, Sept. 2016, at 1.

Such a situation is sometimes referred to as a "zombie mortgage," because the debtor no longer wants the property but the mortgage lives on despite the debtor's best efforts to kill it.[65] Closer to the 2008 financial crisis, RealtyTrac estimated there were 300,000 vacant properties subject to a "zombie mortgage."[66] A more recent article put the number in the thousands for selected metropolitan areas for the third quarter of 2016.[67]

Some debtors have proposed chapter 13 plans that would transfer ownership of an underwater property to the principal mortgage holder. These plans purport to satisfy the requirements for treatment of a secured claim by surrendering the property to the creditor as permitted under section 1325(a)(5)(C) and then "force vesting" title in the property in the secured property as permitted under section 1322(b)(9).[68] After the case, the debtor has thus given up the property to the secured creditor in satisfaction of the debt. In the chapter 11 context, such plans are sometimes called "dirt for debt" plans. The principal argument against such a plan in the chapter 13 context is that, as a general background principle of property law, the transferee's consent is necessary to effectuate a property transfer. Under this reasoning, the debtor cannot use the chapter 13 plan process to vest title in a secured creditor without the secured creditor's consent. The decisions at the bankruptcy court level have split as to whether this approach is permissible, but district court decisions on the question have rejected the approach. No circuit court has yet ruled on the question.[69]

Recommendation. The Commission decided not to take a position on the interpretive issues as they have been currently framed. Instead, the Commission recommends an alternative approach: paying the secured creditor through a transfer of the collateral under sections 1322(b)(8) and 1325(a)(5)(B). The Commission's proposal is similar to an approach approved by the Second Circuit under the parallel provisions of chapter 12.[70]

Section 1322(b)(8) allows payment of a secured claim with "property of the estate," and section 1325(a)(5)(B) allows payment of a secured claim with property equal in value to the amount of the creditor's allowed claim; neither provision requires creditor consent. Because the debtor would be treating the claim other than as permitted under the mortgage, the property could not be the debtor's principal

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65 *See* Andrea Boyack & Robert Berger, *Bankruptcy Weapons to Terminate a Zombie Mortgage*, 54 Washburn L.J. 451, 455 (2015) ("These mortgage loans exist in a sort of un-dead state, with unresolved liens haunting collateral realty long after borrowers have attempted to divest their equity, bury their debt, and move forward.").

66 *See* Barbara Liston, "More Than 300,000 Homes Are Foreclosed 'Zombies,' Study Says," Reuters, https://www.reuters.com/article/us-usa-housing-zombies/more-than-300000-homes-are-foreclosed-zombies-study-says-idUSBRE92R0YQ20130328 (last visited Jan. 29, 2019).

67 *See* Deborah Swann & Daniel Gill, "Holding Back the Invasion of the Zombie Mortgages," Bloomberg Law's Bankr. Law News, Mar 2, 2017, https://www.bna.com/holding-back-invasion-n57982084687/ (last visited Jan. 30, 2019).

68 *See* Andrew C. Hellman & Nathaniel R. Hull, You *Take It: Force-Vesting Under a Chapter 13 Plan*, Am. Bankr. Inst. J., Apr. 2016, at 42.

69 The cases are collected at Wedoff, *supra* note 64, at 8 n.1, and Selene Finance LP v. Brown (*In re* Brown), 563 B.R. 451, 455-56 (Bankr. D. Mass. 2017).

70 *See* First Brandon National Bank v. Kerwin (*In re* Kerwin), 996 F.2d 552 (2d Cir. 1993) (ruling transfer of property to creditor satisfied chapter 12 payment rules for a secured creditor).

residence. Otherwise the antimodification provision of section 1322(b)(2) may be applicable.[71] And of course, any transfer of estate property in payment of a claim would be subject to the good faith requirement of § 1325(a)(3). To establish good faith, the Commission recommends several additional plan provisions and a rule amendment to make the procedures for such a transfer uniform.

The centerpiece of the Commission's recommendation is that courts should interpret sections 1322(b)(8) and 1325(a)(5)(B) to allow payment of a mortgage claim by transferring the property to the principal mortgage holder.[72] To meet the good-faith confirmation requirement of section 1325(a)(3), the plan would have to give the mortgage holder the option of having the property sold free and clear of liens by consenting to a sale under section 363(f)(2). Good faith also would require the plan to give the principal mortgage holder sixty days from confirmation to choose between taking a direct transfer of the property or allowing it to be sold free and clear of liens. Finally, the plan would have to specify deadlines for either issuance of a deed to the lender or the conduct of a section 363(f) sale following the mortgage holder's decision.

Some states grant priority over the claims of mortgage holders to homeowners' association assessments but provide a safe harbor for the mortgage holders who initiate foreclosure proceedings and thereafter take title running from the time of the foreclosure filing. The mortgage lender who takes title through the Commission's recommendation should not receive less than this protection provided under nonbankruptcy law. Good faith also would require the plan to result in no lower payment to the mortgage holder than the holder would have received under the law of the state in which the property is located.

Because the Commission recommendation follows the plain language of sections 1322(b)(8) and 1325(a)(5)(B) and uses the statutory good-faith requirement of section 1325(a)(3) to fill out the details, the Commission believes the recommendation could be implemented through the rules process. If it was believed the Commission's recommendation needed to be implemented through amendments to the Bankruptcy Code, the Commission also would support such statutory amendments. The locus of the process the Commission recommends is less important than the process itself that the Commission believes gives debtors a way to deal with an underwater property while providing a fair opportunity to secured creditors to act in their best interests.

71 The Commission separately recommended that the time for determination of principal residence be the petition filing date. *See* § 2.06 Defining and Valuing the Principal Residence, Timing Issues.

72 The Commission does not intend its recommendation to address situations where the debtor's principal residence is secured only by a tax lien.

§ 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.

Loan Modifications Generally. Consensual mortgage loan modification, sometimes called "loss mitigation," negotiates an adjustment to the terms of a mortgage secured by a debtor's principal residence or other real property. Mortgage loan modifications occur outside of bankruptcy, but they also can occur while the debtor is in a bankruptcy case. Several chapter 13 trustees and their courts have instituted loan-modification programs, which typically involve some form of mediation between the mortgage lender or servicer and debtors.[73] This recommendation addresses mortgage loan modifications during a chapter 13 case.

73 The Commission believes several dozen judicial districts have loan-modification programs but is not aware of any comprehensive list of such programs. Examples include Bankr. S.D. Fla. Admin. Order 14-03; Bankr. S.D.N.Y. R. 9019-2; Bankr. D.R.I. R. App. VII; and Bankr. W.D. Wash. 4001-2. The topic also has been the subject of extensive commentary, much of which discusses the content of loan-modification programs in bankruptcy court. *See, e.g.*, Kevin R. Anderson & Rebecca B. Connolly, *Helping Chapter 13 Homeowners Keep Homes*, Am. Bankr. Inst. J., Mar. 2011, at 40; Linda Elizabeth Coco, *"Foaming the Runway" for Homeowners: U.S. Bankruptcy Courts "Preserving Homeownership" in the Wake of Home Affordable Modification Program*, 23 Am. Bankr. Inst. L. Rev. 421 (2015); Heather D. McGivern, *Loan Modifications: Short-Term Gain, Long-Term Pain*, Am. Bankr. Inst. J., June 2015, at 36; Cathleen Cooper Moran, *Reconsidering the Virtue of Loan Modifications in Chapter 13 Cases*, Am. Bankr. Inst. J., June 2015, at 37; Cecilia G. Morris & Mary K. Guccion, *The Loss Mitigation Program Procedures for the United States Bankruptcy Court for the Southern District of New York*, 19 Am. Bankr. Inst. L. Rev. 1 (2011); John Rao, *Bankruptcy Courts Respond to Foreclosure Crisis with Loss-Mitigation Programs*, Mar. 2011, at 14.

The Commission supports the use of loan modification in bankruptcy. Loan modification, when done well, helps chapter 13 debtors retain their homes, provides better alternatives for home mortgage lenders, and benefits all creditors in chapter 13 cases. Lower mortgage payments obviously improve the debtors' chances of successfully rehabilitating a failing mortgage, which allows families to keep their homes. Lenders avoid foreclosure and other dispositions that are less economically advantageous than a performing loan. Loan modification can stabilize or reduce monthly mortgage payments, provide for payment of arrearages, and address payment of other components such as taxes and insurance. Loan modification also enhances the financial stability of the chapter 13 case, increasing the likelihood that the debtor will complete plan payments while also making possible increased payments to other creditors.

The loan-modification programs in effect are diverse. Some loan-modification programs are prescribed by local bankruptcy rules; others are less formal. Some are modeled as "mediations" using third-party neutrals; others are court-based and supervised by judges or trustees. Some programs are triggered automatically at the beginning of every chapter 13 case containing a home mortgage; others require initial action by a debtor or trustee. Some loan modifications are "motion and order" systems in which courts order temporary or permanent modifications of loans based on stipulations; others use the chapter 13 plan confirmation and modification as the platforms for loan modification. Debtors' attorneys drive the process in some districts, while lenders/servicers carry a greater burden in others — sometimes with little or no involvement by debtors' counsel.

Lenders and servicers have expressed frustration with the complexity, uncertainty and expense of the many different loan-modification programs. Lenders willing to offer loan modifications must consult professionals district by district — and sometimes judge by judge — to navigate the varying local cultures for loan modifications. Nonuniformity increases the costs of mortgage modification, and those costs are routinely passed on to debtors as postpetition fees, costs and expenses.

Consistent with its general recommendation in favor of more uniformity in the consumer bankruptcy system,[74] the Commission believes that it would be desirable to standardize important aspects of consensual mortgage loan modification in chapter 13 cases. This standardization should occur through the national rules process as well as new official forms, providing general authorization and structure for loan-modification programs. In doing so, the national rules also would encourage the development of programs in districts that do not already have them.

Loan Modifications and the Chapter 13 Plan. In most chapter 13 cases that contain a successfully negotiated mortgage loan modification, the terms are not known, and the process is not completed until after a plan has been confirmed. The meeting of creditors in a chapter 13 case commences within fifty days of the petition being filed,[75] and plan confirmation must be addressed within forty-five days after the meeting of creditors.[76] Loan-modification programs rarely adhere to that schedule in chapter 13 cases.

74 *See* § 4.02 Nonuniform Court Practices.

75 *See* Fed. R. Bankr. P. 2003(a).

76 *See* 11 U.S.C. § 1324(b).

Many loan-modification protocols include trial periods that run three months or more before the terms of a final agreement are known. Other creditors in chapter 13 cases — particularly creditors with depreciating collateral such as car lenders — rightfully demand commencement of payments before the uncertain terminus of loan-modification discussions between a lender and a chapter 13 debtor. Loan modification can occur in chapter 13 cases months after confirmation or even years later if necessary to address the debtor's inability to comply with the terms of an unmodified mortgage loan.

Bankruptcy courts have adopted various procedural mechanisms to temporarily confirm plans that allow distributions to other creditors to begin without having complete information about a pending loan modification. Some courts order an "interim" confirmation. Others confirm plans that reference the pending loan modification without details. Some courts delay confirmation altogether, but enter orders allowing payment of adequate protection to some creditors while accumulating funds to be paid to other creditors after the loan modification completes.

Chapter 13 plans should be confirmed expeditiously to begin distributions to creditors. Except in the rare case in which the loan modification becomes final before plan confirmation, a successfully negotiated loan modification should be incorporated into the chapter 13 plan through the plan-modification process of section 1329.

Consensual mortgage modification necessarily changes the terms of payment of the mortgage claim — typically, the largest debt in a chapter 13 case. The mathematics of the chapter 13 case are changed in ways that will often require other adjustments to the plan. If loan modification reduces the monthly mortgage payment, for example, the freed-up income may be available to increase plan payments to other creditors. If the loan modification changes the treatment of an arrearage or changes the amount or method of paying taxes and insurance, those changes will also affect the availability of funds to pay other claims. The plan-modification process is the readily available, best understood and most appropriate vehicle for managing the mortgage loan-modification process in most chapter 13 cases.

Mortgage modification through modification of the chapter 13 plan should always include a motion to modify the plan consistent with Federal Rule of Bankruptcy Procedure 3015(h) and should always lead to an order under section 1329. In conduit districts, the plan-modification process thus will produce a court order on which debtors, trustees, and lenders can rely in altering any payment schedule.[77] This motion-and-order procedure is also important in nonconduit districts where, too often, only the debtor and lender are aware of the terms of the modified loan.

Any court rules governing mortgage modification should specify a date by which the plan modification must be filed; the Commission recommends no later than forty-five days after the negotiated change in contract terms is finalized by the parties. Failure to file the motion should be considered a serious failure — perhaps "cause" for conversion or dismissal. The motion to approve the modified plan should contain the terms of the

77 In a conduit plan, payments to the mortgage holder are made through the chapter 13 trustee, and in a nonconduit plan, the debtor continues to make payments directly to the mortgage holder during the pendency of the chapter 13 case. A fuller discussion about the differences between conduit and nonconduit plans can be found in the Commission's recommendation about conduit plans. *See* § 4.06 Conduit Mortgage Payments.

modified mortgage loan with a comparison to the terms of the original loan; a comparison of the monthly amounts due for principal, interest, taxes and insurance in the original and modified loan; the amount of arrears capitalized into the modified mortgage; any additional fees or deposit the debtor must pay to the lender; the date the first payment is due on the modified loan; and a certification from the lender that no pre- or postpetition amount is due or a statement of exceptions to the certification. This information could be required as part of a new official bankruptcy form, to be attached to any motion for approval of a modified plan that included mortgage modification.

Amended budget information — in the form of amended Official Forms 106I for income and 106J — should be filed and served together with the motion to modify the confirmed plan whenever loan modification changes the original monthly mortgage payment by a substantial amount. The trustee and creditors cannot meaningfully evaluate a consensual mortgage modification to determine whether to object to the plan as modified without amended budget information. When the payment changes are small and the financial impact of the proposed mortgage modification is insubstantial, debtors should not be put to the expense and delay of producing amended schedules unless requested by a creditor or the trustee. When payment changes are substantial, amended budgets should be required and should be served with the motion to approve the modified mortgage and plan. The Commission believes a 10% change in mortgage expenses should be considered "substantial."

Chapter 13 trustees must be fully engaged in the loan-modification process. In some districts, the chapter 13 trustee is a full participant in any loan modification undertaken by a debtor and a mortgage holder. In other districts, loan modification routinely proceeds without the involvement of the trustee, often becoming binding on debtors and lenders before the trustee knows the terms. The Commission was told that some chapter 13 trustees only became aware of consensually modified mortgage loans months or years after the modification was entered into, when payment-change notices or claims disputes revealed payment terms different from those disclosed at the beginning of the chapter 13 case. This lack of transparency and uncertain involvement by the trustee is inconsistent with the interests of creditors in individual cases. The plan-modification process will ensure the trustee is fully aware of any loan modification.

Encouraging Attorneys to Participate in Loan Modifications. Chapter 13 debtors' attorneys should be encouraged to vigorously represent their clients in the loan-modification process. Courts should allow fees for those services as a component of the plan-modification process. Loan modification is complicated, technical and tedious. Gathering the necessary documents and information, navigating the online portals for loan modification, responding promptly to questions from lenders and servicers, digesting and understanding loan-modification terms and documents — aspects common to all loan-modification programs — are usually not within the competence of unrepresented debtors. Once the information is gathered, determining whether the terms of a proposed loan modification are in the debtor's best interest is also commonly beyond the ability of unrepresented debtors. Consistent with its recommendation on presumptively reasonable fees in chapter 13 cases,[78] reasonable fees for representation in connection with loan modification should be allowed in addition to the fees normally allowed for representing debtors in chapter 13 cases.

78 *See* § 3.03 Presumptively Reasonable Attorney's Fees in Chapter 13s.

Loan Modifications and Payment Change Notices (PCNs). The plan-modification process will provide detailed information about any mortgage payment change produced by the loan-modification process. As recommended above, a new official bankruptcy form should include specific information about how the loan modification changed the original mortgage payment. If the Commission's recommendation is adopted, approval of the mortgage modification in the judicial order should substitute for any PCN that Federal Rule of Bankruptcy Procedure 3002.1 otherwise would require.

Transparency in the Loan-Modification Process. Throughout the Commission's recommendations on loan modifications is the theme of transparency to all parties in the bankruptcy process. Indeed, the Commission's recommendation to use the plan-modification process rests largely on providing notice and the ability to be heard to all parties. Participation not only allows all parties in the bankruptcy to protect their own interests but also to help resolve problems that have arisen in the loan-modification process. The rules process that the Commission recommends should consider how to promote transparency in loan modifications through existing online portals and who can access them. The rules process also should consider changes to which documents should be made available through the case management/electronic case filing (CM/ECF) system or through other processes.

§ 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 commission.

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

(c) The USTP and bankruptcy administrators should facilitate the adoption and use of conduit payment of mortgage claims, including allowing bifurcated commission rates.

(d) 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.

Background. Section 1326(c) requires that the chapter 13 trustee serve as the disbursement agent, making payments to creditors under the plan unless the plan or confirmation order provides otherwise. Courts have long understood the statutory language as giving the court discretion whether to allow a debtor to propose a plan where the debtor makes certain payments directly to creditors.[79] Such a plan is known as a "direct payment plan" and most often arises in the context of payments to mortgage holders. In contrast, a "conduit plan" is a chapter 13 plan where the debtor's mortgage obligation is part of the debtor's monthly chapter 13 plan payment, and the trustee passes through to the mortgage holder that portion of the chapter 13 payment that represents the amount the debtor owes on the mortgage.

A little less than half of chapter 13 trustees appear to be primarily administering plans providing for conduit mortgage payments. In the 2017 government fiscal year, 45.7% of chapter 13 trustees reported making ongoing mortgage payments that were 10% or more of their total disbursements.[80] In many jurisdictions, the use of conduit payments is simply implemented through the practices of the local chapter 13 trustee, subject to the customary judicial oversight. In some places, local rules enforce the statutory presumption, requiring conduit mortgage payments unless the court orders otherwise.[81] Other districts require a conduit payment only when a prepetition arrearage exists,[82] although arrearages obviously are common in bankruptcy cases. It is also possible that a local plan form might require a debtor to disclose ongoing direct payments outside the plan's distribution, effectively allowing the chapter 13 trustee to assess whether to demand conduit payments as a condition for not objecting to the plan.[83]

Three published studies have examined whether conduit payments contribute to the successful completion of a case, and none have found a relationship. Norbert and Schreiber looked at chapter 13 cases closed from 1994-2000 in six judicial districts. The discharge/completion rate (33.3%) was identical for conduit and direct-payment plans.[84] Examining the 1999 annual reports to the USTP, Bermant and Flynn reported that the data did not "support the conclusion that moving the ongoing mortgage payments through the trustee operation increases the rate of successful terminations" of chapter 13 cases.[85] Greene, Patel, and Porter ran a regression analysis on a national random sample of 770 chapter 13 cases filed in 2007. In a regression model that accounted for the length of the plan, the number of prior bankruptcies, pro se status, a court order requiring the debtor's wages be paid directly to the trustee (known as a "wage order"), and whether there were conduit payments, only the number

79 *See, e.g.*, *In re* Aberegg, 961 F.3d 1307, 1309 (7th Cir. 1992); Foster v. Heitkamp (*In re* Foster), 670 F.2d 478, 486-88 (5th Cir. 1982); *see also* Wagner v. Armstrong (*In re* Wagner), 36 F.3d 723, 726-28 (8th Cir. 1994) (reaching the same conclusion for chapter 12 plans based on identical statutory language); *In re* Sanford, 390 B.R. 873 (Bankr. E.D. Tex. 2008); *In re* Vigil, 344 B.R. 624 (Bankr. D.N.M. 2006); *In re* Tartaglia, 61 B.R. 439, 442 (Bankr. D.R.I. 1986); *see also* Gordon Bermant & Jean Braucher, *Making Post-petition Mortgage Payments Inside Chapter 13 Plans: Facts, Law & Policy*, 80 Am. Bankr. L.J. 261, 263 (2006) (noting the statutory language "has been read to give bankruptcy courts discretion to permit or not permit direct payments by debtors").

80 The figure in the text is based on a calculation from the U.S. Department of Justice, United States Trustee Program, FY-2017 Chapter 13 Trustee Audited Annual Reports, available at https://www.justice.gov/ust/private-trustee-data-statistics/chapter-13-trustee-data-and-statistics (last visited Nov. 20, 2018). The spreadsheet available at this webpage identifies mortgage payments being 10% of total disbursements as the cutoff to identify trustees who regularly make mortgage payments through the plan.

Using 2005 data, a paper concluded that 47% of trustees used conduit payments "almost exclusively." Bermant & Braucher, *supra* note 79, at 696. This figure is very similar to the current data. The use of conduit plans thus appears to be fairly consistent through time.

81 *See, e.g.*, Bankr. E.D.N.C. R. 3070-2; Bankr. S.D. Tex. R. 3015-1.

82 *See, e.g.*, Bankr. M.D. Ga. R. 3015-1(c); Bankr. S.D. Ind. R. 3015-1; Bankr. D. Kan. R. 3015(b)2; Bankr. D. Nev. R. 3015(g).

