Consumer: 10 Strategies for Better Consumer Bankruptcy Outcomes—A Mini-Arsenal of Best Practices, Novel Approaches and Innovative Ideas that Might Just Improve the Consumer Bankruptcy System

CONCURRENT SESSION

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Strategy No. 1
Pursue More Student Loan Discharges

- A recent empirical study of student loan hardship discharges has found that 0.1 percent of student loan debtors seek a hardship discharge. *See* Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Bankruptcy Undue Hardship Standard.* The author concludes that a number of debtors who may be eligible for hardship discharges never seek discharges. The article does not address economic factors, such as litigation costs, that may deter debtors from seeking hardship discharges.

- Based on an evaluation of hundreds of published undue hardship decisions, another study concludes that the widely used *Brunner* test has been applied unevenly and with no predictable or reliable results. *See* Rafael Pardo and Michelle Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt.* The authors find that debtors similarly situated by demographics and financial circumstances are typically not treated the same when different courts apply the standard. The authors conclude that ''those debtors granted a discharge and those denied a discharge predominantly resemble one another and that there are few statistically significant differences in the factual circumstances of the two groups.'' *Id*. at 412.

- In *In re* Bronsdon, 435 B.R. 791 (B.A.P. 1st Cir. 2010), the court refused to adopt the *Brunner* test and instead endorsed the ''totality of the circumstances'' test. The panel concluded that the *Brunner* test took the section 523(a)(8) standard too far, noting that the ''good faith'' prong has no basis in the statutory language and focuses unduly on prebankruptcy failure to pay. The court also found that *Brunner's* second prong (additional circumstances showing hardship likely to continue) encouraged courts to create rigid threshold requirements, including a showing of a ''certainty of hopelessness'' or certain ''unique'' or ''extraordinary'' circumstances that looked well beyond the likelihood of continued financial hardship. Finally, the *Bronsdon*

court preferred the ''totality of the circumstances'' test because it allowed courts to consider ''any additional facts and circumstances unique to the case.'' These facts and circumstances could include anything relevant to the central inquiry of whether the debtor can maintain a minimum standard of living while repaying the loan. The *Bronsdon* court distilled the ''totality of the circumstances'' standard into a simple question: ''Can the debtor now, and in the foreseeable near future, maintain a reasonable minimal standard of living for the debtor and the debtor's dependents and still afford to make payment on the debtor's student loans?'' *Id*. at 800 (quoting *In re* Hicks, 331 B.R. 18, 31, (Bankr. D. Mass. 2005)). The court's focus on the debtor's circumstances ''in the foreseeable near future'' is noteworthy. When the Second Circuit developed the *Brunner* test in 1987, any student loan for which payments had been due for at least five years could be discharged automatically in a chapter 7 or a chapter 13 case, without a showing of undue hardship.

- The Eighth Circuit has endorsed the ''totality of circumstances'' test for determining undue hardship. *In re* Long, 322 F.3d 549 (8th Cir. 2003).

Strategy No. 2
Support use of *in forma pauperis*

- Some have suggested that bankruptcy courts have granted an excessive number of fee waiver requests since 2005, when 28 U.S.C. § 1930(f) was amended.

- Data collected by the Administrative Office of the U.S. Courts show that nationally only 3.09% (29,632) of chapter 7 cases had fee waiver requests granted in the 12-month period ending March 31, 2012. Although this is a slight increase over the years immediately following the amendment, it is surprising that usage is not higher given the economic downturn and high unemployment rate.

- The local figures for the same period are as follows: 1.71% (197) of chapter 7 cases in E.D. Missouri; 2.00% (187) of chapter 7 cases in W.D. Missouri; 4.52% (304) of chapter 7 cases in D. Kansas

- One problem is that chapter 7 panel trustee's do not receive the fixed $60 fee in IFP cases. Congress should address this issue with legislation that provides trustees with compensation from the current filing fee collected in non-IFP cases.

Strategy No. 3
Always use wage orders in chapter 13

- For decades, the discharge rate for chapter 13 has been around one-third. It has proven difficult to increase the completion rate. Wage orders (or ACH withdrawals) increase the odds of plan completion and discharge, so why aren't we using them everywhere!
    - Braucher study (2001) found districts with wage orders had higher completion rates, controlling for a few other district level practices.
    - Porter, Greene, Patel study (forthcoming) shows wage order has a positive, statistically significant effect on plan completion—even controlling for other factors like income, length of plan, assets, debts, homeownership, etc.

- Paternalism concerns are sometimes offered by opponents to wage orders. These concerns can be rebutted by:
    - Fact that consumers choose deductions for many payments today
    - Consumers might prefer wage order if they understood its effect on chances of discharge
    - Offer ACH as alternative to wage order to minimize notice to employers?