83 *See, e.g.*, Bankr. D. Ariz. Local Form 2084-2 (Chap. 13 Plan) ¶ 4; Bankr. N.D. Cal. Chap. 13 Plan ¶ 3.1.

84 *See* Norberg & Compo, *supra* note 43, at 449-50.

85 Gordon Bermant & Ed Flynn, *Bankruptcy by the Numbers: Who Pays the Mortgage?*, Am. Bankr. Inst. J., June 2001, at 20, 21.

of prior bankruptcies had a relationship with plan completion, and a negative one at that. Conduit payments did not affect plan-completion rates for better or worse.[86]

The Commission has based its recommendations for conduit mortgage payments on reasons other than improving plan-completion rates. Conduit payments allow chapter 13 trustees to have accurate recordkeeping regarding the postpetition payments for what is almost certainly the debtor's largest obligation. The chapter 13 trustee's records are likely to be more accurate than the debtor's records or recall without records. The oversight from a chapter 13 trustee means fewer motions for relief from stay and greater scrutiny of postpetition fees, costs, and charges assessed by mortgage servicers.

Those benefits can come with a price. In a conduit plan, debtors must pay the trustee's statutory percentage fee on the monthly mortgage payment. Most trustees who administer conduit plans can reduce their percentage fees due to the increase in receipts realized from the mortgage payments.[87] Examining 2005 data from the USTP, Bermant and Braucher found that trustees making conduit payments "charge a lower percentage fee and less in dollars per case" than nonconduit trustees.[88] But these effects are effects that will occur on average. In an individual case or a district with few cases, conduit plans could increase costs.

Recommendation. Considering all of the evidence as well as the professional experience of the commissioners with conduit plans, the Commission supports the use of conduit payment in the context of mortgages only. The Commission does not take a position on whether conduit payment is desirable for other types of secured debt. In the Commission discussion about conduit payments, commissioners observed that further evidence about its effectiveness and cost would be welcome, especially in the context of nonmortgage conduit payments. The Commission encourages academic researchers to study these issues.

Although the Commission endorses conduit plans in the mortgage context, it is aware that the circumstances in which conduit payments are used vary considerably across the country. The Commission believes Congress should amend the Bankruptcy Code to create a uniform rule that requires conduit payment of consumer mortgages but allows a court to permit a direct payment if compelling circumstances existed. A compelling circumstance would include a case where payment of the chapter 13 trustee percentage fee would mean the debtor would not be able to complete the plan. Congress also should except judicial districts with few cases where the increase in trustee receipts would not substantially lower the percentage fee such that conduit payments would work a hardship on all

86 *See* Greene, et al., *supra* note 28, at 1069-77 (2017).

87 Chapter 13 trustee compensation is sometimes misunderstood. "Unlike chapter 7 trustees, chapter 13 trustees do not 'eat what they kill.'" Henry E. Hildebrand, III, *Behind the Curtain: The Chapter 13 Percentage Fee*, Am. Bankr. Inst. J., Dec. 2014, at 24, 24. Instead, chapter 13 trustees are paid a fixed compensation that comes out of the percentage fee. *See* 28 U.S.C. § 586(e). The percentage fee also covers the chapter 13 trustee's office expenses. The percentage fee is set in an amount in each judicial district to cover the chapter 13 trustee's salary and office expenses. *See id.*; Hildebrand, *supra*, at 24. As receipts on which the fee is charged go up — perhaps because the trustee is running conduit plans — the percentage fee will go down.

88 Bermant & Braucher, *supra* note 79, at 277.

debtors in the district. Cases where a codebtor pays the mortgage also should be excepted from the requirement of a conduit plan.

Also, a two-tiered fee structure, with a lower percentage fee charged against conduit payments, would lower the costs of those payments. The Commission understands that currently no trustees have different commission rates on conduit mortgage payments versus regular plan payments. The USTP has only allowed "bifurcated commissions" to the extent that a chapter 13 trustee takes a 0% fee on ongoing mortgage payments or child support payments. The USTP has not taken a legal position on whether the current statutes authorize a bifurcated fee structure. The Commission believes the USTP has the authority under the existing statute[89] to authorize a two-tiered fee structure but also that Congress should pass a clarifying amendment expressly authorizing it.

Missed Direct Payments and the Chapter 13 Discharge. Section 1328 provides that the court is to order a discharge upon (among other things) "completion of all payments under the plan." Courts have grappled with whether direct payments occur "under the plan" such that a chapter 13 debtor who has missed direct payments can still receive a discharge. The seminal case is *In re Heinzle*,[90] which held that direct payments are "under the plan" for purposes of section 1328(a) and denied discharge. Most other courts have agreed.[91]

The contrary position is cogently articulated by *In re Gibson*.[92] The *Gibson* court points out that Federal Rule of Bankruptcy Procedure 3002.1 now requires the mortgage holder, in response to the trustee's notice of final cure, to state whether the debtor is current on postpetition mortgage payments. Before the adoption of rule 3002.1, the chapter 13 trustee would not have known that the debtor had missed direct postpetition mortgage payments, and courts routinely ordered a discharge when trustee payments were completed. There had been no long-standing interpretation of direct payments as payments "under the plan," so a payment by the debtor could be understood not to occur "under the plan." At least one commentator has agreed.[93]

The Commission debated whether to express an opinion on this interpretive debate. The Commission decided the better approach was a more comprehensive solution that would move most debtor payments to conduit plans. When debtors use conduit plans, there will not be a surprise at the end of the case with missed direct payments to a mortgage creditor. Any missed payments will be dealt with during the case. The Commission's recommendations for improvements to Federal Rule of Bankruptcy Procedure

89 *See* 28 U.S.C. § 586(e). The Commission's recommendation applies to bankruptcy administrator districts as well.

90 511 B.R. 69 (Bankr. W.D. Tex. 2014).

91 *See In re* Finley, 2018 WL 4172599 (Bankr. S.D. Ill. 2018); *In re* Dowey, 580 B.R. 168 (Bankr. D.S.C. 2017); *In re* Thornton, 572 B.R. 738 (Bankr. W.D. Mo. 2017); *In re* Gonzales, 570 B.R. 788 (Bankr. S.D. Tex. 2017); *In re* Coughlin, 568 B.R. 461 (Bankr. E.D.N.Y. 2017); *In re* Young, 2017 WL 4174363 (Bankr. M.D. La. 2017); *In re* Hoyt-Kieckhaben, 546 B.R. 868 (Bankr. D. Colo. 2016); *In re* Evans, 543 B.R. 213 (Bankr. E.D. Va. 2016); *In re* Ramos, 540 B.R. 580 (Bankr. N.D. Tex. 2016); *In re* Gonzales, 532 B.R. 828 (Bankr. D. Colo. 2015); *In re* Kessler, 2015 WL 4726794 (Bankr. N.D. Tex. 2015); *In re* Doggett, 2015 WL 4099806 (Bankr. D. Colo. 2015).

92 582 B.R. 15 (Bankr. C.D. Ill. 2018).

93 *See* David Cox, *Consumer Point: Don't Move the Goalposts*, Am. Bankr. Inst. J., May 2018, at 20. *But see* Elizabeth L. Gunn, *Consumer Counterpoint: With Notice Comes Responsibility*, Am. Bankr. Inst. J., May 2018, at 21.

3002.1[94] also will minimize the possibility of uncertainty on whether the debtor is current on a mortgage. Together, these proposed solutions will help to minimize the possibility that legal issues will arise in the first place and thus will lower costs.

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

If a 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 within 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.

Background. It is a commonplace shorthand to state that a chapter 13 plan can last for no more than sixty months or five years.[95] This shorthand reflects the rule of some courts that sixty months is the absolute maximum time that a chapter 13 plan can last. At the end of sixty months, these courts have found that they must dismiss the case if the debtor has not completed the chapter 13 plan payments.[96]

Congress intended the sixty-month cap as a protection against unfairness to the debtor.[97] Because chapter 13 requires that a debtor devote his or her disposable income to repayment under the plan,[98] a reasonable time limit on plan length balances the policy goals of maximizing creditor repayment with the debtor's fresh start. But a strict application of the sixty-month rule does not balance these goals. When a debtor has missed a few plan payments and could complete payments soon after the deadline, dismissal and denial of discharge only deprives a debtor of a fresh start without any material improvement in creditor repayment.

Recommendation. Although describing chapter 13 plans as having a sixty-month cap is generally correct, this description does not track the precise statutory law. Section 1322 provides what may be in a chapter 13 plan and is the origin of the idea that plans cannot last for more than sixty months. Subsection (d) states that "the plan may not provide for payments over a period that is longer than 5 years." The same provision provides the general rule for a debtor below the state-median income, specifying that the plan cannot last longer than three years unless the court, for cause, approves a longer period capped at five years. But, section 1322 delineates only

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94 *See* § 2.07 Improvements to Federal Rule of Bankruptcy Procedure 3002.1 — Payment Change Notices and Notices of Final Cure.

95 *See, e.g.*, American Bankruptcy Institute, *Frequently Asked Questions: What Are the Different Kinds of Bankruptcy?* (last visited Nov. 28, 2018), available at http://bankruptcyresources.org/faq-page#t4n510 (chapter 13 is a "three to five year process"); U.S. Courts, *Chapter 13 — Bankruptcy Basics* (last visited Nov. 28, 2018), available at http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics ("[D]ebtors propose a repayment plan to make installments to creditors over three to five years").

96 *See In re* Humes, 579 B.R. 557 (Bankr. D. Colo. 2018) (60 months is absolute bar); *In re* Jackson, 189 B.R. 213 (Bankr. M.D. Ala. 1995) (dismissing case because chapter 13 plans cannot last more than 60 months); *In re* Woodall, 81 B.R. 17 (Bankr. E.D. Ark. 1987) (dismissing case because it ran past 60 months).

97 *See, e.g.*, *In re* Nahat, 315 B.R. 368, 374 (Bankr. N.D. Tex. 2004) (citing concerns about involuntary servitude); *In re* Woodall, 81 B.R. 17, 18 (Bankr. E.D. Ark. 1987) ("[T]he legislative history . . . clearly indicates that chapter 13 cases should not be extended beyond five years, otherwise a debtor could become a 'wage slave.'").

98 *See* 11 U.S.C. § 1325(b).

what can be in a chapter 13 plan that a bankruptcy court may confirm. Nowhere does section 1322 provide the consequences for the failure to follow the terms of a plan or the circumstances under which the court can dismiss a chapter 13 case.

Rather, the dismissal rules are in section 1307.[99] None of these rules expressly state that a court can dismiss a case for failure to finish the plan within sixty months. Instead, section 1307(c)(6) provides that the court "may dismiss" a chapter 13 case "for cause, including . . . material default by the debtor with respect to a term of a confirmed plan." Failing to make plan payments would be a default under the plan. Thus, it is true that a court has the power to dismiss a chapter 13 case where the debtor's missed payments cause the plan to stretch beyond 60 months.

Packed within that power, however, is a substantial amount of court discretion. First, to constitute grounds supporting dismissal a default must be material. Not all defaults are material.[100] More significantly, section 1307(c) provides that a court "may" dismiss a case even if it finds cause. The word "may" suggests courts should exercise discretion in dismissing a case, even if the court finds that one of the factors in section 1307(c) is present. The Supreme Court has cautioned that a statute's use of the word "may" is not alone conclusive of discretion but must be read in the context of the statute as a whole.[101] That test is easily met in the context of the Bankruptcy Code. The dismissal provisions for chapters 7, 9, and 12 all use the word "may" in describing the court's power to dismiss a bankruptcy case.[102] In contrast, section 1112 uses the mandatory "shall" to specify when a court must dismiss a case versus circumstances when a court "may" dismiss a case.[103] In the context of its dismissal provisions, the Bankruptcy Code draws a distinction between "may" and "shall," with the former being a permissive power.

Some courts find significance in section 1329(c), which expressly prohibits modification of a chapter 13 plan that extends payments beyond sixty months, reasoning that section 1307(c) cannot grant discretion to do what section 1329(c) expressly prohibits.[104] But, the two sections can live comfortably together. Sections 1322 and 1329 prohibit a debtor from proposing an initial plan or a subsequent modification that lasts more than sixty months, but neither section addresses what happens when later circumstances prevent the debtor from following through on the debtor's intentions, which is the function of section 1307.

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99 Section 1307 also applies to the conversion of chapter 13 cases to other chapters of the Bankruptcy Code. For ease of exposition, the text only refers to dismissal of chapter 13 cases. The analysis would be the same if the question was whether the case should be converted.

100 *See* Shovlin v. Klaas, 539 B.R. 465 (W.D. Pa. 2015) (allowing cure beyond 60 months for default that was less than one-half of a monthly payment under the plan); *In re* White, 126 B.R. 542 (Bankr. N.D. Ill. 1991) (default that arises from beyond the debtor's control is not "material"); *In re* Durben, 70 B.R. 14 (Bankr. S.D. Ohio 1986) (finding two missed payments that occurred because of repairs to debtor's commercial truck that the debtor was prepared to cure were not a "material" default).

101 *See* Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193, 198-99 (2000).

102 *See* 11 U.S.C. §§ 707(a)-(b), 921(c), 1208(c).

103 *Compare id.* § 1112(b)(1) (court "shall" dismiss a case unless the court determines the appointment of a trustee or examiner is in the best interest of creditors) *with* § 1112(e) (court "may" dismiss if the debtor does not file the information required by section 521).

Section 1112 allows a party to put forward evidence that dismissal is not in the best interest of creditors, coupled either with the likelihood of plan confirmation within a reasonable period of time or the ability to cure within a reasonable time an act or omission that was reasonably justified. *Id.* § 1112(b)(2). That a court might make these findings and fail to dismiss does not undermine the interpretive point that absent such a finding, dismissal is mandatory.

104 *E.g.*, *In re* Humes, 579 B.R. 557, 564 (Bankr. D. Colo. 2018) ("[Section] 1329 reinforces the five-year limitation by forbidding a debtor from doing through modification what it could not do at plan confirmation.").

The Commission believes the best interpretation of section 1307 is that failure to complete plan payments within sixty months is not automatically grounds for dismissal, as several courts have held.[105] Courts should not dismiss a chapter 13 case where missed payments are nominal or in an amount the debtor could pay within a reasonable time.

At the same time, the original reasons for the sixty-month rule remain important. Chapter 13 plans should not last indefinitely. The Commission debated and rejected the idea of fixing a set maximum amount of time for the debtor to cure missed payments and complete the plan. A reasonableness standard is most consistent with the judicial discretion Congress has embedded in section 1307. Also, it was impossible to set a fixed time that would account for the varied circumstances in all cases. Finally, there would be the danger that any fixed period would become a new de facto rule for how long chapter 13 plans could last.

The Commission discussed the amount of time a debtor typically would need to cure and believes it would be rare that a reasonable time would exceed six months. Of course, in many cases a reasonable amount of time might be less than six months. In considering what is a reasonable amount of time, the case law suggests that courts should consider the reasons for the default, whether those reasons will persist, and whether the debtor is or soon will be able to cure the default.

The Commission's recommendation reflects what it believes is the best interpretation of the existing statutory language. As such, the Commission does not believe congressional action is necessary to implement this recommendation, but the Commission would support clarifying amendments to section 1307 consistent with the recommendation.

105 *See In re* Klaas, 858 F.3d 820 (3d Cir. 2017); Marshall v. Henry (*In re* Henry), 368 B.R. 696 (N.D. Ill. 2007); *In re* Hill, 374 B.R. 745 (Bankr. S.D. Cal. 2007); *In re* Brown, 296 B.R. 20 (Bankr. N.D. Cal. 2003); *In re* Black, 78 B.R. 840 (Bankr. S.D. Ohio 1987); *see also In re* Grant, 428 B.R. 504 (Bankr. N.D. Ill. 2010) (refusing to allow 12- to 18-month extension beyond 60-month rule but suggesting dismissal was discretionary).

§ 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.

Background. There is an inherent tension between the chapter 13 plan-confirmation process and the claims-allowance process. Confirmation of a plan binds the parties to the terms of the plan.[106] Unless there is an objection, a proof of claim is deemed allowed.[107] When the claim amount in the plan differs from the amount in a later-filed proof of claim, there are not always clear rules to harmonize the two, particularly when a plan is confirmed before the claims bar date.[108]

One obvious example is when the plan states and proposes to cure a prepetition arrearage. Because the plan must be filed within fourteen days of the petition filing date and before the deadline for proofs of claim,[109] the plan usually represents only the debtor's good-faith estimate of the past-due amount. In contrast, the creditor has records with the exact amount of the arrearage. Nevertheless, some courts have held that at confirmation and absent an objection the plan establishes the amount of an arrearage claim.[110] If the plan underpays the arrearage, the courts are further split on the question of whether the remaining unpaid arrearage survives discharge.[111] Other courts have concluded that a confirmed chapter 13 plan binds a creditor with respect to the treatment of a secured claim but not necessarily the

106 11 U.S.C. § 1327.

107 *Id.* § 502(a).

108 *See, e.g.*, *In re* Larry, 2013 WL 1187880 (Bankr. W.D. La. 2013) (noting costs and delay created when creditor filed a postconfirmation proof of claim asserting mortgage arrearages when the plan did not provide for any arrearages).

109 Fed. R. Bankr. P. 3002(c), 3015(b) (providing respectively that a proof of claim is due within 70 days of filing and a chapter 13 plan is due within 14 days of filing).

110 *See, e.g.*, *In re* Hadfeg, 585 B.R. 208 (Bankr. S.D. Fla. 2018); *In re* Smith, 575 B.R. 869 (Bankr. W.D. Ark. 2017); *In re* Franklin, 448 B.R. 744 (Bankr. M.D. La. 2011); *In re* Nelson, 408 B.R. 394, 403 (Bankr. D. Colo. 2008); *In re* Sanders, 243 B.R. 326 (Bankr. N.D. Ohio 2000).

111 *Compare In re* Bateman (Universal American Mortgage Co. v. Bateman), 331 F.3d 821 (11th Cir. 2003) (arrearage fixed in plan for bankruptcy purposes, but creditor could exercise its state-law rights postbankruptcy with respect to unpaid arrearage), *with In re* Franklin, 448 B.R. 744 (Bankr. M.D. La. 2011) (plan set amount of arrearage to which creditor was entitled).

amount of the claim.[112] Similar issues arise regarding secured claims not subject to valuation under the hanging paragraph of section 1325(a).[113]

Some jurisdictions have resolved the arrearage issues proactively by including in the local uniform chapter 13 plan provisions that the proof of claim controls the amount of the arrearage. Under these provisions, if the debtor or trustee disputes the amount set forth in the proof of claim, the amount of the claim would then be determined on a party's objection to the claim without necessarily delaying confirmation.

Federal Rules of Bankruptcy Procedure Amendments. Amendments to the Federal Rules of Bankruptcy Procedure effective December 1, 2017, took important steps toward reconciling a chapter 13 plan with a contrary proof of claim. The amendments now clearly require that secured creditors must file proofs of claim.[114] The amendments also shortened the bar date for filing proofs of claim.[115] These amendments will more closely align the timing of the claims-allowance process and the confirmation process.

Most importantly, the amended rules specify that a secured claim of a nongovernmental creditor may be valued in a plan, and unless the court orders otherwise, the amount of the claim valued in the plan will control over a contrary proof of claim.[116] Taken together, these amendments start to build the framework for striking the balance between the proof of claim and the plan, but they unnecessarily leave open issues. It appears the Advisory Committee's intention was to let the official form for chapter 13 plans — the so-called "national plan" — resolve these issues.[117]

Recommendation — Adoption of "National Plan" Outcomes. Legal uncertainty about how to resolve conflicts between the chapter 13 plan and contrary proofs of claim helps no one. The uncertainty adds costs to both debtor and nondebtor parties and can invite debtors to game the system by slipping provisions into their plan that a creditor might miss and then might become bound by the provision. The rules should clearly provide what a plan can and cannot control. Although the national plan form provides certainty, most jurisdictions have opted out and use a local form. For unresolved conflicts between a plan and contrary proofs of claim, the Commission recommends amendments to Federal Rules of Bankruptcy Procedure to incorporate the outcomes in the national plan form.

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112 *See In re* Euliano, 442 B.R. 177, 189 (Bankr. D. Mass. 2010).

113 *See, e.g.*, Nissan Motor Acceptance Corp. v. Smith, 2010 WL 4005056 (E.D. Wis. 2010) (terms in a confirmed plan arguably in conflict with the hanging paragraph held binding on a creditor who did not object to confirmation).

114 Fed. R. Bankr. P. 3002(a).

115 *Id.* 3002(c).

116 *Id.* 3012(b); 3015(g).

117 The Advisory Committee Note to Federal Rule of Bankruptcy Procedure 3015 expressly excepts the "amount of any current installment or arrearages" from the binding effect of a chapter 13 plan, distinguishing those figures from the amount of the secured claim. There is no Federal Rule of Bankruptcy Procedure that provides that the amount on the proof of claim for arrearages controls over the plan, but Official Bankruptcy Form 113 — the national plan form — does so. *See* Fed. R. Bankr. P. 3015(c) (providing for a uniform national chapter 13 plan form unless a local form is adopted); Official Form 113 §§ 3.1-3.3 (providing that arrearages on proofs of claim control over contrary amounts in the plan), http://www.uscourts.gov/sites/default/files/b_113_and_cn_0.pdf (last visited Nov. 18, 2018).

Throughout its various drafts since it was first proposed in 2013, the national plan form has consistently identified when the plan controls over a contrary proof of claim, and when the claim amount is to be used. The national form balances the tension between the plan and the proof of claim as follows, unless otherwise ordered by the court:

> 1. The proof of claim controls as to the amount of an arrearage and the amount of a current installment payment.[118]
>
> 2. The amount of a secured claim valued under section 506(a) is determined in the plan, and the total amount of the claim is determined in the proof of claim.[119]
>
> 3. The amount of a claim not subject to valuation under the "hanging paragraph" of section 1325(a) is fixed by the proof of claim.[120]

The Commission recommends that the Advisory Committee incorporate these provisions from the national form into a Federal Rule of Bankruptcy Procedure. If the Advisory Committee does not act, the Commission recommends that courts adopt local rules to this effect or include similar provisions in their local plan forms.

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118 Official Form 113 § 3.1, http://www.uscourts.gov/sites/default/files/b_113_and_cn_0.pdf (last visited Nov. 18, 2018).

119 *Id.* § 3.2.

120 *Id.* § 3.3. The "hanging paragraph" of section 1325(a) provides an exception for the rule in section 506(a) that the amount of a secured claim is the value of the collateral. Under the "hanging paragraph," the debtor cannot reduce the amount of the secured claim to the value of the collateral for (i) purchase-money security interests in automobiles acquired for personal use within 910 days of the bankruptcy filing or (ii) a purchase-money security interest in any other thing of value acquired within one year of the filing. It is referred to as the "hanging paragraph" because the paragraph is an unnumbered subsection of 1325(a).

§ 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.

Background. In most every case where the debtor does not surrender collateral, a chapter 13 plan will propose to pay a secured claim in installment payments over time. To be confirmable over a creditor's objections, the plan's installment payments on a secured claim must include not just the principal amount owing, but also interest. This rule comes out of section 1325(a)(5)(B)(ii), which requires payment of the "value" of the secured claim. A later payment is not equivalent value to payment today. The plan must propose an interest rate that makes the plan's installment payments the same as receiving the value of the secured claim at confirmation.

In any particular case, it will rarely be evident what the interest rate should be to make the value of a stream of future payments the same as receiving payment in full today. The correct rate will depend on the general cost of funds, the creditor's other investment opportunities, the rate at which the creditor can obtain capital, the risk of nonpayment, and other factors. Calculating the correct rate thus requires not only estimates about today's facts but also projections about the future. Moreover, in chapter 13 the dollar amounts involved rarely justify the engagement of costly financial experts to testify about the factors necessary to set an interest rate for secured creditors. The challenge is crafting not only legally appropriate but also practicably administrable rules to arrive at an interest rate in a chapter 13 plan.

In *Till v. SCS Credit Corp.*,[121] the Supreme Court granted certiorari on the issue. The Court first considered three approaches: (1) the "coerced loan approach," under which the court deduces the interest rate the creditor would charge if forced to make a loan to a similarly situated creditor; (2) the "presumptive contract approach," under which the court presumes the rate in the original contract is appropriate; and (3) the "cost-of-funds approach," under which the court calculates the creditor's cost of borrowing. The Court rejected these three approaches in favor of the "formula approach," which requires a court to start with the national prime rate and then make an upward risk-adjustment based on such "factors as the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan."[122]

Concerns about administrability were at the core of the Court's reasoning: "[T]he formula approach entails a straightforward, familiar, and objective inquiry, and minimizes the need for potentially costly additional evidentiary proceedings."[123] Although the "presumptive contract approach" might also

121 541 U.S. 465 (2004).

122 *Id.* at 478-79.

123 *Id.* at 479.

be administrable, the "prime-plus" formula approach considers "the state of financial markets, the circumstances of the bankruptcy estate, and the characteristics of the loan" and not just "the creditor's circumstances or its prior interactions with the debtor."[124]

Recommendation. The Commission discussed the bankruptcy system's experience with the *Till* decision. On balance, the Commission decided this experience has borne out the Supreme Court's belief in the administrability of the "formula approach" endorsed by *Till*. There is now little litigation over the issue. In many jurisdictions, local norms or court decisions have settled on an interest rate. The Commission does not believe any change is warranted in the body of law about interest rates in chapter 13 plans.

The Commission's position is an endorsement of the *Till* framework. The Commission did not consider whether chapter 13 interest rates need to be systematically higher or lower, changed in particular categories of cases, or recalculated as a matter of local practice. In setting chapter 13 interest rates across all contexts, the *Till* framework works well and should be left in place.

Since the *Till* decision, courts have grappled with whether it applies outside of the chapter 13 context and especially whether it applies in a chapter 11.[125] As discussed in the Foreword,[126] the Commission debated its recommendations only in the context of consumer bankruptcy and takes no position on whether these recommendations have merit outside the context of consumer cases.

§ 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.

Background. Section 541 provides that the bankruptcy estate consists of all "legal and equitable interests of the debtor in property as of the commencement of the case." Generally speaking, the bankruptcy estate thus consists of all the debtor's property at the moment of filing. Postpetition property acquired by the bankruptcy estate also becomes part of the estate, but the statute creates an exception for "earnings from services performed by an individual debtor after the commencement of the case."[127] The exception is the proverbial "fresh start" whereby postpetition income and assets belong to the debtor. Almost every chapter 13 debtor funds their plan out of postpetition earnings, however, creating a potential doctrinal puzzle of how plan payments can occur if the debtor's postpetition earnings are not property of the

124 *Id.*

125 *See, e.g.*, Momentive Performance Materials, Inc. v. BOKF, N.A. (*In re* MPM Silicones, L.L.C.), 874 F.3d 787, 798-800 (2d Cir. 2017); Wells Fargo Bank v. Texas Grand Prairie Hotel Realty, L.L.C. (*In re* Texas Grand Prairie Hotel Realty, L.L.C.), 710 F.3d 324, 331-37 (5th Cir. 2013); Bank of Montreal v. Official Comm. of Unsecured Creditors (*In re* American Homepatient, Inc.), 420 F.3d 559, 566-70 (6th Cir. 2005); 7 Collier on Bankruptcy ¶ 1129.05[2][c][i] (16th ed. Rich Levin & Henry Sommer eds.).

126 *See supra* Foreword.

127 11 U.S.C. § 541(a)(6).

estate. Section 1306 solves this puzzle by adding to the chapter 13 estate income and assets the debtor acquires postpetition.[128]

Section 1306 provides that postpetition earnings and property cease to accumulate in the bankruptcy estate upon the earlier of case closing, dismissal, or conversion.[129] Case closing can be an arbitrary date, because the closing of the case is a ministerial act in the court clerk's office that, depending on the district, can occur months or even more than a year after the debtor completes the plan. In such a situation, earnings and property received by a debtor after completion of plan payments but before case closing thus literally are property of the estate under section 1306(a). The Commission is concerned that cases could arise that work an injustice to a debtor who has completed all plan payments — and thus has done everything necessary for a fresh start — but who faces a claim from a trustee or creditor for substantial earnings or assets received after completion of the plan payments but before the ministerial act of closing the case. A different debtor who was lucky enough to have the case flagged in the court system as "closed" would not face such a claim. The Bankruptcy Code should not distinguish between debtors based on the happenstance of when the clerk's office makes a docket entry.

Recommendation. The Commission thus recommends adding the completion of the plan payments to the list of events in section 1306 that cause postpetition earnings and assets to cease accumulating in the bankruptcy estate. The existing language would remain such that property would cease accumulating upon the earliest of the completion of plan payments or the closing, dismissal or conversion of the case. The Commission's recommendation is to require completion of all payments made "under the plan," leaving it to case law to determine what payments are deemed to occur "under the plan."[130]

128 *Id.* § 1306(a)(2) ("Property of the estate includes, in addition to the property specified in section 541 . . . all property . . . that the debtor acquires after the commencement of the case . . . and earnings from services performed by the debtor after the commencement of the case.").

129 Section 1306 does not take any property out of the bankruptcy estate. It merely specifies when the debtor's postpetition earnings or postpetition assets stop becoming part of the bankruptcy estate. Thus, the Commission's proposal does not affect when property of the estate revests in the debtor. *See* 11 U.S.C. § 1327(b) ("Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.").

130 A split has developed in the case law over whether payments made directly to a secured creditor are payments "under the plan." The Commission has not taken a position on this split in the case law. *See* § 4.06 Conduit Mortgage Payments for a discussion of "direct payment plans" and "conduit plans" and the meaning of "payments to be made to the chapter 13 trustee."

V: 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.

Background. Chapter 7 trustees are an integral part of the consumer bankruptcy system. Section 704 lists the formal duties of a chapter 7 trustee with respect to a bankruptcy case. In addition, chapter 7 trustees have duties to provide information as part of the oversight function of the U.S. Trustee Program (USTP) (or by the bankruptcy administrator) given the level of the trustee's fiduciary duties and the need for trustees to provide a proper accounting and expeditious administration of estates.[1] In all cases, chapter 7 trustees must:

- review the petition, statements, schedules, and tax returns;
- conduct the section 341 meeting;
- investigate the debtor's financial affairs;
- submit reports to the court and the U.S. Trustee;
- investigate and refer cases of abuse, criminal misconduct, and discharge issues;
- review bank statements and other records as needed;
- send letters notifying claimants of domestic support obligations and relevant state child support enforcement agencies of the bankruptcy filing and of the later discharge; and
- respond to public inquiries (e.g., creditors, debtor's counsel, pro se debtors).

In asset cases, chapter 7 trustees have additional responsibilities:

- review claims;
- account for all property received;
- review bank statements, insurance, tax, stock, and business records;

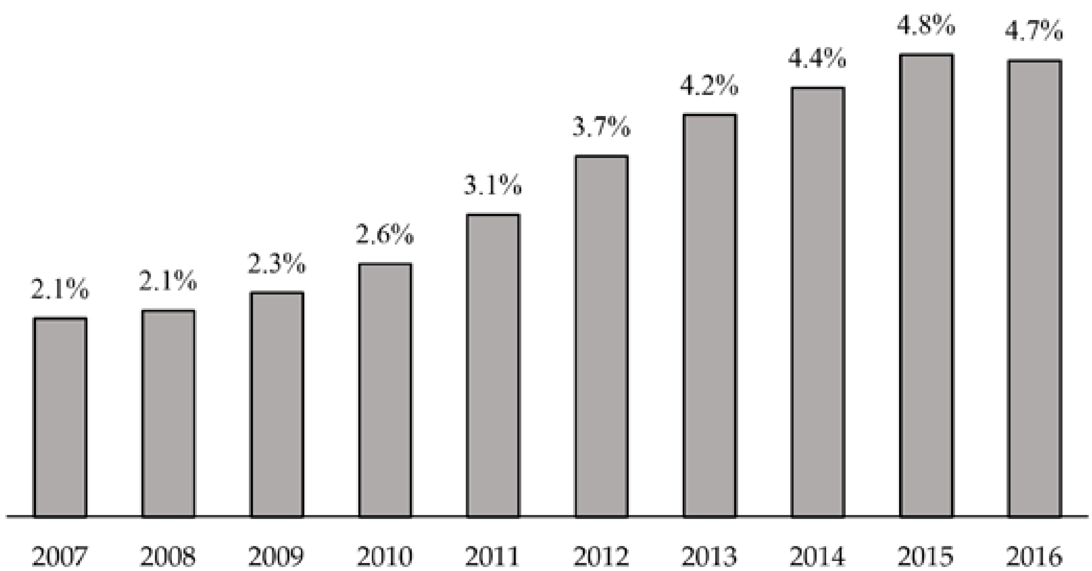
1 *See* 28 U.S.C. § 586(a)(1) (giving the U.S. Trustee the power to establish, maintain, and supervise a panel of private trustees for chapter 7 cases).

- perform the obligations of an ERISA plan administrator if necessary;
- maintain the records and transfer patients of a health-care business; and
- monitor and manage all professionals employed.

Chapter 7 trustees also must undergo audits of their business records with follow-up inquiries from the auditors.

As compensation, a chapter 7 trustee earns a base fee of $60 per case plus a percentage of the estate assets that the trustee distributes to creditors.[2] In cases without assets that can be administered for payment to creditors — "no-asset" cases — the $60 base fee is the only compensation that the trustee receives. And because this compensation comes from the filing fee, a chapter 7 trustee earns no compensation when the court waives the filing fee for debtors who are granted a filing fee waiver.[3] According to the Commission's calculations from the Federal Judicial Center's (FJC) Integrated Database,[4] the courts waived the filing fee in 4.7% of consumer chapter 7 cases in the 2016 calendar year, which was the most recent complete year for which data were available. As Figure 1 shows, the current waiver rate is more than double what it was in 2007.

Figure 1: IFP Waivers in Consumer Chapter 7 Cases by Year



2 Section 330(b)(1) authorizes the payment of a $45 fee to chapter 7 trustees, and section 330(b)(2) authorizes the Judicial Conference to assess an additional $15 court fee to pay to the chapter 7 trustee, which the Judicial Conference has done. *See* U.S. Courts, Bankruptcy Court Miscellaneous Fee Schedule, https://www.uscourts.gov/services-forms/fees/bankruptcy-court-miscellaneous-fee-schedule (last visited Jan. 9, 2019). Section 330(a)(7) provides for additional compensation for trustees in the form of a commission on funds distributed to creditors, in the amounts specified in Section 326(a).

3 *See* 28 U.S.C. § 1930(f)(1) (authorizing a court to waive the filing fee if the debtor's income is less than 150% of the poverty line). The court also may authorize the debtor to pay the filing fee in installments, in which case the chapter 7 trustee will receive little or no compensation unless the debtor completes the installments.

4 Federal Judicial Center, Integrated Database, https://www.fjc.gov/research/idb, (last visited Nov. 18, 2018).

The current base fee has departed from historical norms. When the Bankruptcy Code was first enacted, the trustee received $20 out of a $60 filing fee.[5] Congress raised the base fee in 1984 to $45 and raised it again in 1994 to $60. The base fee has not changed since 1994 and remains $60. If the base fee had kept pace with inflation, it would be approximately $101 as of the end of 2018. The chapter 7 filing fee has increased several times since 1994, either through congressional action or through increases in the miscellaneous fees implemented by the judiciary. Table 1 shows the relationship between the base fee in a no-asset case and the overall chapter 7 filing fee at selected points in time.

Table 1[6]: Relationship Between Chapter 7 Trustee Base Fee and Chapter 7 Filing Fee, Selected Years

	Filing Fee	Base Trustee Fee	Base Fee as % of Filing Fee
1979	$60	$20	33.0%
1986	$90	$45	50.0%
1994	$145	$60	41.4%
2003	$209	$60	28.7%
2005	$274	$60	21.9%
2006	$299	$60	20.1%
2018	$335	$60	17.9%

As the table shows, the base fee as a percentage of the filing fee is at a historical low. The filing fee has been raised to recoup the costs of administering the bankruptcy system, but trustee compensation has not kept pace.

5 *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, §§ 101, 246, 92 Stat. 2549, 2564, 2671 (adding section 330(b) with a $20 trustee fee and 28 U.S.C. § 1930 with a $60 filing fee for a chapter 7 case).

6 The authority for the 1979 fees is listed in the preceding footnote. Beginning in 1994, the Judicial Conference was authorized to add a miscellaneous fee to the chapter 7 filing fee. Historical tables for miscellaneous fees are not readily available, and the figures for historical miscellaneous fees come from the commissioners' personal records).

The 1986 fee structure comes from the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 434, 98 Stat. 333 (amending section 330(b) to provide for a $45 trustee fee) and the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 117, 100 Stat. 3088, 3095 (raising the chapter 7 filing fee to $90).

The 1994 fee structure comes from the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 117, 108 Stat. 4106, 4119 (allowing the Judicial Conference to add a $15 filing fee to go to the chapter 7 trustee), and Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1994, Pub. L. No. 103-121, § 111, 107 Stat. 1153, 1164 (raising statutory chapter 7 filing fee to $130).

The 2003 filing fee was the result of the Consolidated Appropriations Act of 2000, Pub. L. No. 106-113, § 113, 113 Stat. 1501, 1501A-20, which raised the statutory chapter 7 fee to $155 to which was added a $54 miscellaneous fee.

The 2005 filing fee combines the $54 miscellaneous fee with a $220 statutory chapter 7 fee enacted in the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, § 6058(a), 119 Stat. 231, 297. (Congress had raised the chapter 7 filing fee to $200 in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 325(a), 119 Stat. 23, 98, but this rate never took effect.).

Congress increased the statutory chapter 7 filing fee again in 2006 to $245. *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 10101(a), 120 Stat. 4, 184. The statutory fee has not been changed since 2006, but the total miscellaneous fees now total $90. *See* U.S. Courts, Bankruptcy Court Miscellaneous Fee Schedule, https://www.uscourts.gov/services-forms/fees/bankruptcy-court-miscellaneous-fee-schedule (last visited Jan. 9, 2019).

To understand the total way that trustees are compensated, one must also consider the additional compensation awarded to trustees in asset cases. In an asset case, sections 330(a)(7) and 326(a) provide that chapter 7 trustees receive a commission on a sliding scale based on a percentage of the money disbursed to creditors:

- 25% of the first $5,000;
- 10% on amounts from $5,001 to $50,000;
- 5% on amounts from $50,001 to $1,000,000; and
- 3% on amounts more than $1,000,000.

In theory, the percentage of compensation chapter 7 trustees earn in asset cases combines with the $60 base fee to provide "overall, reasonable compensation" for the trustee's services.[7] Using federal court and USTP data, ABI consultant Ed Flynn provided an analysis to the Commission that calculated that only 8.5% of the chapter 7 cases from 2007-2016 were asset cases. The USTP's database of chapter 7 trustee final reports reveals that over half of asset cases fall into the "small-case category," with distributions of $5,000 or less.[8] The ABI's Consumer Bankruptcy Fee Study concluded that "the system has failed chapter 7 panel trustees."[9]

Recommendation. In written comments and in statements made to the Commission and its committees, the need to raise trustee compensation appears to enjoy almost unanimous support. The Commission agrees. Inadequate compensation affects not just the chapter 7 trustees but also the consumer bankruptcy system more broadly, with skilled chapter 7 trustees leaving for more lucrative opportunities and those who remain facing skewed incentives to find assets and sometimes taking unduly aggressive legal positions for that purpose.

The Commission recommends that Congress should raise the chapter 7 trustee base fee to $120. This would be 36% of the current filing fee, much closer to the historical norm and responsive to the increase in trustee duties implemented by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.[10]

The Commission also addressed the more difficult question of the appropriate source for the fee increase. A consensus emerged that the bankruptcy system already has enough funds to support the increase in chapter 7 trustee compensation without increasing filing fees. The Commission therefore recommends that the increase in the fee should come from bankruptcy filing and other court fees already paid to

7 Lois Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 Am. Bankr. Inst. L. Rev. 17, 106 (2012).

8 The calculations in the text are from U.S. Dep't of Justice, Chapter 7 Trustee Final Reports, https://www.justice.gov/ust/bankruptcy-data-statistics/chapter-7-trustee-final-reports (last visited Jan. 10, 2019). Because these reports do not distinguish between business and consumer cases and distributions tend to be lower in consumer cases, the percentage of small cases is likely even higher for consumer cases only.

9 Lupica, *supra* note 7, at 106.

10 Pub L. No. 109-8, §§ 102(c), 219, 446, 1105, 119 Stat. 23, 32, 55, 118, 192.

the general treasury. These bankruptcy filing and other court fees should be placed into a special fund earmarked for chapter 7 trustee compensation.

A comprehensive approach to raising trustee compensation also should consider the fees that trustees earn in asset cases. The Commission recommends changing the breakpoints for trustee compensation in asset cases as summarized in Table 2. The last column of Table 2 estimates the total increase in chapter 7 trustee compensation from the changes, using an analysis that ABI consultant Ed Flynn provided to the Commission based on annual averages from asset cases closed during 2015 and 2016 (but not including the 3% of chapter 7 cases that come from the bankruptcy administrator districts in Alabama and North Carolina).

Table 2: Comparison of Current Trustee Fees in Asset Cases and Commission Recommendations

Current Law	Commission Recommendation	Estimated Increase in Trustee Compensation
25% for \$1 to \$5,000	25% for \$1 to \$10,000	\$12.2 million
10% for \$5,001 to \$50,000	10% for \$10,000 to \$100,000	\$9.8 million
5% for \$50,0001 to \$1,000,000	5% for \$100,001 to \$1,000,000	n/a
3% for > \$1,000,0000	4% for > \$1,000,000	\$14.1 million
	Total:	\$36.1 million

The analysis assumes any increase in the fee breakpoints would be applied to pending cases for it to have the immediate effect in trustee compensation shown in the last column. The Commission took no position on whether the recommendation should apply to pending cases and provides the analysis only to give a sense of how trustee compensation would change if the recommendation was fully implemented.

§ 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.

Background. Section 327(a) authorizes a bankruptcy trustee to employ professional persons, including attorneys and accountants. If it is in the best interest of the estate, the trustee can act as the attorney or accountant for the bankruptcy estate.[11] Federal Rule of Bankruptcy Procedure 2014 implements these provisions by requiring the filing of an application to employ a professional and transmission of that

11 11 U.S.C. § 327(d).

application to the U.S. Trustee. The rule requires the application to state the reasons for selecting the professional, the services to be rendered, and the compensation arrangement. It also mandates a verified statement of the professional connections to any parties in the case, including the U.S. Trustee.