Strategy No. 4
Engage in the National Model Plan process

- The Bankruptcy Rules Advisory Committee is considering proposed rule amendments dealing with chapter 13 practice. The topics under consideration include: whether secured creditors should be required to file proofs of claim; whether the deadline for filing claims should be shortened (60 days after petition); whether requests for determination of amount of allowed secured claims, priority claims, cure amount, and lien avoidance under § 522(f) may be made as part of the plan confirmation process and whether these determinations are binding despite a contrary proof of claim; whether there should be a procedure for requesting an order that a lien has been satisfied.

- The Advisory Committee is also considering whether there should be an Official Form model chapter 13 plan. A proposed rule amendment would require that the Official Form be used for all chapter 13 plans. The rule would further provide that non-standard provisions will be ineffective unless they are set out in the section of the Official Form specifically designated for such provisions and are identified in accordance with the requirements of the Form.

Strategy No. 5
Embrace the new consumer forms

- The Bankruptcy Official Forms Modernization Project (FMP) began its work in 2008. The first group of forms published for comment on Aug. 15, 2002 (Official Forms 3A, 3B, 6I, 6J, 22A-1, 22A-2, 22B, 22C-1, and 22C-2).

- Comments are due Feb. 15, 2013, and can be submitted at: http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx

- In general, major Official Form revisions are almost always undesirable to practitioners. Another concern is that the new "simplified" forms might encourage pro se filings. However, the proposed forms include extensive warnings about filing without an attorney.

- There are some possible advantages worth considering about the proposed forms: some debtors may actually read the forms and explanations; some debtors may acquire better understanding of process; requests for information are generally more specific and therefore less likely that debtor's counsel can be blamed for omissions.

Strategy No. 6
Address creditors' claims

- File timely claims for secured creditors and creditors with nondischargeable debts. 11 U.S.C § 501(c); R.3004. Chapter 13 debtors may wish to file claims on behalf of secured creditors or creditors with nondischargeable claims so that those creditors can share in the chapter 13 distributions. Section 501(c) permits the debtor or trustee to file a proof of claim on behalf of a creditor, if a creditor does not timely file its own proof of claim. Claims filed by the debtor or trustee must be filed within 30 days of the claim bar date. Be timely: late filed claims by the trustee or debtor are not treated the same as late filed claims by the creditor. *See In re* Drew, 256 B.R. 799 (B.A.P. 10th Cir. 2001); *In re* Davis, 430 B.R. 62 (Bankr. W.D.N.Y. 2010). Claims filed by debtors should be treated specifically and consistently in debtor's chapter 13 plan.

- Object to creditors' claims where:
    - The creditor does not appear to be the lawful owner of the debt. Amended R. 3001(c)(3)
    - The debtor has a good faith basis for disputing the amount due.
        - conflicts with other statements of amount due by the creditor
        - contains unreasonable fees

- Is the lack of documentation a sufficient basis upon which the court may disallow creditor's claim?

  If an objection is made to the proof of claim, the creditor has the ultimate burden of persuasion as to the validity and amount of the claim. When claims are executed in accordance with Rule 3001, they constitute prima facie validity of the claim. An objecting party must produce evidence that then rebuts the claimant's prima facie evidence, and if such evidence is sufficient, the burden shift back to the claimant to demonstrate the validity of the claim. Conversely, claims filed without necessary documentation are not accorded this evidentiary value. Courts must then weigh the available evidence to determine whether to allow the claim. That is, the court determines whether the evidence presented in sufficient to establish an enforceable claim against the debtor or property of the estate and in what amount. Most courts find that listing a creditor and amount owed on debtor's schedules constitutes some evidence of the debt owed. *Compare In re* Dove-Nation, 318 B.R. 147 (B.A.P. 8th Cir. 2004) (debtor's original schedules, signed under oath, admitting liability on debts, can constitute additional evidence supporting the claims) *with In re* Kirkland, 572 F.3d 838 (10th Cir. 2009) (debtor's schedules of no evidentiary value against an objecting trustee).

Strategy No. 7
Convert failed chapter 13s as routine matter

- Rate of discharge was stubbornly around 33% for decades, going back to Warren, Westbrook, and Sullivan data gathered in 1981. In wake of BAPCPA, it finally appears to be climbing up near 40%. This is based on cases filed in 2007 in Consumer Bankruptcy Project. It could be a temporary effect of BAPCPA that will diminish, and even if not, some of higher plan completion rate may be result of discouraging people from filing entirely.

- In one study, only about 9% of all chapter 13 cases convert; this means more than 50% are dismissed. (Remaining 40% complete plans).

- Dismissals usually do NOT result in a successful repeat filing (repeaters are even less likely to get discharges) and attorneys' fees and filing fees are paid twice, or more often.