The Commission received and discussed comments about possible conflicts of interest when the trustee or a member of a trustee's firm acts as a professional in the case. Other comments asserted that such conflicts were uncommon or observed that trustees generally employ their own firm only in small cases, where the dollar values at stake do not justify expensive outside professional services. Although rule 2014 governs an application to employ professionals, the Commission learned there are widely disparate procedures around the country regarding the parties who must receive these applications. Read literally, rule 2014 requires the trustee to send the application only to the U.S. Trustee.

Recommendation. The Commission considered different prophylactic rules to minimize the possibility of conflicts of interest in a trustee's choice of professionals.[12] The challenge is to craft a rule that allows "good" decisions by trustees to employ outside professionals, including professionals at the trustee's own firm, and screens out "bad" decisions. With the variety of consumer cases in the bankruptcy courts, any prophylactic rule on professional employment inevitably will be either underinclusive or overinclusive relative to the problem. Commissioners also differed on the extent to which trustees' employment of professionals was actually a problem across the bankruptcy system.

The Commission, however, was concerned that rule 2014 does not give all parties an opportunity to address applications to employ professionals that parties might see as problematic. Only the U.S. Trustee must receive the application to employ. In the words of *Collier on Bankruptcy,* "This is oddly limited service for a rule that courts have made to bear so much weight."[13] Therefore, the Commission recommends that the Federal Rules of Bankruptcy Procedure require "notice and a hearing" on the trustee's application to employ a professional.[14] Notice under this proposal would have to be given to all creditors, the debtor, and the U.S. Trustee.

The Commission's intention is that the phrase "notice and a hearing" would be interpreted consistently with section 102, which does not necessarily require an actual hearing if no party requests a hearing or if there is insufficient time for a hearing to occur. Requiring broad notice of applications to employ professionals will give those who have incentives to monitor the application the information necessary to object when the application is problematic.

By recommending expanding notice beyond the U.S. Trustee, the Commission does not intend to imply that U.S. Trustees have done an inadequate job in monitoring employment applications but only to add new resources and new interested parties to review these applications in a bankruptcy system

12 The Commission is appreciative to ABI consultant Ed Flynn for providing data analyses to the Commission about the incidence of employment of professionals by trustees and the types of cases in which trustees employ outside professionals.

13 9 Collier on Bankruptcy ¶ 2014.02 n.4 (16th ed., Richard Levin & Henry Sommers eds.).

14 Because Federal Rule of Bankruptcy Procedure 2014 has wide application in commercial cases, it bears repeating here the admonition in the Foreword that the Commission takes no position on its recommendation outside the context of consumer cases.

dealing with more than 750,000 cases annually. Individual creditors and debtors may have concerns or information the U.S. Trustee does not.

§ 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.

Background. The Commission has taken a pragmatic approach in its recommendations, and a pragmatic approach must acknowledge the benefits that come from the appropriate mediation of disputes. In the words of Abraham Lincoln, "Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses, and waste of time."[15] Certainly the experience of today's lawyers and judges is no different. Mediation can save money and time as well as lead to settled outcomes that parties are likely to view as fair. Indeed, the American Bankruptcy Institute has an active Committee on Mediation, and the Commission thanks the Committee on Mediation for the valuable background information it provided for this recommendation.

Within the context of consumer bankruptcy, there are disputes that can benefit from mediation. In a letter sent to the Commission, the ABI Committee on Mediation provided statistics from a mediation program in the U.S. Bankruptcy Court for the Central District of California. Sixty percent of the mediated disputes were nondischargeability matters, with preferential and fraudulent transfer issues taking up another 26% of the mediated matters. The remaining 14% of mediations were scattered across issues relating to claims objections, asset turnover, lien avoidance, and chapter 13 plan confirmation. Elsewhere in the report, the Commission has made recommendations related to loss mitigation/

15 2 Collected Works of Abraham Lincoln 82 (Roy P. Basler ed., 1953), available at https://quod.lib.umich.edu/l/lincoln/lincoln2/1:134?rgn=div1;view=fulltext (last visited Jan. 7, 2019).

mortgage foreclosure mediation, and those more specific recommendations should be read against the more general background here.[16]

Bankruptcy courts may have authority to order cases to mediation. Federal Rule of Bankruptcy Procedure 7016 specifically applies Federal Rule of Civil Procedure 16 to adversary proceedings. Rule 16(a) authorizes pretrial conferences for purposes that include facilitating settlement, and Rule 16(c) authorizes a court at a pretrial conference to act to facilitate "the just, speedy, and inexpensive disposition of the action."[17] Also, local rules can authorize mediation generally in bankruptcy matters, as several districts have done.[18]

Recommendations. The Commission supports mediation of appropriate disputes. At the same time, not every dispute is appropriate for mediation. Bankruptcy judges should not routinely order mediation of all disputes. A mandate that the court order mediation in every adversary proceeding and contested matter will unnecessarily delay the resolution of some matters as well as drive up the cost. In ordering a dispute to mediation, a bankruptcy judge should consider the cost of mediation compared to the benefits that might flow from it. The Commission believes in a nuanced approach that recognizes the differences among local bankruptcy court environments and that will lower the risk of mediation abuse.

To maximize mediation's cost-effectiveness, bankruptcy courts should establish rosters of mediators who are willing to serve pro bono. Even when a pro bono mediator is available, a bankruptcy judge assessing whether to order mediation should still remember the expense of having counsel prepare for and attend the mediation.

For two reasons, the Commission considered but rejected the possibility of going further and recommending that all courts establish mediation programs. First, some judicial districts are small and are unlikely to need a formal mediation program. Second, in those judicial districts in which judges often act as judicial mediators for one another, there may not be sufficient work for a mediation panel, but the availability of a pro bono panel would still allow the court to augment its mediation resources for consumer cases.

Parties have experienced some abuses in the mediation process, especially when the lines between the court's role and the mediator's role have not been respected. A mediation process that a party views as unfair is worse than no mediation. Parties are more likely to respect outcomes when they view the process as fair.

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16 *See* § 4.05 Loan Modifications in Chapter 13.

17 The advisory committee note to rule 16 makes clear that courts may be authorized to order mediation:

> Even if a case cannot immediately be settled, the judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to consensual resolution of the dispute without a full trial on the merits. The rule acknowledges the presence of statutes and local rules or plans that may authorize use of some of these procedures even when not agreed to by the parties.

Fed. R. Civ. P. 16 advisory committee's note.

18 *See, e.g.*, Bankr. N.D. Cal. R. 9040-1 to 9050-1; Bankr. S.D. Fla. R. 9019-2; Bankr. E.D. Mich. R. 7016-2; Bankr. D.N.J. R. 9019-1 to 9019-2; Bankr. D. Or. R. 9019-2; Bankr. W.D. Wash. R. 9040-1 to 9050-1.

To help ensure that mediation accomplishes its goal of facilitating settlement without damaging the dispute-resolution process, the Commission has three recommendations. These recommendations are designed to prevent perceived abuses and to separate the mediation process from the adversary process before the bankruptcy court.

First, a bankruptcy judge presiding over a matter should not also act as mediator in the matter unless the judge commits to recusal if the matter does not settle. Of course, this recommendation is not intended to suggest judges should not have the traditional pretrial tools to manage litigation, only that the same person should not act as both mediator and judge in the same matter.

Second, the judge presiding over a matter should have only minimal contact with a mediator, limited to procedural matters such as whether the matter settled and the terms of any settlement. This second recommendation is an extension of the first; the mediation is not an opportunity for the mediator simply to be the judge's "eyes and ears." The parties should have confidence that the judge will decide the matter only on the evidence and arguments presented through the formal adversarial process and not based on any disclosures in an unsuccessful mediation.

Finally, the mediator should not issue orders in the case. The issuance of orders is a judicial role and properly confined to the judge hearing the matter. Confining the mediation to an appropriate, nonjudicial role is consistent with Federal Rule of Bankruptcy Procedure 9031, specifically forbidding the use of a special master in a bankruptcy case.

§ 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.

Background. The Commission's charge is to consider improvements "to the consumer bankruptcy system."[19] In a significant percentage of filings, however, there is not a sharp division between a business

19 *See supra* Foreword.

case and a consumer case.[20] Also, if the Commission's recommendation for an increase in the debt limits for chapter 13 eligibility is adopted,[21] the numbers of debtors who have a business is likely to increase.

Individuals may file under chapter 13 even though they are "engaged in business."[22] Section 1304(b) provides, in part, that "unless the court orders otherwise," such a debtor may "operate the business of the debtor," and section 1304(c) states that "a debtor engaged in business shall perform the duties of the trustee."

Section 704(a)(8) imposes tax and business operation reporting requirements on a trustee authorized to operate a business.[23] Thus, adequate reporting of a business operation by a chapter 13 debtor who is engaged in business is currently a statutory requirement. Some, but not all, chapter 13 trustees or bankruptcy courts have adopted or recommended business-reporting forms.[24] Consistent with the Commission's recommendations for uniformity,[25] business reporting by a chapter 13 debtor should be uniform as well.

Recommendation. A chapter 13 debtor engaged in business has an existing duty under section 708(a)(8) to report on that business. The Commission proposes no change in that requirement.

Other than the bare requirement to report, however, there is currently no official form for reporting business operations in chapter 13 cases and no requirement for a particular frequency of the required reporting. Reporting for small business cases in chapter 11 is treated differently. For these cases there is an official reporting form, and monthly reports are required unless the court orders a different reporting period.[26] Specifically, Official Form 425C implements the periodic reporting requirement of section 308(b) for small-business chapter 11 cases.

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20 *See* Robert M. Lawless, *Striking Out on Their Own: The Self-Employed in Bankruptcy,* in Broke: How Debt Bankrupts the Middle Class 101, 106 tbl.6.1 (Katherine Porter ed., 2012) (using 2007 interviews of bankruptcy debtors and finding 14.0% of bankruptcy debtors report full-time self-employment at or in the two years before bankruptcy); Robert M. Lawless & Elizabeth Warren, *The Myth of the Disappearing Business Bankruptcy*, 93 Cal. L. Rev. 743, 773 tbl.2 (2005) (using 2001 interviews of bankruptcy debtors and finding 13.5% of bankruptcy filers report full-time self-employment at or in two years before bankruptcy and at much higher rates than the official count of "business" cases as measured from the bankruptcy checkbox).

21 *See* § 3.10 Chapter 13 Debt Limits.

22 11 U.S.C. § 1304(a).

23 (a) The trustee shall

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>
> (8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires.

11 U.S.C. § 704(a)(8).

24 *E.g.*, Bankr. W.D. Pa. R. 2015-1(f) (requiring an initial questionnaire of a chapter 13 debtor with a business and monthly operating reports).

25 *See* § 4.02 Nonuniform Court Practices.

26 Fed. R. Bankr. P. 2015(a)(6).

An official form for business reporting in chapter 13 would increase uniformity, aid in measuring chapter 13 operations, and help debtors comply with the existing business-reporting requirement. However, because many debtors in chapter 13 have business operations with small amounts of income not material to the administration of their cases, a separate official form for chapter 13 business reporting would be appropriate rather than requiring chapter 13 debtors to use the existing small-business form for chapter 11s.

The Commission recommends an amendment to Federal Rule of Bankruptcy Procedure 2015 to require the use of a new official form to fulfill the reporting duty of a chapter 13 debtor engaged in business. Together with the rule amendment, the Advisory Committee on Rules of Bankruptcy Procedure should propose a new official reporting form for chapter 13 debtors engaged in a business.

Because the size of businesses operated by most chapter 13 debtors will be small, quarterly rather than monthly reporting provides the best balance between providing necessary information for the trustee and avoiding unnecessary burdens on small-business owners. For the rare chapter 13 case where more frequent reporting would be appropriate, rule 2015 should allow that the court could so order. Similarly, where the debtor's business income and expenses were immaterial to the case, the court should be able to excuse the reporting requirement altogether.

§ 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.

Background. For a consumer, the goal of bankruptcy is a fresh start, but an effective fresh start must do more than merely free the debtor from past obligations. The debtor also needs the tools to begin rebuilding his or her postbankruptcy financial life. One of the most important tools is a good credit score built on a solid credit report. After bankruptcy, the typical debtor will have a strongly negative credit score. The system should remove any unnecessary obstacles that prevent debtors from rebuilding their credit through responsible borrowing and repayment.

In developing its list of topics, the Commission received comments about problems with how the credit-reporting system interacted with postbankruptcy debtors. These comments included:

(1) Discharged debts being listed as "charged off" rather than reporting a zero balance.

(2) Mortgage servicers not reporting to a credit agency while a bankruptcy case is pending.

(3) Incorrect reporting by mortgage servicers after final cure in bankruptcy.

(4) The lack of a standard method for reporting debts after a chapter 13 case is dismissed.

(5) Lenders reporting a "ride-through" secured debt as not current.[27]

(6) Lenders reporting a charge-off for a nonfiler co-obligor in a chapter 13 after completion of the chapter 13 plan rather than at the time of filing.

(7) The lack of a clear method to report on the bankruptcy of a third party who is not an obligor on the loan subject to the report but has statutory or equitable rights in the collateral securing the loan. For example, such rights might arise in connection with community property or property used by unmarried couples.

Listing these comments is not meant as a finding by the Commission that the problems identified are widespread. The Commission lacked the resources to determine the scope of the problems with postbankruptcy credit-reporting. At the same time, it was apparent that a large segment of the bankruptcy community believed the credit-reporting system could work much better for bankruptcy filers.

Recommendation. The Commission considered the options to improve credit-reporting for postbankruptcy debtors. The Commission first discussed possible amendments to the Fair Credit Reporting Act[28] directly, but without sufficient reporting on the scope of the problem, the Commission believed the first priority should be to gather facts. Commissioners also observed that accurate postbankruptcy credit-reporting is in the interests of debtors, the credit-reporting agencies, and lenders who rely on the credit-reporting. Changes could be implemented without legislative or regulatory intervention.

The Commission believes the ABI should facilitate communication between bankruptcy experts and credit-reporting experts. Both fields are complex, and the experts in each field have tended not to communicate with one another. The ABI should work with the Consumer Data Industry Association, the leading trade association for the credit-reporting industry, to identify leading experts who could come together at a forum and discuss how to improve postbankruptcy credit-reporting. The forum should not be merely a typical professional conference but rather should have a goal of producing a written report with specific recommendations.

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27 For a debt secured by personal property, section 521(a)(6) requires a consumer debtor to either (i) surrender the collateral, (ii) reaffirm the debt, or (iii) redeem the collateral. A debtor who does none of these options and continues to make payments on the loan is said to be "riding through" on the debt. The Commission has made recommendations regarding the "ride-through" at § 2.03 Statement of Intention — Deadlines and Consequences.

28 15 U.S.C. §§ 1681-1681x.

§ 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 (AO), the FJC, the Advisory Committee on Rules of Bankruptcy Procedure, the USTP, and private bankruptcy organizations.

Background & Recommendation — New Bankruptcy Forms. On December 1, 2015, new bankruptcy forms went into effect. The new forms were the result of a seven-year effort known as the Forms Modernization Project. In creating the forms, the Advisory Committee on Rules of Bankruptcy Procedure "drew on the services of a professional forms-design expert, and surveys of bankruptcy petitioners, software vendors, bankruptcy judges and clerks, as well as other members of the bankruptcy community."[29]

The new forms contained several innovations. First, they were intended to be simpler to use than the forms they replaced. Plain-English instructions direct how to complete the forms. There are now separate forms for businesses and individuals, with the latter emphasizing multiple-choice and yes-and-no questions to minimize mistakes. Upon the release of the new forms, the Advisory Committee expressed its belief that they would "reduce administrative strains, improve delivery of case information to judges, and protect debtor and creditor rights."[30]

The Commission received critical comments about the new forms, both in writing and during the Commission's public meetings. The general theme of the criticisms was that the new forms contain too much information, making the forms cluttered, burdensome, and more difficult to read. Concerns were expressed that the new forms make it more likely that debtors can inadvertently fail to disclose information and that attorney time has increased to complete the forms.

Not all the comments the Commission received about the new forms were critical. Some commenters commended the Forms Modernization Project and believed it had largely accomplished its goals.

29 U.S. Courts, Revised Bankruptcy Forms Go Into Effect December 1 (Nov. 24, 2015), https://www.uscourts.gov/news/2015/11/24/revised-bankruptcy-forms-go-effect-december-1 (last visited Jan. 19, 2019).

30 *Id.*

Criticisms were characterized as typical of complaints about changes in legal procedure and were predicted to become less prevalent as the system adjusted to the new forms.

At the time of its discussion about the new forms, the Commission observed that less than three years had passed since the new forms went into effect. The Commission decided that there had not been enough experience with the new forms for the Commission to conclude whether they were serving the goals of the Forms Modernization Project. The Commission also discussed whether it had the expertise to second-guess forms that had been developed in consultation with experts over a long period of time and with input from many bankruptcy professionals. At the same time, the Commission recognized the strong criticism from some members of the bankruptcy community about the new forms.

For these reasons, the Commission recommends that the Advisory Committee on Rules of Bankruptcy Procedure study whether the new forms are accomplishing their goals and whether any improvements can be made. The Commission's recommendation of further study should not be misunderstood as an endorsement of the forms as they currently exist, but instead as a recognition that the Advisory Committee is best positioned to gather information about whether changes are needed and how to make them. The Advisory Committee should undertake that further study.

Background & Recommendation — Data-enabled Forms. Data-enabled forms are digital documents that contain "tags" identifying specific pieces of information embedded in the forms. The tags are invisible to the person using the form but can be used later to automatically extract information from the form and combine the information with data from other sources. The technology behind data-enabled forms is now decades old, and software to create such forms is widely available, with Adobe Acrobat being a well-known example.

A bankruptcy case requires the filing of many forms that contain an abundance of financial and other information, such as asset valuations, debts owed, lawsuits pending against the debtor, and prior bankruptcies. This information is necessary to administer the bankruptcy case. When aggregated with data from other cases, the information can assist in the administration of the bankruptcy system. The USTP requires trustees to submit uniform final reports that are data-enabled. The USTP uses the information from these forms to assist in its oversight of bankruptcy trustees and makes the data from the forms available on its website.[31] The availability of this data increases transparency in the system and helps inform evidence-based policy-making. Indeed, the Commission made use of the uniform final report data in preparing this report.

The debate over requiring the bankruptcy forms to be data-enabled is now over a decade old. In a 2008 report concluding that more data accessibility in the bankruptcy system would be desirable generally, the Government Accountability Office (GAO) specifically recommended implementation of data-enabled

31 U.S. Dep't of Justice, Uniform Final Reports, https://www.justice.gov/ust/uniform-final-reports (last visited Jan. 20, 2019).

forms.[32] The GAO noted that its recommendations were consistent with section 604 of the Bankruptcy Abuse Prevention & Consumer Protection Act of 2005, which states that the sense of Congress was to make bankruptcy data available in "usable electronic form in bulk to the public,"[33] with appropriate privacy concerns and safeguards.

The Commission agrees with this recommendation. Bankruptcy forms should be data-enabled to allow data extraction by trustees, attorneys, and researchers. Technological developments have made it much easier for programmers to write computer scripts that "scrape" information from the existing, non-data-enabled bankruptcy forms. Indeed, several private companies regularly data-scrape from bankruptcy court records and use the valuable information they obtain for private gain. The bankruptcy system's failure to implement data-enabled forms has only made more expensive what is currently possible with a little technological know-how, blocking benefits that private industry has already seen and that otherwise would inure to the government and the public. Moreover, appropriate privacy protections already are embedded in the bankruptcy system. Section 107(c) sensibly directs the bankruptcy court to protect information that "would create an undue risk of identity theft," a directive implemented in part through the bankruptcy forms' limiting access to the debtor's Social Security number and directing the disclosure of only the last four digits of an account number.

Background & Recommendation — Development of Form Software. Although software exists that allows bankruptcy professionals to assemble the information relevant to a bankruptcy filing, this software requires professional expertise to use it competently and it is not available to the public. A bankruptcy professional must know where and how to enter information provided by clients into the bankruptcy forms.

The development of new software that uses artificial intelligence and other technologies to take the raw information from the consumer and then assemble the bankruptcy schedules and other forms — much like TurboTax and similar software for income tax filings — not only would help unrepresented debtors navigate the bankruptcy system but also likely would lower the costs for both legal aid groups and private attorneys in offering bankruptcy services. As the Commission discusses in its recommendation regarding chapter 7 attorney fees, lowering the costs of filing bankruptcy is an important part of increasing access to the system, and an obstacle to lowering costs is the unnecessary complexity of routine consumer bankruptcy cases. Easy-to-use and widely available bankruptcy form software could be an important part of reducing this complexity.

Experience has shown that the challenges of developing such software are immense. Because of these challenges, the development of such software is not an activity for which the expenditure of government funds likely would be productive. Rather, the government should encourage the private marketplace — including both for-profit and nonprofit organizations — to compete and create the software. The AO, the

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32 Gov't Accountability Office, Judiciary Should Take Further Steps to Make Bankruptcy Data More Accessible 36 (2008), available at https://www.gao.gov/new.items/d0928.pdf (last visited Jan. 20, 2019).

33 Pub. L. No. 109-8, 119 Stat. 23, 123-24.

FJC, the USTP, and the Advisory Committee on Rules of Bankruptcy Procedure should cooperate with organizations that are developing bankruptcy software. Similarly, professional bankruptcy organizations should lend their members' expertise to help develop this software as part of their commitment to improving the administration of justice.

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

(a) The 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.

Background. In its public meetings and in written comments, the Commission heard from practitioners about the diversity of local docket practices. As technology has increased the ability to practice in more than one judicial district, conforming to disparate local practices drives up costs to attorneys that get passed on to their creditor and debtor clients. Conflicting requirements also increase the likelihood of errors. Local practices also include differences in how parties can ensure they receive notice of filings in a bankruptcy case. If an attorney does not receive notice or is simply unsure whether notice will occur, the attorney will have to incur costs to monitor a case.

Some bankruptcy courts across the country have implemented technology that permits users to prepare and file an electronic proof of claim (ePOC) and related documents (e.g., a Notice of Mortgage Payment Change pursuant to rule 3002.1). The availability of ePOC is relatively new. In considering reforms to docket practices, the Commission reviewed a number of ways the ePOC system might be improved.

In making these recommendations, the Commission was sensitive to the role of the AO and the scope of its authority. Administration of docketing practices is ultimately the responsibility of judges and clerks of court, subject to whatever limits might be imposed legislatively or through the bankruptcy rulemaking process. The AO, however, is well situated not only to encourage but also to coordinate the development of uniform practices by facilitating dialogue and information-sharing among the bankruptcy courts.

Uniform Naming Conventions & Pleading Formats. The Commission discussed how uniformity in docketing practices could be improved. The most obvious example is a docket event that is known by different names in different jurisdictions. For example, an entry docketed as a "motion for relief from stay" might be docketed as a "motion to lift stay" somewhere else. The name on the docket entry not only affects whether interested parties can identify what they are looking for, but also affects the subject and description of the notice interested parties receive. The AO might promulgate a standardized list of pleading names to be used for docketing, as well as conventions to be used in identifying nonstandard docket entries. In addition, the AO might consider what types of docket entries might benefit from including an identification of any real property affected by the motion or the identity of the party bringing the motion (e.g., "ABC Bank's Motion for Relief from Stay (123 Main Street)"). Uniformity and more information will help serve the goals of allowing persons to quickly and accurately identify bankruptcy filings that affect their interests. Also, the workings of the bankruptcy system will be easier for outside parties to understand, increasing transparency and confidence in the administration of justice.

Locally required document formats also can create issues, especially in the many courts that allow or require the submission of orders electronically. For example, some courts require a signature block for the judge to sign a proposed order, but others do not. Some courts require a margin at the top of the page to allow room for court notations to indicate the entry of an order, but others do not. Some courts require some symbol or phrase to indicate the end of the order (e.g., ##END OF ORDER##"), but others do not. For firms practicing in multiple districts or even before different judges in the same district, so many different requirements on so many different formatting issues inevitably lead to errors. Pleadings are then rejected by the court, imposing costs on both the law firm and the court. Having one standard would reduce errors and staff training time, leading to greater efficiency and better service for clients.

Notice Issues. The Commission understands that some judicial districts do not send out ECF notices in response to a request for notice unless the requesting party is an attorney admitted to practice before that court.[34] In these cases, the party must rely on opposing counsel to mail a copy of any motion or objection that might adversely affect that party's interest. Alternatively, the party must perform a manual PACER search or subscribe to a third-party noticing service. Much

34 Of course, the court could deny an abusive request to receive notice. The Commission's recommendation is intended to allow parties with an economic interest in a case to be assured of receiving notice. It is not meant to provide a mechanism to provide information to nonparties that is readily available from other sources like PACER. For example, a nonparty who filed requests for notice in all consumer cases in a district most likely would be making an abusive request.

The Commission takes no position on whether its recommendation should be implemented outside the context of consumer bankruptcy cases.

more efficient notice would be provided if the clerk of each court instead served via ECF a copy of the pleadings filed in each case to any party who so requested it. Some courts will not accept any requests for notice but will allow ECF users to add themselves to the creditor matrix so as to receive notice, which means any parties with filing credentials can add themselves to a case. Different procedures to get added to a notice list across districts burden attorneys practicing in more than one district and raise the risk they will fail to receive notice. Ensuring parties receive proper notice is an essential element of due process and serves the more practical goal of helping attorneys avoid missing response deadlines. The bankruptcy courts should strive to make it easier and less costly for parties to ensure they will receive notice of cases where they have an interest.

On the other hand, a party may desire to stop receiving ECF notices in a bankruptcy case. For instance, a creditor may obtain relief from the automatic stay or have its property abandoned from the estate. An attorney may no longer represent a client on whose behalf notice was requested, or the attorney may have left the law firm. Having a simple and uniform mechanism for canceling ECF notices would help attorneys reduce the number of ECF e-mails that must be reviewed daily, thereby minimizing the possibility of overlooking notices the attorney needs to see, as well as the time and cost of providing legal services.

Scanning Standards. Supporting documentation for motions and pleadings is often included via scanned files. In its public meetings and committee discussions, the Commission learned that the standards for scanned documents can vary widely from court to court. For example, courts have widely varying limits on the size of scanned documents that can be submitted. Some courts direct that scans can only be black-and-white, but some documents such as mortgage documents or payment histories are more legible if scanned in color. Nonuniformity across judicial districts about scanning standards raises costs for multidistrict practices and creates opportunities for error. Size limitations also can conflict with requirements to include certain documents with pleadings when the scan of those documents exceeds the size limitation.

The Commission considered whether a recommendation on scanning standards was necessary. It is likely the varying scanning standards are simply the result of individual districts adopting rules as technology developed. But the solution is simple, namely coordination across districts, coordination that the AO is in a good position to facilitate. The Commission believes scanning standards should make it as easy as possible for parties to get relevant documentation before the court within the limits of available technology. For example, scanning standards should set the file size at the maximum amount that technology permits and adjust the size upward as technology develops. The standards should allow parties to include images where it is necessary to do so, including documents for which the party might not have the original electronic version (e.g., an appraisal report). The AO and bankruptcy professional organizations also should educate practitioners on the technological side of best practices, such as converting documents directly to a PDF from a word-processing program rather than unnecessarily scanning to a larger-sized image file.

ePOCs. A number of bankruptcy courts across the country have implemented technology that permits users to prepare and file a proof of claim and related documents, such as a notice of mortgage payment change, through the population of a web-based form called an electronic proof of claim, or "ePOC." The development of ePOC portals is exactly the type of cross-district coordination that promises to lower costs for attorneys and clients. The Commission recommends several ways to improve ePOC implementation.

First, credentials generally are not required to use the ePOC portals. Any individual or party could file a proof of claim, amend another party's claim, or even withdraw a claim, either inadvertently or perhaps for an improper purpose. The AO should facilitate the implementation of security procedures to ensure the integrity of the ePOC portals.

Second, technical issues with the ePOC portals need to be addressed. There is potential for information to be entered incorrectly and included on the proof of claim because it is difficult to review the information entered on the screen before it is submitted. Moreover, due to character limitations, creditor names and the information in other fields may be truncated. Finally, where a party's judgment is that the risk of making a mistake outweighs the convenience of using an ePOC portal, the party should be able to file a traditional proof of claim. Use of the ePOC portals should not be mandatory. For similar reasons, parties always should be allowed to upload a PDF copy of the proof of claim on the ePOC portal instead of having to populate the web-based form.

§ 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 that (1) 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) 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 AO should provide access to the database of preferred addresses to registrants of the case management/electronic case filing (CM/ECF) system.

Background. Providing notice is the cornerstone of our jurisprudential system, which rests on the idea that all parties have a right to appear and be heard before a court affects their legal rights. Generally speaking, court proceedings do not bind persons who have not received notice of those proceedings.

In bankruptcy court, Federal Rule of Bankruptcy Procedure 2002 specifies how to provide notice to parties, and rule 7004 specifies how to serve a complaint and summons. In bankruptcy practice, a reference to providing "service" usually means a procedure that complies with the requirements of rule 7004 rather than the somewhat simpler procedures for providing notice under rule 2002. The bankruptcy rules specify when a party must comply with rule 7004, which is generally when a party initiates litigation within the bankruptcy case. For example, a party must provide "service" and comply with rule 7004 when initiating an adversary proceeding, but provide "notice" under rule 2002 of the section 341 meeting.

Parties should expect to receive notice of proceedings where their rights are at stake, and they should expect that this notice is effective and not a hollow formality. On the other hand, overly complex procedural rules impose costs that ultimately fall on debtors and creditors. The rules must balance the goal of providing effective notice with the costs to parties of compliance. Although the notice and service rules for bankruptcy generally work well, the Commission received several comments about specific rules that impose costs without any apparent increase in the effectiveness of conveying information to the party who receives the notice or service. After weighing the competing considerations, the Commission recommends some changes to the rules surrounding notice and service.

Recommendation — Providing a "Service" Address on the Proof of Claim. The proof of claim (Form B410) currently provides that the creditor must identify where notices should be sent for purposes of rule 2002. This requirement does not expressly apply to service under rule 7004. There is no apparent reason why a creditor should not supply an address for both service under 7004 and notice under rule 2002. The point of rules 2002 and 7004 is to make sure effective notice or service is provided, not to create loopholes that a creditor can use to evade a legitimate attempt to provide notice or effective service.[35]

Therefore, Federal Rule of Bankruptcy Procedure 3001 should require that a creditor identify on the proof of claim (Form B410) the name and address of the person responsible for receiving service under rule 7004. If the creditor is a corporation (or a partnership or unincorporated association), the claimant would list the name and address of an officer or agent for purposes of receiving service under rule 7004(b)(3). The same requirement should apply to holders of a transferred claim, currently governed under rule 3001(e). Conforming amendments to the official proof of claim form would also be necessary.

Rule 7004(h) requires that service on an insured depository institution be accomplished by certified mail to "an officer of the institution." The institution can waive this requirement in writing. Thus, the amendments to rule 7004 should not only require a creditor to state on the proof of claim the name and address of an officer of the institution for service under rule 7004, they also should allow the creditor to indicate it would prefer that service under rule 7004 be made in some other manner that would more quickly and efficiently provide service to the individual or department responsible for the matter. Rule 7004(h) was added by congressional

35 Fed. R. Civ. P. 4(d)(1) states, "An individual, corporation, or association that is subject to service . . . has a duty to avoid unnecessary expenses of serving the summons." Although the technical rules in the rest of this civil rule do not apply to bankruptcy through Fed. R. Bankr. P. 7004(a), the prefatory language commending the avoiding of unnecessary costs reflects a more universal principle about the parties' responsibilities in litigation. *Cf.* Fed. R. Bankr. P. 1001 ("These rules shall be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every case and proceeding.").

action,[36] which limits what actions the Advisory Committee on Rules of Bankruptcy Procedure can take in regard to this provision. Nonetheless, an amendment providing a means for a depository institution to effectuate the waiver that rule 7004(h) allows furthers rather than hinders congressional intent.

Requiring a service address on the proof of claim would also simplify another issue. Federal Rule of Bankruptcy Procedure 3007 was amended in 2017 to specify that objections to claims should be served on the claimant by first-class mail to the person and address most recently designated on the proof of claim. Rule 3007(a)(2)(A) requires service consistent with rule 7004 only for claims objections against the federal government and insured depository institutions. As stated by the Advisory Committee Notes for the 2017 amendments to rule 3007, "Subdivision (a) is amended to specify the manner in which an objection to a claim and notice of the objection must be served. It clarifies that Rule 7004 does not apply to the service of most claim objections." If the proof of claim required a "service" address, then rule 3007 could specify that all claim objections should be served under rule 7004. Rule 3007(a) could further clarify that such service could be made by first-class mail to the person filing the proof of claim.

Recommendation — Identification of "Officer, Managing Partner, or General Agent or Any Other Agent." Unlike notice under rule 2002, which may be mailed to the creditor or its authorized agent, service under rule 7004(b) on a corporation, partnership, or other unincorporated association, other than a federally insured depository institution, must be directed "to the attention of an officer, a managing or general agent or to any other agent authorized by appointment or by law to receive service of process." Rule 7004(h) which, as discussed above, applies to insured depository institutions, requires service on an "officer." Courts are divided on whether service under either rule 7004(b) or 7004(h) is sufficient if it names an office (e.g., "Attn: President") or whether it must name an individual (e.g. "Attn: Jane Smith, president").[37]

The Commission recommends that rule 7004 provide that it does not require identifying an officer, a managing or general agent, or any other agent by name. The Commission believes this interpretive recommendation could be implemented through clarification in the advisory committee's note to rule 7004. Requiring the name of an individual is an example of complexity that does not further the purpose of ensuring that service is actually effective.

Recommendation — Access to the Database of Preferred Addresses. Section 342(f) permits creditors to file with any bankruptcy court an address to be used by all or particular bankruptcy courts to provide notice to such creditors in chapter 7 and 13 cases. Creditors may provide their preferred addresses to the Bankruptcy Noticing Center's National Creditor Registration Service.[38] These addresses are used by the Bankruptcy

36 *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 114, 108 Stat. 4106, 4118.

37 Courts holding that service is sufficient if it names an office include Moglia v. Lowitz & Sons (*In re* Outboard Marine Corp.), 359 B.R. 893 (Bankr. N.D. Ill. 2007); Fleet Credit Card Servs., Inc. v. Tudor (*In re* Tudor), 282 B.R. 546 (Bankr. S.D. Ga. 2002); Schwab v. Associates Comm. Corp. (*In re* C.V.H. Transp. Co.), 254 B.R. 331 (Bankr. M.D. Pa. 2000). Courts requiring the service of process to name an individual include *In re* Franchi, 451 B.R. 604 (Bankr. S.D. Fla. 2011); Carlo v. Orion Omniservices Co. (*In re* Carlo), 392 B.R. 920 (Bankr. S.D. Fla. 2008); Saucier v. Capital One (*In re* Saucier), 366 B.R. 780 (Bankr. N.D. Ohio 2007); Addison v. Gibson Equip., Inc. (*In re* Pittman Mech. Contractors Inc.), 180 B.R. 453 (Bankr. E.D. Va. 1995); and *In re* Schoon, 153 B.R. 48 (Bankr. N.D. Cal. 1993).

38 See Bankruptcy Noticing Center, Electronic Bankruptcy Noticing and Preferred Mailing Address Registration, https://bankruptcynotices.uscourts.gov/ (last visited Jan. 15, 2019).

Noticing Center for the mailings it sends to creditors and are used to supplement and correct the addresses that are listed on the mailing matrix prepared by the debtor under Federal Rule of Bankruptcy Procedure 1007(a)(1). If there is a match between the creditor name on the debtor's mailing matrix and a name contained on the National Creditor Registration Service database, and the address provided by the debtor is different from the address in the database, the mailing is redirected to the creditor's preferred address. However, the database of preferred addresses is not accessible by debtor's counsel. Having access to the preferred addresses would reduce the costs of preparing a mailing matrix and ensure more reliable service to creditors. The AO could implement this change administratively by providing access to this information to registrants of the CM/ECF system.

Appendix to Section 5.08

The Commission formally 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 the Federal Rules of Bankruptcy Procedure that would accomplish the Commission's first recommendation. Because of the technical nature of this recommendation, the Commission thought it would be helpful to include this text as an exhibit to this section:

Proposed amendatory language for Federal Rule of Bankruptcy Procedure 3001

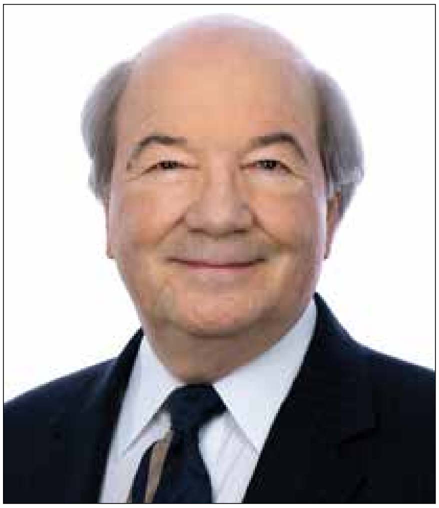
> If the holder of a claim or its authorized agent is a corporation, the proof of claim shall include the name and address of an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process on behalf of the corporation. If the holder of a claim is an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act), the proof of claim shall state whether the holder has waived its entitlement under Rule 7004(h) to service by certified mail in contested matters and adversary proceedings and, if such entitlement is not waived, the name and address of an officer to receive service by certified mail.

Amendatory language for Federal Rule of Bankruptcy Procedure 3007

> (a) Time and Manner of Service
>
> . . . .
>
> (2) *Manner of Service*
>
>> (A) The objection and notice shall be served in accordance with Rule 7004, and
>>
>> (B) Service of the objection and notice shall also be made by first-class mail or other permitted means on the debtor or debtor-in-possession, the trustee, and if applicable, the entity filing the proof of claim under Rule 3005.

Appendix A: Members of the ABI Commission on Consumer Bankruptcy

Hon. William Houston Brown (Ret.) (Co-Chair)
U.S. Bankruptcy Judge, Retired
Western District of Tennessee
Memphis, Tennessee



Hon. William Houston Brown retired in 2006 as a U.S. Bankruptcy Judge for the Western District of Tennessee, and he had been designated to sit also in the Middle District of Tennessee, Southern District of Florida, Eastern District of Michigan and Western District of Kentucky. He also served a four-year term on the Bankruptcy Appellate Panel for the Sixth Circuit from 1999 through 2002.

Judge Brown is a member of the American Bankruptcy Institute, having served on its Board and Executive Committee, and he is a Fellow in the American College of Bankruptcy. He is the author or co-author of several texts, including *Bankruptcy Exemption Manual*, *2005 Bankruptcy Reform Legislation with Analysis 1st and 2d editions*, *Bankruptcy and Domestic Relations Manual* and *The Law of Debtors and Creditors*, as well as bankruptcy form books, all published by Thomson Reuters. He is also a principal contributing editor for *Norton Bankruptcy Law and Practice 3rd*, published by Thomson Reuters. Judge Brown prepares a quarterly update of consumer cases for the Federal Judicial Center, which distributes those materials to all bankruptcy judges, and he is a speaker at the Federal Judicial Center's annual seminars for bankruptcy judges. He also speaks regularly at seminars throughout the U.S. on consumer bankruptcy topics. Judge Brown also acts as a mediator in bankruptcy-related disputes, has conducted mock trials, and has testified as an expert witness in bankruptcy court proceedings.

Judge Brown is currently the editor and adviser to the Academy for Consumer Bankruptcy Education, the education arm of the National Association of Chapter 13 Trustees. In 2011, Judge Brown received the Excellence in Education award from the National Conference of Bankruptcy Judges, and in 2012, he received the Judicial Excellence Award from the American Bankruptcy Institute and Thomson Reuters Publishing Company. He received his law degree from University of Tennessee College of Law, where he was Order of the Coif.

Hon. Elizabeth L. Perris (Co-Chair)
U.S. Bankruptcy Judge, Retired
District of Oregon
Portland, Oregon

Hon. Elizabeth L. Perris is a retired U.S. Bankruptcy Judge for the District of Oregon who served for more than 30 years, from April 1984 through January 2015, and was a member of the Bankruptcy Appellate Panel for the Ninth Circuit from 1988-93 and 1998-2005. She also was an adjunct professor at Lewis & Clark College of Law from 2005-06 and 2008-09, and at Willamette University School of Law in 1998.

From 1976-84, Judge Perris worked in Oregon as a bankruptcy court law clerk, served as a bankruptcy trustee and was an attorney in private practice specializing in bankruptcy. She was a member of the U.S. Judicial Conference Advisory Committee on Bankruptcy Rules from 2007-14. She also chaired the Bankruptcy Judges' Education Committee and was a board member of the Federal Judicial Center, in the process helping educate new bankruptcy judges from throughout the country. Judge Perris is a Fellow of the American College of Bankruptcy. She received her A.B. from the University of California, Berkeley in 1972 and her J.D. from the University of California, Davis in 1975.

Michael T. Bates
JPMorgan Chase & Co.
Dallas, Texas

Michael T. Bates is a vice president and assistant general counsel at JPMorgan Chase & Co., where he provides legal advice to Chase's mortgage banking bankruptcy group. Prior to joining Chase, he was a partner in the law firm of Fox Rothschild, LLP, where he provided legal advice to the consumer financial services industry on regulatory and legal compliance issues related to bankruptcy, consumer collections and other default-related servicing issues. He also served for over 21 years as a senior vice president and senior company counsel for Wells Fargo & Co., where he provided legal advice to all of Wells Fargo's consumer bankruptcy groups. Mr. Bates is admitted to practice in Minnesota and Iowa. He is an active member in NACTT, for which he currently co-chairs the NACTT Mortgage Committee. Mr. Bates received his undergraduate degree from Iowa State University and his J.S. with honors from Hamline University School of Law.