- Trustees and debtors' attorneys should move to convert chapter 13 cases where payments are missed, unless debtor affirmatively objects, instead of dismissing them.

- Conversion to chapter 7 would be a default position. Debtor could affirmatively object where some reason that chapter 7 would harm debtor.

- Most debtors would fare better in chapter 7 than being out of bankruptcy system. In chapter 7, most debtors would get a discharge of unsecured debt, continued period of automatic stay for organizing affairs and protection from dunning, and the ability to negotiate a secured debt option such as reaffirmation, ride-through, or surrender with the assistance of an attorney and court supervision.

Strategy No. 8
Consider an administrative reserve system

- Based on the data collected in "The Consumer Bankruptcy Fee Study" (Lois R. Lupica), the average post-BAPCPA fee for debtor's counsel in discharged chapter 13 cases (data set through 2009) in the local districts: $2,639.35 - E.D. Missouri; $2,417.43 – W.D. Missouri; $2,337.43 – D. Kansas.

- The current "no look" fees in these districts are higher ($3,000-$4,000).

- A problem in many chapter 13 cases is that there is no contingency for funding the representation of the debtor in post-confirmation maters. One solution is for the debtor's plan to provide for a contingent administrative reserve. *See, e.g.*, Chapter 13 Plan (Form 2) U.S. Bankruptcy Court, District of Maine, available at: http://www.meb.uscourts.gov/w_forms.html.

- The reserve amount approved at confirmation would remain contingent and is not funded until additional fees are approved by the court upon application by the debtor's counsel.

- This recognizes the likelihood that the debtor will require additional services beyond the "no look" amount.

- The plan would provide that any remaining sums not approved for fees at the end of plan would be disbursed to general unsecured creditors The Maine model chapter 13 plan provides: "Any unused portion of the administrative reserve shall be paid pro rata to general unsecured claims that have not otherwise been paid in full."

Strategy No. 9
File strong appeals of bad decisions

- Sometimes judges get it wrong!

- Know your legal theories.

- Build a record. If it's not in the record it didn't happen!
  See Dakota Indus., Inc. v. Dakota Sportswear, Inc., 988 F.2d 61 (8th Cir. 1993); *Nulf v. Int'l Paper Co*., 656 F.2d 553 (10th Cir. 1981).

- Tell a compelling story. You need to have good facts.
  See, e.g., In re Crager, 2012 WL 3518473 (5th Cir. Aug. 16, 2012) (holding that proposed plan under which virtually the entire amount that the debtor paid to the trustee would go to her attorney, was not an abuse of chapter 13).

- Know the Federal Rules of Bankruptcy Procedure that apply to appeals.
  The 3 Ws – What, When, Where
  What: Know the difference between final orders and interlocutory orders. The former are appealable as of right, the later require leave to appeal. R. 8001(a), (b). In the Eighth Circuit, an order denying confirmation of a plan, without dismissal of the case, is not a final order. *See In re* Zahn, 526 F.3d 1140 (8th Cir. 2008). However, debtor is permitted to object to his own plan. Confirmation of such plan will be a final order appealable as of right. *See also In re* Timothy, 442 B.R. 28, 30 n.14 (B.A.P. 10th Cir. 2010).
  When: You have **14** days from the date on which the entry of judgment, order, or decree to file a notice of appeal. R.8002.
  Where: You will automatically go to the Bankruptcy Appellate Panel unless a party elects to go to the District Court. R.8001(e). It is possible to seek direct appeal to the Circuit Court of Appeal. R.8001(f).

- Don't forget to ask for stay pending appeal, if necessary. *See* R.8005.

- Don't reinvent the wheel.

Strategy No. 10
Do not allow DIY chapter 13s

- Nationally, about 9% of all bankruptcies are pro se. In largest district, the Central District of California, the fraction of pro se cases is 27%.

- DIY filings are more common in chapter 7, but it's a substantial portion of chapter 13 filings as well. In 2006, Administrative Office shows 5.5% of chapter 13 filings were pro se.

- Plan completion rate is very, very low for pro se cases—around 5%. For cases filed in 2004, 5.8% of pro se cases had a chapter 13 discharge, compared to 40.% of non pro se cases (these are figures exclude those cases that converted to chapter 7).

- Pro se filers have not fared better with getting discharges in chapter 13 after BAPCPA (general plan completion rate has risen) but has gotten worse.

- Most pro se plans are not confirmed, meaning pro se debtors get only short-term benefit of the stay.

- Anecdotally, the few successful pro se chapter 13 cases are filed by lawyers, family members of lawyers, people with bankruptcy expertise, etc.

- Low completion rate for pro se filings drags down the overall plan completion rate and changes our perception of whether chapter 13 "works."

- Petition preparers present a closely related problem. How do they benefit the system? Are debtors, creditors, or courts better off because of petition preparers?