Alane A. Becket
Becket & Lee LLP
Malvern, Pennsylvania

Alane A. Becket is an AV-rated attorney and managing partner of Becket & Lee LLP, a Malvern, Pa., law firm that provides comprehensive nationwide representation of financial institutions in bankruptcy matters, with a focus on consumer lenders and debt-purchasers. In addition to client and industry relations, she focuses on litigation strategy, and Becket & Lee has been lead or co-counsel in some of the most influential decisions in consumer bankruptcy over the last 20 years.

In addition to her duties at Becket & Lee, Ms. Becket is President-Elect of the American Bankruptcy Institute. She formerly chaired the ABI's Consumer Committee and has served on its Board since 2009, most recently as Vice President-Publications. Ms. Becket is currently co-chair of the Bankruptcy Section and of the Professional Standards and Grievance Committees of the National Creditors Bar Association (NCBA), as well as a member of the National Association of Chapter Thirteen Trustees (NACTT). She has written and lectured extensively on consumer bankruptcy issues for a variety of professional organizations, including the American Bankruptcy Institute, the Federal Judicial Conference, NACTT, NABT, Norton Bankruptcy Law Advisor, NCBA, the National Conference of Bankruptcy Judges, the Commercial Law League of America and a host of local and regional organizations. Ms. Becket graduated from Pennsylvania State University and received her J.D. from Widener University School of Law.

Edward C. Boltz
Law Offices of John T. Orcutt
Durham, North Carolina

Edward C. Boltz is a partner at the Law Offices of John T. Orcutt, P.C., where he has represented clients in not only chapters 7 and 13, but also in related consumer-rights litigation, including fighting abusive mortgage practices and developing solutions for student loans. He is a member of the North Carolina State Bar, where he has been certified as a specialist in consumer bankruptcy law. Mr. Boltz is admitted to practice before the U.S. Districts Courts in both the Eastern and Middle Districts of North Carolina. He served as president of the National Association of Consumer Bankruptcy Attorneys (NACBA) from 2013-16 and remains on its board of directors, and he co-chairs its Legislative Committee. He also serves on the Bankruptcy Council for the North Carolina Bar Association.

Mr. Boltz is a frequent speaker on bankruptcy issues at both national and local seminars, including at NACBA conventions and workshops, past NCLC workshops and the North Carolina Bankruptcy Institute. In April 2008, Mr. Boltz testified on behalf of NACBA in Congress regarding the need for changes to the Bankruptcy Code to protect members of the National Guard and Reservists from the harsh results of the means test, enacted as the National Guard and Reservists Debt Relief Act. Mr. Boltz is also the president of the Monti, a North Carolina organization that produces live storytelling shows. Recordings of his and others tales can be heard at www.themonti.org. Mr. Boltz received his B.A. from Washington University in St. Louis in 1993 and his J.D. from George Washington University in 1996.

Rudy J. Cerone
McGlinchey Stafford PLLC
New Orleans, Louisiana

Rudy J. Cerone is a member of McGlinchey Stafford, PLLC, resident in its New Orleans offices. He was admitted to the California Bar in 1979 and to the Louisiana Bar in 1984. Mr. Cerone is a Fellow of the American College of Bankruptcy (2001) and is certified as a Business Bankruptcy Specialist by the American Board of Certification (1993) and by the Louisiana Board of Legal Specialization (1997). He is a long-time member of the American Bankruptcy Institute and has served as co-chair of its Caribbean Insolvency Symposium since 2015. Previously, he served as the American Bankruptcy Institute's Secretary and an Executive Committee member from 2010-15, as a member of its Board of Directors from 2004-15, as co-chair of its Bankruptcy Litigation Committee from 2005-06, as chair of its Hospitality, Entertainment Venues and Gaming Subcommittee from 2001-05, and as a member of the advisory board of its Southwest Bankruptcy Conference from 2003-11. He also is a former chair, president and board member of the American Board of Certification.

Mr. Cerone is a member of the State Bar of California, the Louisiana State Bar Association (for which he chaired its Consumer Protection and Bankruptcy Section from 1994–97 and was chair from 2002–04 and a member from 2013–present), the Bankruptcy Law Advisory Commission of the Board of Legal Specialization, the Bar Association of the Federal Fifth Circuit and the American Bar Association. He also is an author and lecturer on both business and complex consumer bankruptcy issues. He received his B.A. *summa cum laude* from the University of California at San Diego in 1976 and his J.D. *cum laude* from Boston College Law School in 1979, where he received the Order of Coif (1979), was the executive editor of the *Boston College International & Comparative Law Review* (1978-79) and received the Best Law Review Editor Award (1979).

Hon. Randall L. Dunn
U.S. Bankruptcy Judge, Retired
District of Oregon
Portland, Oregon

Hon. Randall Dunn is a retired U.S. Bankruptcy Judge for the District of Oregon and was born and grew up in Northwest Indiana. He also had been appointed to the Ninth Circuit's Bankruptcy Appellate Panel (BAP) and served as the BAP's Chief Judge. Prior to his appointment as a Bankruptcy Judge in 1998, Judge Dunn was the managing partner of the Portland, Ore., office of the law firm of Copeland, Landye, Bennett and Wolf, LLP, where his practice focused on corporate/business, securities and bankruptcy law.

In the bankruptcy area, Judge Dunn represented a number of creditors' committees in chapter 11 cases, but his work also encompassed the representation of creditors and debtors in matters ranging from preference defenses to representing individual debtors in chapter 7. He also did substantial loan-documentation work and worked extensively in business-entity formation and on mergers and acquisitions.

Judge Dunn is a past president of the National Conference of Bankruptcy Judges, having served previously as NCBJ Treasurer and Secretary, and served on its Board of Governors. He also served as chair of the Federal Bar Association Bankruptcy Section and spent five years as editor-in-chief of its newsletter publication, *Bankruptcy Briefs*. In addition, he has been active in the Oregon State Bar's Debtor-Creditor Section, serving four terms on the Executive Committee, one term as Treasurer and two years as editor-in-chief of the *Oregon Debtor-Creditor Newsletter*, and he has worked on several of the Section's subcommittees. He also has served as chair of the Ninth Circuit's Bankruptcy Education Committee and as the representative of Ninth Circuit Bankruptcy Judges on the Ninth Circuit Executive Committee, which is the planning body for the Ninth Circuit Conference. Judge Dunn received his undergraduate degree with honors from Northwestern University and his J.D. in 1975 from Stanford University Law School, where he was an articles editor of its law review.

Henry E. Hildebrand, III
Chapter 13 Trustee
Nashville, Tennessee

Henry E. Hildebrand, III has served as Standing Trustee for Chapter 13 matters in the Middle District of Tennessee since 1982 and as Standing Chapter 12 Trustee for that district since 1986. He also is Of Counsel to the Nashville law firm of Farmer Purcell White & Lassiter. Mr. Hildebrand is a Fellow of the American College of Bankruptcy and serves on its Education Committee. He is Board Certified in Consumer Bankruptcy Law by the American Board of Certification and now serves on its Faculty Committee. He is also chairman of the Legislative and Legal Affairs Committee for the National Association of Chapter 13 Trustees (NACTT) and is on the board of directors for the NACTT Academy for Consumer Bankruptcy Education, Inc., for which he writes the Critical Case Comments column for its website.

Mr. Hildebrand is a regular contributor to the *ABI Journal* and has served as an adjunct faculty member for the Nashville School of Law and St. John's University School of Law. He received his undergraduate degree from Vanderbilt University and his J.D. from the National Law Center of George Washington University.

Ariane Holtschlag
Law Office of William J. Factor, Ltd.
Chicago, Illinois

Ariane Holtschlag is a partner with the Law Office of William J. Factor, Ltd. in Chicago. Her practice is focused primarily in the field of consumer bankruptcy and is equally divided among representing trustees, debtors and creditors in chapters 7 and 13. She also represents individuals and small businesses in chapter 11. Ms. Holtschlag was honored as one of the American Bankruptcy Institute's "40 Under 40" in 2017 for her achievements. She received her undergraduate degree from Illinois Wesleyan University in 2004 and her J.D. from the University of Iowa in 2007.

Hon. David W. Houston, III (Ret.)
Mitchell McNutt & Sams
Tupleo, Mississippi

Hon. David W. Houston, III joined Mitchell, McNutt & Sams in Aberdeen, Miss., in 2013, and his practice is focused on commercial transactions, commercial litigation, bankruptcy and creditors' rights. For the previous 30 years, he had served as the U.S. Bankruptcy Judge for the Northern District of Mississippi, presiding over cases in the Southern District of Mississippi, the Middle District of Louisiana, and the Northern, Southern and Western Districts of Texas. He conducted trials in numerous consumer and complex business cases, authoring hundreds of published opinions.

Prior to assuming the bench, Judge Houston was a partner for 11 years in the Aberdeen law firm of Houston, Chamberlain and Houston. In addition, he served as a special agent with the Federal Bureau of Investigation in Washington, D.C., Tampa, Fla., and New York City. Due to his experience in the area of alternative dispute resolution, Judge Houston is available to conduct mediation and arbitration proceedings. He received his B.B.A. in accountancy in 1966 and his J.D. in 1969 from the University of Mississippi.

Prof. Dalié Jiménez
University of California, Irvine
Irvine, California

Prof. Dalié Jiménez is a professor of law at the UC Irvine School of Law, where she teaches bankruptcy, contracts and consumer-protection courses. She is one of three principal investigators in the Financial Distress Research Project, a large-scale, longitudinal, randomized control trial evaluating the effectiveness of legal and counseling interventions to help individuals in financial distress. The project has received generous financial support from the National Science Foundation, the American Bankruptcy Institute, the National Conference of Bankruptcy Judges and the Arnold Foundation, among others. Prof. Jiménez spent a year as part of the founding staff of the Consumer Financial Protection Bureau working on debt collection, debt relief, credit reporting and student loan issues.

Prior to her academic career, she clerked for Hon. Juan R. Torruella of the U.S. Court of Appeals for the First Circuit, was a litigation associate at Ropes & Gray in Boston, and worked on consumer-protection issues for a Massachusetts state senator. In 2018, she was honored as one of the American Bankruptcy Institute's "40 Under 40" for her achievements. Prof. Jimenéz received her J.D. *cum laude* from Harvard Law School and holds dual B.S. degrees in electrical engineering/computer science and political science from MIT.

Richardo I. Kilpatrick
Kilpatrick & Associates, P.C.
Auburn Hills, Michigan

Richardo I. Kilpatrick is the president of Kilpatrick & Associates, PC in Auburn Hills, Mich., and specializes in creditors' rights and insolvency law while focusing on corporate, consumer and commercial litigation and bankruptcy, real property remedies for creditors, real property transactions and general corporate counseling. He is a past president of ABI and has served on the board of directors for the American College of Bankruptcy. Mr. Kilpatrick is a member of the State Bar of Michigan, the U.S. District Court for the Eastern and Western Districts of Michigan, the Sixth Circuit Court of Appeals and the U.S. Supreme Court. He was inducted as a Fellow into the American College of Bankruptcy in March 1999 and appointed to its board of directors in July 2001.

Mr. Kilpatrick has spoken at the National Conference of Bankruptcy Judges and is a presenter at numerous seminars focusing on bankruptcy and collections presented by the Institute of Continuing Legal Education faculty for the Norton Litigation Institute, PESI and ABI. He is a frequent speaker and an editor for Norton's *Treatise on Bankruptcy*, and he frequently publishes articles on consumer and commercial bankruptcy. In October 2008, Mr. Kilpatrick was invited to be a conferee at the National Bankruptcy Conference, and in August 2011, he accepted an invitation to serve as a member of the Judicial Conference Advisory Committee on Bankruptcy Rules. He is Board Certified in Consumer Bankruptcy Law by the American Board of Certification. Mr. Kilpatrick received his B.A. in economics in 1973 from Harvard University and his J.D. in 1982 from the University of Michigan Law School.

Prof. Bruce A. Markell
Northwestern University Pritzker School of Law
Chicago, Illinois

Prof. Bruce A. Markell is the Professor of Bankruptcy Law and Practice at Northwestern Pritzker School of Law. From 2004-13, he was a U.S. Bankruptcy Judge for the District of Nevada, and from 2007-13, he also was a member of the Bankruptcy Appellate Panel for the Ninth Circuit. Before taking the bench, Prof. Markell practiced bankruptcy and business law in Los Angeles for 10 years, where he was a partner at Sidley & Austin, and he was a law professor for 14. After law school, he clerked for then-judge Anthony M. Kennedy on the U.S. Court of Appeals for the Ninth Circuit. He is the author of numerous articles on bankruptcy and commercial law, and a co-author of four law school casebooks.

Prof. Markell contributes to *Collier on Bankruptcy* and is a member of *Collier*'s editorial advisory board. He is a conferee of the National Bankruptcy Conference, a Fellow of the American College of Bankruptcy, a member of the International Insolvency Institute and a member of the American Law Institute. In addition, he is a founding member of the NITA-trained faculty of the Advanced Consumer Bankruptcy Practice Institute. Prof. Markell has served as an advisor on bankruptcy and secured transaction reform to the Republic of Indonesia and recently completed a project redrafting Kosovo's bankruptcy law. He also consults regularly with the International Monetary Fund on insolvency-related issues (having been part of the IMF's missions to Ireland, Bosnia, Montenegro, Serbia and Greece).

Ronald R. Peterson
Jenner & Block
Chicago, Illinois

Ronald R. Peterson is a partner at Jenner & Block in Chicago, where he concentrates his practice in the areas of commercial, insolvency and bankruptcy law, and is a member of the firm's Bankruptcy, Workout and Corporate Reorganization and Bankruptcy Litigation Practices. He is also a member of its Real Estate and Construction Litigation and Corporate Finance Practices and the Real Estate Finance Litigation and Workout Task Force. A Fellow of the American College of Bankruptcy, Mr. Peterson focuses primarily on representing debtors, trustees, creditors, committees, landlords and secured lenders in chapter 11 cases.

In addition to his insolvency litigation practice, he counsels clients on a variety of transactional issues, including corporate restructurings. Since 2003, *Chambers & Partners* has named him one of the country's leading lawyers in bankruptcy law, and he is AV-rated by Martindale-Hubbell. Mr. Peterson has been a member of the panel of chapter 7 trustees for the Northern District of Illinois, Eastern Division since 1987. He has presided over numerous complex commercial cases, including *Stotler & Co.*, the country's 10th largest commodities house, and *Lancelot Investment*, a $1.7 billion Ponzi scheme. He has also served as examiner in the case of Robert Lund, a large real estate developer and the chairman of the creditors' committee in *Thomas J. Petters*, a $3.5 billion Ponzi Scheme.

Mr. Peterson is a member of the American Bankruptcy Institute, the Commercial Law League of America, the International Association of Restructuring, Insolvency & Bankruptcy Professionals, and the Business Bankruptcy Committee of the Business Law Section and the Bankruptcy Litigation Committee of the Litigation Section of the American Bar Association. He is the incoming president of the National Association of Bankruptcy Trustees, a Fellow in the American College of Bankruptcy and a director of the National Association of Bankruptcy Trustees. He also is a prolific lecturer and writer on bankruptcy and commercial law issues. Mr. Peterson received his A.B. *cum laude* in speech and political science from Ripon College in 1970 and his J.D. in 1973 from the University of Chicago Law School.

John Rao
National Consumer Law Center, Inc.
Boston, Massachusetts

John Rao is an attorney with the National Consumer Law Center, Inc. in Boston, where he focuses on consumer credit, mortgage servicing and bankruptcy issues. He frequently appears as a panelist and instructor at bankruptcy and consumer law trainings and conferences, and serves as an expert witness in court cases, having testified before Congress on bankruptcy and mortgage servicing matters. Mr. Rao is a contributing author and editor of NCLC's *Consumer Bankruptcy Law and Practice* and a co-author of NCLC's *Foreclosures and Mortgage Servicing*, as well as *Bankruptcy Basics*. He is also a contributing author to *Collier on Bankruptcy* and the *Collier Bankruptcy Practice Guide*.

Mr. Rao served as a member of the federal Judicial Conference Advisory Committee on Bankruptcy Rules from 2006-12, appointed by Chief Justice John Roberts. He is a conferee of the National Bankruptcy Conference, a Fellow of the American College of Bankruptcy, a member of the editorial board of *Collier on Bankruptcy*, a board member of the National Consumer Bankruptcy Rights Center, and a former board member of the National Association of Consumer Bankruptcy Attorneys and the American Bankruptcy Institute. Additionally, in 2017 he received the Excellence in Education Award from the National Conference of Bankruptcy Judges. Mr. Rao is a graduate of Boston University and received his J.D. from the University of California.

Wendell J. Sherk
SherkLaw
St. Louis, Missouri

Wendell J. Sherk is a solo attorney with SherkLaw in St. Louis and represents consumers, businesses, debtors and creditors. He has also represented bankruptcy trustees. He is the Missouri co-chair for the National Association of Consumer Bankruptcy Attorneys, as well as a member of the American Bankruptcy Institute and the Missouri Bar Association, and he contributes to the bankruptcylawnetwork.com blog. In addition, he has chaired the Bar Association of Metropolitan St. Louis's Bankruptcy Committee. A regular speaker and author on bankruptcy topics, Mr. Sherk has appeared in local TV and print news. He received the 2014 Michael Roser Excellence in Bankruptcy Award and the 2005 Judge Robert Brauer Innovations in Bankruptcy Law Award. Mr. Sherk graduated from Washington University in 1986 and Washington University School of Law in 1989.

Tara Twomey
National Consumer Bankruptcy Rights Center
San Jose, California

Tara Twomey is currently executive director for the National Consumer Bankruptcy Rights Center in San Jose, Calif., and is Of Counsel to the National Consumer Law Center. She has also been a Lecturer in Law at Stanford Law School, Harvard Law School and Boston College Law School. Ms. Twomey is a former clinical instructor at the Legal Services Center of Harvard Law School, where her practice focused in part on sustainable homeownership for low- and moderate-income homeowners. Currently, she focuses on consumer credit and bankruptcy issues.

Ms. Twomey is a contributing author of several books published by the National Consumer Law Center, including *Mortgage Servicing and Loan Modifications* and *Home Foreclosures*, and she is also a contributing author to the *Collier Bankruptcy Practice Guide*. In addition, she is a conferee of the National Bankruptcy Conference. Ms. Twomey received her undergraduate degree from the University of California, San Diego and her J.D. *summa cum laude* from Boston College Law School. After law school, she clerked for Chief Justice Herbert P. Wilkins of the Massachusetts Supreme Court, after which she received a two-year Skadden Fellowship to work at the Legal Services Center of Harvard Law School.

G. William Beard (*Ex Officio*)
IRS Office of Chief Counsel
Washington, District of Columbia

G. William Beard is senior technician reviewer and significant bankruptcy case coordinator for the Office of Associate Chief Counsel, Procedure and Administration of the Internal Revenue Service in Washington, D.C. Since arriving at Chief Counsel in 1998, he has focused on bankruptcy law and the IRS's bankruptcy procedures, receiving many awards. Mr. Beard has drafted, or contributed to, numerous items of published guidance, including IRS rulings on setoffs in bankruptcy and the effect of bankruptcy on innocent spouse relief. He also led the Chief Counsel's bankruptcy school for many years, and has been an adjunct professor at Georgetown University Law Center since 2007. Previously, Mr. Beard clerked in the U.S. Bankruptcy Court for the Northern District of Ohio's Western Division from 1994-98. He received his B.S. from Ohio State University and his J.D. from the University of Toledo College of Law.

Edward T. Gavin (*Ex Officio*)
Gavin/Solmonese LLC
Wilmington, Delaware

Edward T. Gavin, CTP is a managing director and founding partner of Gavin/Solmonese LLC in Wilmington, Del., where he leads the firm's Restructuring and Fiduciary Services Practice and specializes in complex bankruptcy matters, representing debtors, creditors and committees as financial advisor, asset-sale advisor, chief restructuring officer or in other responsible party roles. He is frequently called upon to provide expert testimony in matters involving breach of fiduciary duty and bankruptcy matters, including preferences. In addition, he is frequently appointed liquidating trustee, litigation trustee or plan administrator for post-confirmation liquidating trusts.

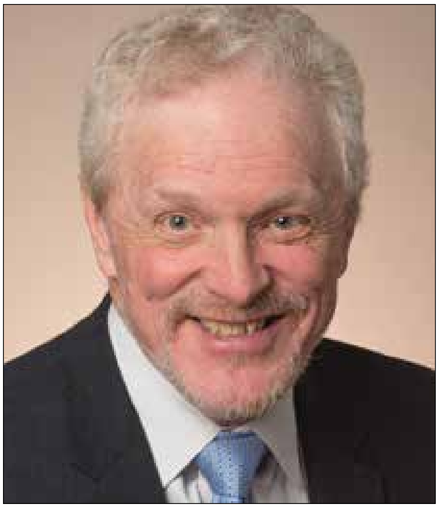
Mr. Gavin is ABI's President and previously served as ABI's Vice President-Development. He also co-chaired ABI's Financial Advisors & Investment Banking Committee, was co-chair and education director of ABI's Ethics Committee, and served on ABI's Civility Task Force and the ABI National Ethics Standards Task Force, leading that group's Committee Solicitation Protocols Subcommittee. Mr. Gavin is a 30th Anniversary Circle contributor to ABI's Endowment Fund and co-chaired ABI's Mid-Atlantic Bankruptcy Workshop from 2009-14. He also co-authored ABI's *Chief Restructuring Officer's Guide to Bankruptcy* and writes the "Turnaround Tactics" blog for *Forbes*. He is on Twitter as @tedgavin. Mr. Gavin attended the University of the Arts in Philadelphia, studying music theory and education.

Samuel J. Gerdano (*Ex Officio*)
American Bankruptcy Institute
Alexandria, Virginia

Samuel J. Gerdano is the executive director of the American Bankruptcy Institute in Alexandria, Va., the nation's largest multi-disciplinary organization in the field of insolvency. He joined ABI in May 1991. In 2007, on the occasion of ABI's silver anniversary, he was awarded ABI's first Lifetime Achievement Award. From 1985-91, he was the chief legal counsel to Sen. Charles E. Grassley (R-Iowa) and staff director for the Subcommittee on Courts and Administrative Practice of the Senate Judiciary Committee. The subcommittee had jurisdiction over the U.S. Bankruptcy Code; Mr. Gerdano has thus been involved in all major bankruptcy policy changes since 1985. Immediately prior to his service on the Senate Judiciary Committee, he was assistant chief counsel for advocacy for the U.S. Small Business Administration in Washington, D.C. Prior to that, he was with a major law firm in the District of Columbia.

Mr. Gerdano is admitted to practice in the federal and local courts of the District of Columbia and the U.S. Supreme Court, and was named a Fellow in the American College of Bankruptcy in 2001. He is the author of numerous articles on bankruptcy and other legal topics, regularly appears as a presenter at continuing legal education programs, and is a frequently cited authority on bankruptcy in the national news media. Mr. Gerdano is a 1983 honors graduate of Syracuse University College of Law and received his B.A. from Syracuse University.

Hon. Eugene R. Wedoff (Ret.) (*Ex Officio*)
Solo Practitioner
Oak Park, Illinois



Hon. Eugene R. Wedoff is the immediate past president of the American Bankruptcy Institute. He served as a bankruptcy judge in the Northern District of Illinois in Chicago from 1987-2015, was chief judge from 2002-07, and presided over the chapter 11 reorganization of United Air Lines. In addition, he was a member of the Advisory Committee on Bankruptcy Rules from 2004-14 and served as its chair after 2010. Judge Wedoff was the president of the National Conference of Bankruptcy Judges in 2013 and 2014. He also served as a member of NCBJ's Board of Governors, including as its secretary and as chair of its education committee. In addition, he was an associate editor of the *American Bankruptcy Law Journal*.

Judge Wedoff is a Fellow of the American College of Bankruptcy and a member of the National Bankruptcy Conference. He is a frequent lecturer and served as a member of the Federal Judicial Center's Committee on Bankruptcy Judge Education. In 2016, he received the Judge William Norton, Jr. Judicial Excellence Award from the American Bankruptcy Institute; in 2009, he received the Lawrence P. King Award from the Commercial Law League; and in 1995, he received the Excellence in Education Award from NCBJ. His current legal practice is exclusively *pro bono* representation in bankruptcy appeals. Judge Wedoff graduated from the college and law school of the University of Chicago.

Clifford J. White, III (*Ex Officio*)
Executive Office for U.S. Trustees
Washington, District of Columbia

Clifford J. White, III was appointed Director of the U.S. Trustee Program in December 2006 after having served as the Acting Director since May 2005. Mr. White has nearly 40 years of experience in federal service. Most of his tenure has been with the U.S. Trustee Program, including formerly as a Deputy Director and as an Assistant U.S. Trustee.

Prior to joining the Program, Mr. White served as a Deputy Assistant Attorney General within the Department of Justice and as an official at two other federal agencies. He has been recognized with an Attorney General's Award for Distinguished Service, and was conferred the Presidential Rank Award of Meritorious Executive in 2006 and Distinguished Executive in 2009. Mr. White graduated with honors from the George Washington University and the George Washington University Law School.

Prof. Robert M. Lawless, Reporter
University of Illinois College of Law
Champaign, Illinois

Prof. Robert M. Lawless is the Max L. Rowe Professor of Law and co-director of the Program on Law, Behavior & Social Science at the University of Illinois College of Law. In addition to numerous scholarly papers on the bankruptcy system, he is a co-author for the eighth edition of *Secured Transactions: A Systems Approach* and the co-author of *Empirical Methods in Law*, a textbook on empirical methodologies as applied to the study of law.

Prof. Lawless administers and contributes to the blog Credit Slips, a discussion on credit, finance and bankruptcy. He also participates in the Consumer Bankruptcy Project, a long-term research project studying persons who file bankruptcy. Prof. Lawless is a member of the American Law Institute, the National Bankruptcy Conference and the American College of Bankruptcy. He received both his undergraduate degree in accounting and his J.D. from the University of Illinois, during which time he served as editor-in-chief of the *University of Illinois Law Review.*

Appendix B: Advisory Committee Members

Committee on Case Administration and the Estate

Commissioners: Edward C. Boltz, Dalié Jiménez, Richardo I. Kilpatrick and Tara Twomey.

ADVISORY COMMITTEE MEMBERS:

1. Thomas L. Canary, Jr., Reimer Law Co. (Louisville, KY)
2. H. David Cox, Cox Law Group (Lynchburg, VA)
3. John Crane, RAS Crane LLC (Atlanta, GA)
4. Franklin Drake, Smith Debnam Narron Drake Saintsing & Myers, LLP (Raleigh, NC)
5. James J. Haller, James J. Haller Attorney at Law (Mundelein, IL)
6. Michael J. McCormick, McCalla Raymer Leibert Pierce, LLC (Roswell, GA)
7. Susan L. Myers, Legal Aid Center of Southern Nevada (Las Vegas, NV)
8. Brian D. Shapiro, Law Office of Brian D. Shapiro (Las Vegas, NV)
9. Brian L. Shaw, Fox Rothschild LLP (Chicago, IL)
10. Alice L. Whitten, Wells Fargo Law Department (Minneapolis, MN)

Committee Chair: Bruce A. Markell
Reporter: Robert M. Lawless

Committee on Chapter 7

Commissioners: Rudy J. Cerone, Ariane Holtschlag, Ronald R. Peterson and Wendell J. Sherk.

ADVISORY COMMITTEE MEMBERS:

1. Karen Cordry, National Association of Attorneys General (Washington, DC)
2. Miriam Goott, Walker & Patterson, PC (Houston, TX)
3. Neil C. Gordon, Arnall Golden Gregory LLP (Atlanta, GA)
4. Mark C. Leffler, Boleman Law Firm, PC (Richmond, VA)
5. Dennis J. LeVine, Kelley Kronenberg (Tampa, FL)
6. Nathalie D. Martin, University of New Mexico School of Law (Albuquerque, NM)
7. Faiq Mihlar, Heavner, Beyers & Mihlar, LLC (Decatur, IL)
8. Kate E. Nicholson, Nicholson Herrick LLP (Cambridge, MA)
9. Joseph R. Prochaska, Reno & Cavanaugh PLLC (Nashville, TN)

Committee Chair: Randall L. Dunn
Reporter: Robert M. Lawless

Committee on Chapter 13

Commissioners: Michael T. Bates, Alane A. Becket, Henry E. Hildebrand, III and John Rao.

ADVISORY COMMITTEE MEMBERS:

1. Beverly M. Burden, Chapter 13 Trustee, E.D. Ky. (Lexington, KY)
2. Daniel L. Cummings, Norman, Hanson & DeTroy, LLC (Portland, ME)
3. Alex Jeffrey Dolhancyk, The Dolhancyk Law Firm, P.C. (Jonesboro, GA)
4. Jenny L. Doling, Doling Shaw & Hanover (Palm Desert, CA)
5. Angela Littwin, University of Texas School of Law (Austin, TX)
6. Keith Lundin (Pittsburgh, PA)
7. Leslie N. Mann, Mackie Wolf Zientz & Mann, P.C. (Little Rock, AR)
8. Jason P. Miller, Santander Consumer USA, Inc. (Dallas, TX)
9. James F. Molleur, Molleur Law Office (Biddeford, ME)
10. David G. Peake, Chapter 13 Trustee (Houston, TX)

Committee Chair: David W. Houston, III
Reporter: Robert M. Lawless

ADVISORY COMMITTEE MEMBER BIOGRAPHIES

Beverly M. Burden has served as the chapter 13 trustee for the Eastern District of Kentucky in Lexington since 1999. She previously clerked for Hon. Joe Lee and prior to that was an assistant attorney general for the Commonwealth of Kentucky, concentrating on consumer fraud litigation. Ms. Burden is a Fellow in the American College of Bankruptcy, inducted in 2017, and serves on the board of directors of the NACTT Academy for Consumer Bankruptcy Education. She received her J.D. from the University of Kentucky College of Law and holds a B.B.A. in accounting.

Thomas L. Canary, Jr. is a senior attorney with Reimer Law Co. in Louisville, Ky., where he concentrates his practice in the areas of bankruptcy, replevin and creditors' rights. He is admitted to practice in Kentucky, Indiana, West Virginia and Ohio, as well as the federal district courts in all those states and the Sixth Circuit Court of Appeals. Mr. Canary is the former president and shareholder of the firm of Mapother & Mapother, P.S.C. and received the National Creditors Bar Association President's Award in 2009. He is the current author and editor of *Kentucky Collections*, published by Thomson Reuters, and is a frequent writer and lecturer on bankruptcy and creditors' rights. Mr. Canary received his B.S. with honors from the University of Kentucky in 1981 and his J.D. from the University of Kentucky College of Law in 1984.

Karen Cordry is bankruptcy and special issues counsel for the National Association of Attorneys General in Washington, D.C. She serves as a resource person to the states for all issues relating to the effects of bankruptcy on the activities of the attorneys general. Previously, Ms. Cordry was a field attorney with the National Labor Relations Board in Detroit and with the Office of Appeals' Appellate Court and Contempt

Litigation Sections in Washington, D.C. She is a frequent contributor to the Affairs of State column in the *ABI Journal* and is writing a second edition of *Bankruptcy Law and the Governmental Regulatory Process*. Ms. Cordry received her B.S. in biochemistry from Michigan State University in 1973, her J.D. from Wayne State University in 1977 and her LL.M. from George Washington University in 1987.

H. David Cox is an attorney with Cox Law Group in Lynchburg, Va., and practices bankruptcy law throughout the Western District of Virginia. Prior to entering private practice, he served as a law clerk for the late Hon. William E. Anderson. He co-edits the treatise *Bankruptcy Practice in Virginia*, co-authored the fourth edition of the American Bankruptcy Institute's *Consumer Bankruptcy: Fundamentals of Chapter 7 and Chapter 13 of the U.S. Bankruptcy Code*, and has lectured at numerous regional and national CLE programs. Mr. Cox became a permanent member of the Fourth Circuit Judicial Conference in 2009 and was inducted as a Fellow of the American College of Bankruptcy in 2013. He received his B.A. in 1992 from Virginia Tech and his J.D. in 1995 from the University of Richmond - TC Williams School of Law.

John Crane is a managing partner with RAS Crane LLC in Atlanta. He previously was a managing partner with Aldridge Pite, LLP, deputy general counsel with Citigroup and a managing attorney with Pendergast & Associates, P.C. Mr. Crane received his B.S. from the University of Tennessee-Knoxville and his J.D. from Mississippi College School of Law.

Daniel L. Cummings is a member of Norman, Hanson & DeTroy, LLC in Portland, Maine, and counsels entrepreneurs and businesses on commercial law, with a focus on dispute resolution and litigation. He has practiced law since 1989 and has appeared in the U.S. Bankruptcy Courts in Maine and Massachusetts, as well as in the First Circuit Court of Appeals. Mr. Cummings regularly represents credit union clients, including in a significant chapter 7 case with national implications that established as valid an "all or nothing" reaffirmation policy, *Jamo v. Katahdin Federal Credit Union*, 283 F.3d 392 (1st Cir. 2002). He is a long-time member of the American Bankruptcy Institute. Mr. Cummings received his B.S. *summa cum laude* in 1982 from the University of Maine and his J.D. *summa cum laude* in 1989 from the University of Maine School of Law.

Alex J. Dolhancyk is a practitioner with The Dolhancyk Law Firm, P.C. in Jonesboro, Ga., and has more than 28 years of experience in consumer bankruptcy matters. He is the past Georgia state chair for the National Association of Consumer Bankruptcy Attorneys (NACBA) and is Board Certified in Consumer Bankruptcy Law by the American Board of Certification. Mr. Dolhancyk is a past member/advisor of the Bench and Bar Committee for the U.S. Bankruptcy Court in the Northern District of Georgia. He also is a frequent speaker for many organizations, including NACBA, the American Bankruptcy Institute and the Atlanta Bar Association. Mr. Dolhancyk received his B.A. from the University of Tennessee, his J.D. from the University of Memphis and his LL.M. in international business law from Emory University School of Law.

Jenny L. Doling is a founding partner of DOLING SHAW & HANOVER, APC, in Palm Desert, Calif., where she represents consumer debtors and trustees. She is admitted to practice in California and

Nevada, and before the Ninth and Tenth Circuit Courts of Appeals. Ms. Doling serves on the board of directors for the National Association of Consumer Bankruptcy Attorneys (NACBA). She teaches bankruptcy law and speaks nationally on consumer bankruptcy issues for ABI, NACBA, NACTT and NCBJ. In 2013, Ms. Doling was honored with the National Distinguished Services Award by NACBA, and in 2016, she received the Hammes-Shulman Legislative Advocacy Award. She received her J.D. from California Western School of Law in San Diego, was on the Dean's Honor List and was also the recipient of the Dean's Merit Scholarship.

Franklin Drake has been a partner in the Raleigh, N.C., law firm of Smith Debnam since 1994, where he specializes in creditors' rights, bankruptcy and repossession law. He has practiced in North Carolina, Kentucky, West Virginia and the federal courts of southern Indiana. For the last 38 years in 40 states, Mr. Drake has lectured at practical training courses, including bankruptcy and regulatory compliance programs. He has represented most of the major secured and unsecured financiers on secured lending, consumer bankruptcy and regulatory compliance matters, and especially enjoys guiding his clients around compliance pitfalls and how *not* to get sued. Mr. Drake received his B.A. with honors in 1975 and his J.D. in 1978 from the University of North Carolina at Chapel Hill.

Miriam Goott is a member of Walker & Patterson, P.C. in Houston and has a diverse consumer bankruptcy practice representing debtors, creditors and chapter 7 trustees. She has served as president and vice president of the Houston Bar Association's Bankruptcy Section, during which time she created programs that targeted the needs of new lawyers — specifically in the areas of trial skills and advocacy. Ms. Goott was honored as one of ABI's "40 Under 40" for its inaugural 2017 class and relishes being in the courtroom. She counts herself as fortunate to be part of a practice that is focused on doing good work, not just on making money, and as a result she has taken on cases where there was minimal money to be made. Ms. Goott received her B.A. in psychology from the University of Texas at Austin and her J.D. from St. Mary's University School of Law.

Neil C. Gordon is a partner in the Atlanta office of Arnall Golden Gregory LLP. He served two years as a U.S. District Court law clerk, chaired the Bankruptcy Section of the Atlanta Bar from 1992-93, held every office at NABT, including president from 2011-12, and chaired its Amicus Committee for eight years. Mr. Gordon has authored/co-authored more than 70 scholarly articles on bankruptcy topics and made over 150 seminar presentations. He has co-chaired ABI's Legislation Committee and is a Lifetime Member of ABI, a Master of the Bench in the American Inns of Court, and a Fellow of the American College of Bankruptcy. Mr. Gordon received his B.B.A. with a focus on real estate and urban land studies in 1976 from the University of Florida and his J.D. in 1979 from the University of Georgia School of Law.

James J. Haller is a sole practitioner in Mundelein, Ill., who represents consumer debtors in bankruptcy and district courts. He served as president of the National Association of Consumer Bankruptcy Attorneys in 2017 and was also a member of NACBA's board of directors. He currently serves as NACBA's education director. Mr. Haller has been named a "Leading Lawyer" every year since 2013 and was listed in *Super Lawyers* in 2019. He received his B.A. in 1989 from Carleton College in Northfield, Minn., and his J.D. in 1993 from Washington University in St. Louis.

Mark C. Leffler is a shareholder with Boleman Law Firm in Richmond, Va., the state's largest consumer bankruptcy practice. He is president of the NACTT Academy for Consumer Bankruptcy Education, is a frequent author for the Academy's webzine at considerchapter13.org, and has been a panelist at numerous NACTT annual conferences. Mr. Leffler is AV-rated by Martindale-Hubbell and is listed in *The Best Lawyers in America* for his work in bankruptcy and debtor rights. He speaks and writes on bankruptcy matters for Virginia CLE programs, and he is a member of the Board of Governors for the VSB Bankruptcy Section. Mr. Leffler received his B.S. from Eastern Mennonite College in Harrisonburg, Va., and his J.D. from Duquesne University School of Law in Pittsburgh.

Dennis J. LeVine is a partner in the Tampa, Fla., office of Kelley Kronenberg, where he focuses his state-wide practice on bankruptcy litigation and creditors' rights. He is Board Certified in both Consumer Bankruptcy Law and Business Bankruptcy Law by the American Board of Certification (ABC). Prior to joining the firm, Mr. LeVine was founder and president of Dennis LeVine & Associates, P.A. in Tampa for 19 years, where he primarily represented creditors and chapter 7 trustees in all bankruptcy courts and creditors in commercial and consumer collection actions. Mr. LeVine is a past president of the Tampa Bay Bankruptcy Bar Association and a member of ABI, for which he served on its Board of Directors. He has published numerous articles and been a guest speaker on bankruptcy and collection law throughout the U.S. Mr. LeVine received his undergraduate degree from Tulane University, where he was elected Phi Beta Kappa, and his J.D. from George Washington University's National Law Center.

Prof. Angela K. Littwin is the Ronald D. Krist Professor of Law at the University of Texas, Austin. She studies bankruptcy, consumer and commercial law from an empirical perspective. Her current research includes studying the attitudes toward bankruptcy among consumers being sued by debt collectors, as well as the relationship between consumer credit and domestic violence. Prof. Littwin has published in journals such as the *University of Pennsylvania Law Review*, the *California Law Review* and the *American Bankruptcy Law Journal*. She has recently published articles about local legal culture, the Consumer Financial Protection Bureau, and how consumer bankruptcy attorneys adapted to BAPCPA. Prof. Littwin received her undergraduate degree from Brown University and her J.D. from Harvard Law School in 2002, after which she clerked for Hon. Rosemary Barkett of the U.S. Court of Appeals for the Eleventh Circuit.

Hon. Keith M. Lundin is a retired U.S. Bankruptcy Judge for the Middle District of Tennessee in Nashville, having served from 1982-2016, and currently maintains a Bankruptcy Workshop website called LundinOnChapter13.com in Pittsburgh. He also served on the Bankruptcy Appellate Panel for the Sixth Circuit from 1997-99. Judge Lundin has been an adjunct professor for Vanderbilt University School of Law and Emory University School of Law and a visiting professor for the University of New Mexico School of Law. He is a member of the National Bankruptcy Conference and has also been the assistant editor for the *American Bankruptcy Law Journal*, a contributing editor for *Norton Bankruptcy Law and Practice* and managing editor for the *Norton Bankruptcy Law Adviser*. He also co-authored *Chapter 13 Bankruptcy*.

Leslie N. Mann is a shareholder in the law firm of Mackie Wolf Zientz & Mann, P.C. in Little Rock, Ark. She is admitted to practice in Arkansas and Tennessee. Ms. Mann is a member of the Arkansas Bar Association, the American Bankruptcy Institute, the National Association of Chapter 13 Trustees (NACTT) and the ALFN. She served as chair of the USFN Bankruptcy Committee from 2005-07 and was awarded the USFN Committee Chair of the Year award in 2007. Ms. Mann is past chair of the ALFN Judicial Issues Committee as well as past chair of the ALFN Bankruptcy Committee. She served as co-chair of the NACTT Mortgage Committee from 2004-10. Ms. Mann attended the Centenary College of Louisiana.

Prof. Nathalie D. Martin is the Frederick M. Hart Chair in Consumer and Clinical Law at the University of New Mexico School of Law in Albuquerque, N.M., where she teaches bankruptcy, contracts, consumer law, secured transactions and other UCC classes. She also has taught a business law clinic and business associations. Prof. Martin is a member of the American Law Institute and the American College of Bankruptcy, as well as a former resident scholar at the American Bankruptcy Institute and a former dean of faculty of the American Board of Certification, which writes the tests used to certify bankruptcy attorneys. She received her B.A. in 1983 from St. Olaf College, her J.D. in 1986 from Syracuse University and her LL.M. in 1998 from Temple University.

Michael J. McCormick is a senior partner in the bankruptcy department at McCalla Raymer Leibert Pierce, LLC in Atlanta and has been with the firm since 2004. A Toronto native, he is a frequent speaker and author on various topics related to bankruptcy, including the handling of escrow. Mr. McCormick is a member of numerous local and national bankruptcy organizations, including ABI, and is an associate member of NACTT. He is also Board Certified in Consumer Bankruptcy Law by the American Board of Certification. Mr. McCormick received his undergraduate degree from the University of Western Ontario and his J.D. from Wake Forest University School of Law in 1994.

Faiq M. Mihlar is a co-managing member and partner at Heavner, Byers & Mihlar, LLC in Decatur, Ill., where he oversees the firm's bankruptcy practice representing creditors in all aspects of chapter 7, 11, 12 and 13 proceedings, as well as the firm's Missouri collection practice. He is a speaker and author on bankruptcy and related topics for the NCBJ, IICLE, BASIL, ABI, ISBA, ALFN, Lorman Education Services and Pincus Professional Education. Mr. Mihlar is a committee chairman of the Chapter 13 Local Rules Sub-Committee for the Southern District of Illinois and is licensed to practice in Illinois and Missouri. He received his undergraduate degree from Southeast Missouri State University in 1993 and his J.D. from Southern Illinois University School of Law.

Jason P. Miller is the senior director of Litigation and Bankruptcy Counsel for Santander Consumer USA Inc. (SC) in Dallas and has been with SC for more than four years. He is responsible for managing SC's Litigation portfolio in addition to working with servicing in providing them legal advice and guidance. Previously, Mr. Miller spent over 10 years practicing consumer and commercial bankruptcy law, specifically representing consumers. He thereafter was the chapter 13 trustee for the Northern District of Texas - Fort Worth Division. Mr. Miller received his J.D. from Columbia University School of Law in 1997.

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David G. Peake was appointed Chapter 13 Trustee for the Southern District of Texas, Houston Division, in June 1998. Previously, he had been in private practice representing individuals and small businesses. Mr. Peake is licensed to practice law in the State of Texas and is currently a member of the College of the State Bar of Texas, ABI, the National Association of Consumer Bankruptcy Attorneys and the National Association of Chapter 13 Trustees, for which he also serves on its executive committee as the organization's president. He is originally from St. Paul, Minn., where he completed his undergraduate degree at Macalester College and received his J.D. from William Mitchell College of Law.

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Appendix C: ABI Commission on Consumer Bankruptcy Bylaws

The American Bankruptcy Institute (ABI) has created the Commission on Consumer Bankruptcy (Commission):

> 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.

To aid in carrying out this task, the Commission has adopted these bylaws.

I. Membership

a. The Commission shall consist of the co-chairs and the initial commissioners appointed by the ABI president-elect, *ex-officio* commissioners, and commissioners appointed to fill vacancies pursuant to paragraph f. *Ex officio* members have no vote but may attend and participate in Commission meetings.

b. The following persons shall be *ex-officio* members of the Commission: (i) Eugene Wedoff, (ii) Edward T. Gavin, (iii) the executive director of the ABI, (iv) a representative of the U.S. Trustee's Office, and (v) a representative of the Internal Revenue Service.

c. By agreeing to serve on the Commission, each commissioner commits to making his or her best effort to participate in meetings and make meaningful contributions to the Commission's work.

d. Commissioners may not delegate their responsibilities. This paragraph does not prevent commissioners from receiving assistance such as research or advice from colleagues, associates, law clerks, and research assistants.

e. A co-chair or commissioner may be removed only for cause and only by a vote representing two-thirds of the other commissioners. A commissioner who is removed for cause shall also cease to be a member of any committees of the Commission to which the commissioner was appointed.

f. If a vacancy on the Commission arises other than in one of the co-chairs, the ABI president shall consult with the co-chairs. After consultation, the ABI president may, but is not required to, appoint a new commissioner. In the absence of a vacancy, the ABI president may not appoint any new commissioners.

g. If a vacancy arises in one of the co-chairs, the commissioners shall elect one of their number to serve as a co-chair. The resulting commissioner vacancy may, but is not required to, be filled pursuant to paragraph f.

II. Ethics

a. The Commission's work is a law reform project, intended to further the purposes of the ABI "to support the analysis of insolvency issues," as stated in article I of its bylaws. Model Rule of Professional Conduct 6.4 provides:

> A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Commissioners should base their work on their best professional judgment as drawn from their personal and professional experiences. Commissioners should not take positions merely because they advance the economic or political interests of themselves, their employer, or their clients. When commissioners are unable to leave the interests of employers and clients "at the door" for a particular issue, they must recuse themselves from consideration of that issue. If such conflicts are pervasive, a commissioner should consider resigning from the Commission.

b. It is recognized that in their professional capacities commissioners may have argued for legal outcomes that may be affected by the Commission's work. If a commissioner has argued for a legal outcome in litigation or other proceedings (i) that is pending or reasonably certain to occur in the near future and (ii) that would be affected by matters under consideration by the Commission, the commissioner shall disclose that fact to the co-chairs, consistent with Model Rule 6.4. The co-chairs shall have the discretion to decide whether ameliorative measures would be appropriate to ensure the Commission's work maintains its objectivity and integrity. These ameliorative measures generally will mean disclosure to the rest of the Commission. The co-chairs may in addition limit the affected commissioner's participation on the particular issue. The co-chairs may also decide the matter does not require any ameliorative measures if the connection between the Commission's work and the pending litigation is tenuous.

III. Confidentiality

a. The Commission's materials, deliberations and work product are work product of the Commission and are to remain confidential until the Commission determines otherwise. By agreeing to serve on the Commission, each commissioner agrees to maintain the confidentiality of such materials, deliberations and work product. Commissioners may disclose confidential materials, deliberations, or work product only with the express written consent of the Commission co-chairs. For purpose of this Article, "commissioner" includes *ex officio* commissioners.

b. The requirement of confidentiality in paragraph a. does not prohibit commissioners from (i) discussing substantive issues before the committee with non-committee members to help the committee exercise his or her best professional judgment; (ii) receiving assistance from associates, law clerks, and research assistants in their organization; (iii) authoring scholarly works that touch upon substantive issues before the committee so long as the scholarly works do not reproduce confidential committee materials; or (iv) discussing the work of the Commission in informal or formal settings so long as the commissioner does not reveal confidential Commission materials.

c. The requirement of confidentiality in paragraph a. does not apply to the extent any law, statute, regulation, order, protocol, rule or rule of ethics requires disclosure of a commissioner's work product, materials, communications, or deliberations.

IV. Meetings & Quorum

a. The Commission shall meet from time to time as the co-chairs deem appropriate. Notice of any meeting shall be given to all commissioners as soon as reasonably practicable but in no instance less than forty-eight hours in advance.

b. One-fourth of the commissioners may request a special meeting of the Commission by so notifying the co-chairs.

c. Meetings may be conducted in-person, telephonically, by other electronic means, or a combination of these methods.

d. The co-chairs shall designate the time and place of any meeting.

e. A quorum shall consist of half of the Commission, not including *ex-officio* members.

V. Committees

a. There shall be three committees of the Commission: (i) the Case Administration & Estate Committee, (ii) the Chapter 7 Committee, and (iii) the Chapter 13 Committee.

b. Each committee's membership shall consist of such commissioners and other persons as the ABI president-elect shall have appointed.

c. A Commissioner selected by the ABI president-elect shall serve as committee chair. The committee chair shall call and preside over all committee meetings.

d. The Commission may remove a committee member for cause by a vote representing two-thirds of the commissioners.

e. In the event of a vacancy on a committee, the ABI president may, but is not required to, appoint another person to serve as a committee member. In the event of a vacancy in the chair, the ABI president shall designate a Commissioner to serve as committee chair.

f. The Commission may adopt operating procedures for the committees.

g. In the event of overlap, the co-chairs of the Commission, acting in consultation with the Commission reporter, will decide which committee shall consider a particular topic.

VI. Voting

a. The Commission will attempt to work by consensus to the greatest extent possible.

b. When a vote is necessary and except where otherwise specified in these bylaws, the Commission shall act by a majority vote of the commissioners present and voting at a meeting where a quorum exists.

c. If the Commission co-chairs are unable to agree on any decision specified in these bylaws, the ABI president shall break the tie.

VII. Final Report

a. The Commission shall produce a Final Report of its recommendations. The Final Report shall consist of (i) individual recommendations that the Commission will have adopted pursuant to paragraph b, (ii) the explanations of the recommendations in paragraph c, and (iii) the written dissents submitted pursuant paragraph c.

b. It is the intention of the Commission that the committees will produce individual recommendations on various issues. The Commission shall debate and consider each of these recommendations separately. Each recommendation shall be considered to be adopted by the Commission only if approved by a two-thirds vote of the commissioners present and voting at a meeting where a quorum exists.

c. The Commission shall also prepare written explanations of each recommendation to be published with each recommendation. The Commission shall approve the Final Report with recommendations and explanations before its release.

d. Commissioners may prepare a written dissent from any recommendation approved by the

Commission. Dissenting commissioners are encouraged to work together and submit joint dissents that concisely explain the reasons for their dissenting views. It is intended that commissioners will submit written dissents only on issues they believe are of particular importance.

VIII. Reporter

a. The co-chairs shall appoint a reporter for the Commission. The reporter shall work with the committees, coordinate work among the committees, assist the Commission in drafting the Final Report, and perform such other duties as the co-chairs or Commission shall direct.

b. The reporter may be removed for cause by a vote representing two-thirds of the commissioners. If the position of reporter is vacant, the co-chairs shall appoint a new reporter.

c. The co-chairs may appoint a deputy reporter or such other persons as they determine necessary to aid the Commission.

IX. Adoption & Amendment of Bylaws

a. These bylaws will take effect when adopted by a majority vote of the commissioners voting at a meeting where a quorum is present.

b. After their initial adoption, these bylaws may be amended only by a two-thirds vote of the commissioners voting at a meeting where a quorum is present.

Appendix D: ABI Commission on Consumer Bankruptcy Committee Operating Procedures

I. Introduction

The ABI president has charged the Commission on Consumer Bankruptcy Laws ("Commission") with the following task:

> 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.

To fulfill its mission, the Commission has established three committees: (1) Committee on Case Administration & the Estate, (2) Committee on Chapter 7, and (3) Committee on Chapter 13. It is the Commission's intent that the committees will take the lead in research and drafting the proposals the Commission will consider.

II. Committee Membership

Each committee is composed of approximately fifteen persons, including five members of the Commission. Pursuant to the resolution of the ABI board of directors authorizing the Commission, the ABI president has appointed the members of each committee as well as a chair for each committee.

All commissioners, including the Commission co-chairs and *ex-officio* Commission members, may participate in any committee meeting, but only committee members may vote on committee matters. Commissioners participating in the meeting of a committee of which they are not a member should be mindful that the decisions of the committee are made only by its members and that the principal discussion should be among the committee members. Each committee may determine the extent to which individuals other than committee members and commissioners may participate in a committee meeting.

A. Ethical Duties

By agreeing to serve, each committee member commits to making his or her best effort to participate in meetings and make meaningful contributions to the committee's work. Committee members may not delegate their responsibilities. These guidelines are not intended to prevent committee members from receiving assistance such as research or advice from associates, law clerks, and research assistants.

The Commission's work is a law reform project, intended to further the purposes of the ABI "to support the analysis of insolvency issues," as stated in article I of its bylaws. Model Rule of Professional Conduct 6.4 provides:

> A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Committee members should base their work on their best professional judgment as drawn from their personal and professional experiences. Committee members should not take positions merely because they advance the economic or political interests of themselves, their employer, or their clients. When committee members are unable to leave the interests of employers and clients "at the door" for a particular issue, they must recuse themselves from consideration of that issue. If such conflicts are pervasive, a committee member should consider resigning from the committee.

It is recognized that in their professional capacities committee members may have argued for legal outcomes in past or pending litigation or other proceedings that may be affected by the committee's work. If a committee member has argued for a legal outcome in pending litigation that would be affected by matters under consideration by the committee, the committee member should disclose that fact to the committee chair, consistent with Model Rule 6.4. The committee chair shall have the discretion to decide whether ameliorative measures would be appropriate to ensure the Commission's work maintains its objectivity and integrity. These ameliorative measures generally will mean disclosure to the rest of the committee or Commission. The committee chair may in addition limit the affected committee's member's participation on the particular issue. The committee chair may also decide the matter does not require any ameliorative measures if the connection between the Commission's work and the pending litigation is tenuous.

B. Confidentiality

Each committee's materials, deliberations and work product are work product of the Commission and are to remain confidential until the Commission determines otherwise. By accepting an appointment to and serving on a committee, each committee member agrees to maintain the confidentiality of such materials, deliberations and work product. The Commission will determine which matters and proposals from each committee to include in the Commission's final report. Committee members may disclose confidential materials, deliberations, or work product only with the express written consent of the Commission co-chairs.

The requirement of confidentiality does not prohibit committee members from:

- discussing substantive issues before the committee with non-committee members to help the committee exercise his or her best professional judgment;

- receiving assistance from associates, law clerks, and research assistants in their organization;

- authoring scholarly works that touch upon substantive issues before the committee so long as the scholarly works do not reproduce confidential committee materials; or

- discussing the work of the Committee or Commission in informal or formal settings so long as the committee member does not reveal confidential committee materials.

The requirement of confidentiality does not apply to the extent any law, statute, regulation, order, protocol, rule or rule of ethics requires disclosure of a committee member's work product, materials, communications, or deliberations.

C. Removal and Replacement of Committee Members

The Commission bylaws provide that the Commission may remove members of a committee for cause by a two-thirds vote of the commission.

The ABI president may, but is not required to, appoint new committee members to fill vacancies that may occur by inability to serve, resignation, or removal.

III. Committee Tasks

A. Process and Timeline

Committee recommendations are due to the Commission by December 31, 2017. The Commission will hold hearings on the committee recommendations, debate the recommendations, and approve or disapprove the various recommendations. The reporter will draft the report in the summer of 2018. The goal is for the Commission to issue its report in no later than December 2018.

An overview of the Commission process is attached as an appendix to these Operating Procedures. The process contemplates an iterative and fluid relationship between the committees and the Commission. For example, committees may submit preliminary proposals to the Commission or submit recommendations to the Commission piecemeal. The process contemplates that the co-chairs of the Commission and the

Commission reporter will facilitate communications between the Commission and its committees as well as among the committees.

The end product of each committee will be recommendations on the specific topics it has undertaken to study. The recommendations will be followed by the reasons for each of the committee's recommendations. These may include a summary of dissenting views. Where appropriate, a bibliography or other supporting information may follow the explanation of reasons. The Commission reporter will assist each committee in producing the recommendations.

B. Identification of Topics

At the beginning of its work, each committee will identify a list of topics it intends to cover. The committee structure follows the organization of the Bankruptcy Code. The Chapter 7 and Chapter 13 Committees should focus on topics that tend to appear in cases under those chapters. The Committee on Case Administration and the Estate should focus on overarching consumer issues that arise out of chapters 1, 3, and 5.

The issues facing the bankruptcy system do not necessarily divide obviously across each committee's charge. To prevent duplication of effort, a particular topic will only be studied by one committee. Where the lists of proposed topics from the committees overlap, the Commission co-chairs will act in consultation with the reporter and committee chairs to assign a particular topic to one committee. The lists of topics will be shared among the committees.

C. Meetings, Public Hearing & Other Work

Each committee will meet as their work requires, approximately monthly. Most all meetings will be conducted electronically. Committee chairs will schedule meetings with as much advance notice as practicable and at least forty-eight hours' notice for any meeting where a vote will be taken.

Subject to budget availability, each committee is scheduled to have one in-person meeting. At some point during the in-person meeting, the committee shall solicit input and feedback from constituencies that may be affected by the committee's work.

Committee members may apply in advance to the ABI president for approval to request ABI reimbursement for attendance at a committee meeting if the meeting is not held in conjunction with an event such person would otherwise have attended at his or her own expense or would have been reimbursed by their employer or other organization. All ABI reimbursement policies will apply to the request for reimbursement.

D. Decision-making

To the greatest extent possible, all work of the Commission and committees will be done by consensus. Where consensus is not reached on particular issues, the chair of the committee will call for a committee vote with a majority being necessary to approve the matter under consideration. Because the committee recommendations will summarize any dissenting viewpoints, there will be no formal statements of dissent to the committee recommendations. Individual committee members always may express their views to the Commission outside the committee report.

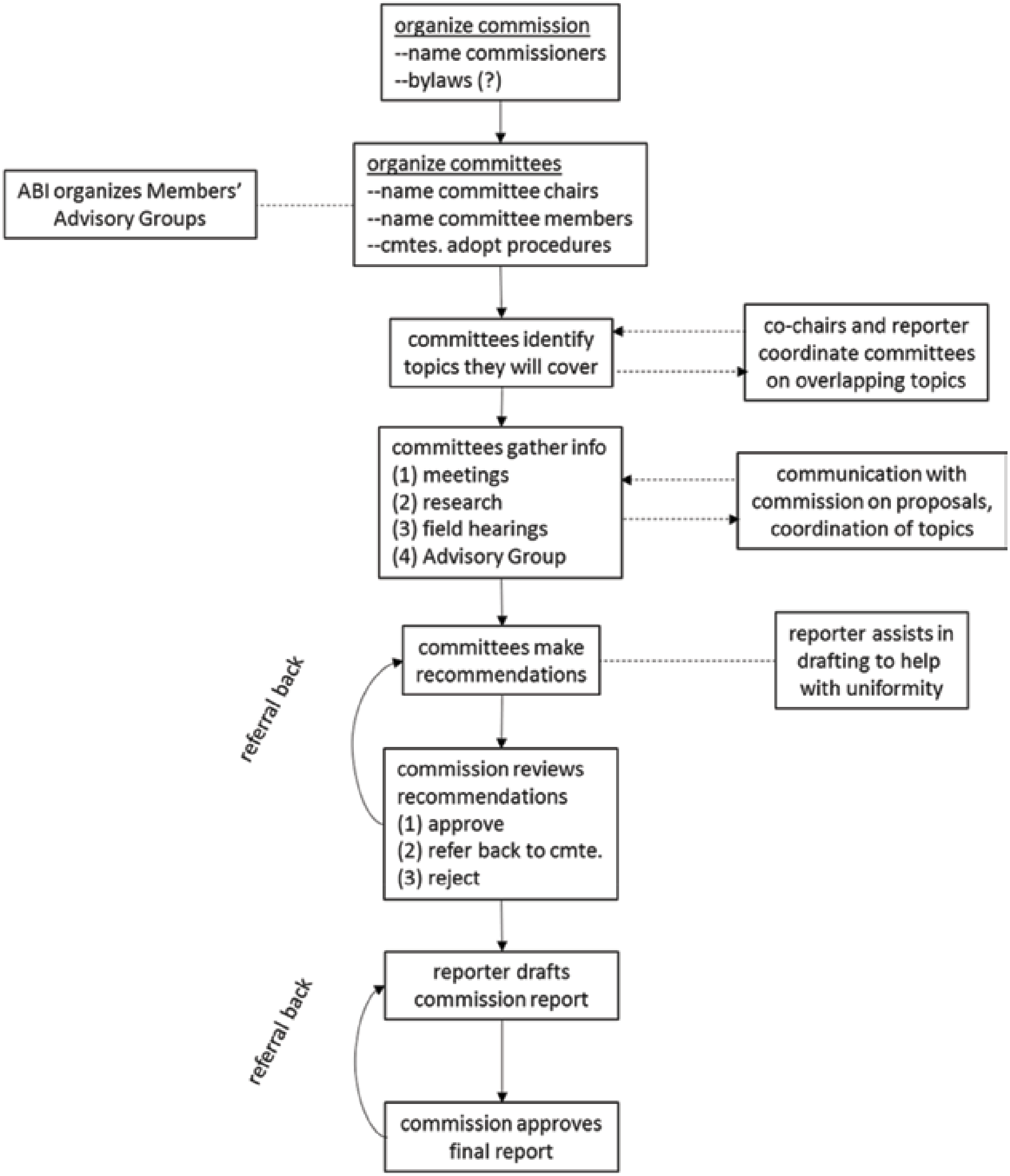
E. Role of Reporter and Commission Co-Chairs

Each committee should work with the Commission reporter to the greatest extent possible. The Commission reporter will assist with research and drafting of the committee reports as well as help coordinate the work across committees.

Each committee should appoint a committee reporter to assist the Commission reporter in production of its committee recommendations. The committee reporter may be a person on the committee or a non-committee member.

The committee chairs also shall keep the Commission co-chairs informed of the committee's work and help the Commission co-chairs coordinate the work across committees.

Process for ABI Commission on Consumer Bankruptcy Laws



The American Bankruptcy Institute's Commission on Consumer Bankruptcy was established in 2017 with a mission to research and recommend improvements to the consumer bankruptcy system that can be implemented within the existing structure. The Commission's purpose was to address the social and economic shifts that have occurred since the last major amendments to the Bankruptcy Code, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), and to assess BAPCPA's effects on the current state of consumer bankruptcy law. The Commission determined that the study 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. The 22 Commissioners (including five non-voting *ex-officio* members) were supported by the official reporter, Prof. Robert M. Lawless, one of the nation's top bankruptcy scholars. Nearly 30 other leading professionals from the fields of law, finance, judiciary and academia served on three topical advisory committees, providing essential expert guidance to the Commissioners. The Commission's record included testimony at some seven public field hearings held around the country, as well as written submissions, scholarly articles, empirical data and opinion surveys. The Commission testified at a congressional hearing before the House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law, and also provided recommendations to the U.S. Department of Education's evaluation of student loans in bankruptcy. After months of deliberations, the Commission unanimously adopted this Report to Congress, the Committee on Bankruptcy Rules and the public. The Report recommends nearly 50 discrete policy reforms.

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