REFORMING ATTORNEYS' FEES IN CHAPTER 7 BANKRUPTCY: LESSONS FROM PROPOSED CHAPTER 10 BANKRUPTCY

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Consumer bankruptcy is an integral part of the United States' legal system and economic framework. Currently, there is an access to justice issue to bankruptcy relief that centers around an ability to pay debtors' attorneys' fees. Without the ability to pay for an attorney, the access to justice provided by consumer bankruptcy—the fresh start—is out of reach for many individuals. The Consumer Bankruptcy Reform Act of 2022 ("CBRA") proposes a radical reform of the consumer bankruptcy system, which includes reforms to paying debtors' attorneys. Drawing on CBRA, this Article calls for targeted reforms to the payment and treatment of attorneys' fees in chapter 7. The current system can be modified to allow for payment of attorneys' fees post-petition and make them nondischargeable, without overhauling the entire consumer bankruptcy system. This can help remove the economic barrier of paying for attorneys' fees, and thereby increase access to justice and the opportunity for a fresh start for individuals.

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TABLE OF CONTENTS

INTRODUCTION

The importance of a functioning bankruptcy system cannot be overstated. The Bankruptcy Code[1] has been in place since the enactment of the Bankruptcy Act of 1978.[2] The Bankruptcy Code and the relief it can afford debtors is an integral part of the United States' legal system.[3] Even before enactment of the Bankruptcy Code, bankruptcy law was deeply rooted in the United States' legal system since at least 1898,[4] when bankruptcy law became a permanent feature of federal law.[5] Although bankruptcy law is a fixture of the American legal system, that does not correlate to an ability to access the system for those in need.

Currently, there is an access to justice issue that centers around an ability to pay attorneys' fees. Many debtors are unable to pay attorneys' fees under the current parameters of the Bankruptcy Code. An effective bankruptcy system needs mechanisms in place that provide an ability to pay for attorneys. This would not only make bankruptcy accessible, but it would enhance the ability of attorneys to offer bankruptcy services if there were effective mechanisms in place to ensure payment of attorneys' fees. This would broaden the supply of bankruptcy services and, likely, reduce the overall cost of attorneys' fees associated with filing for bankruptcy relief.

Attorneys' fees serve as an economic barrier that diminishes the ability of an individual to access the bankruptcy system and the justice it can provide to debtors through a fresh start. And, even if an individual is able to access the bankruptcy system, for many individuals the fresh start—the fundamental goal of consumer bankruptcy[6]—is still illusive. Many chapter 7 debtors are burdened with nondischargeable debts, such as student loans, post-bankruptcy. Moreover, many chapter 13 debtors never complete a plan of repayment and, therefore, never receive

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[1] Unless otherwise noted, all references to "Bankruptcy Code" or "Code" are to Title 11 of the U.S. Code. *See* 11 U.S.C. §§ 101–1532 (2018).

[2] *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2549 (1978) ("To establish a uniform Law on the Subject of Bankruptcies."); *see also* Amber N. Morris, *Small Business Debt in the Age of Covid-19*, 29 AM. BANKR. INST. L. REV. 131, 132 (2021) (noting that the current Bankruptcy Code was enacted in 1978).

[3] This core role of bankruptcy and importance thereof, is evident from the inclusion of the Bankruptcy Clause in the Constitution. *See* U.S. CONST. art. I, § 8, cl. 4 ("To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States . . . ."). As one commentator observed, "American bankruptcy law is as old as the United States Constitution." Morris, *supra* note 2, at 132 (citation omitted).

[4] *See* Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (1898).

[5] *See* Richard C. Sauer, *Bankruptcy Law and the Maturing of American Capitalism*, 55 OHIO ST. L.J. 291, 291 (1994) (noting permanent bankruptcy law was created in 1898).

[6] *See* Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) (quoting Grogan v. Garner, 498 U.S. 279, 286–87 (1991)) ("The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'"); *see also* Pamela Foohey, Robert M. Lawless, Katherine Porter & Deborah Thorne, *Life in the Sweatbox*, 94 NOTRE DAME L. REV. 219, 259 ("The primary goal of consumer bankruptcy, both chapters 7 and 13, is to provide the debtor with a fresh start through the discharge of debts—that is, to get people back on level financial ground."); *see also* Amy Y. Landry & Robert J. Landry, III, *Medical Bankruptcy Reform: A Fallacy of Composition*, 19 AM. BANKR. INST. L. REV. 151, 168 (2011) (recognizing the core goal of a fresh start, in conjunction with the "equitable distribution of assets to creditors").

any fresh start. Thus, access to justice—a fresh start—under the current bankruptcy system is not within reach for many individuals, even if they are able to file a case. However, the *first step* in accessing justice in the bankruptcy system is ensuring the ability to be able to file a case, which often hinges on the ability to pay an attorney. The focus of this Article is on that first step.

To address this shortcoming of the current system, policymakers proposed the Consumer Bankruptcy Reform Act of 2022 ("CBRA").[7] CBRA proposes a repeal of consumer chapter 7 and chapter 13,[8] replacing both chapters with a new chapter 10 of the Bankruptcy Code for consumers.[9] CBRA is designed to address barriers in the consumer bankruptcy system and to enhance access to justice and bankruptcy's fresh start. [10]

The CBRA is radical.[11] It is the most comprehensive proposed reform of consumer bankruptcy in the U.S. since 1978.[12] It not only repeals the legal framework of consumer bankruptcy[13] in place for over forty years, but it also transforms the policy orientation of consumer bankruptcy from a creditor-oriented policy to one favoring debtors.[14] This type of reform is a hotly contested political issue, triggering a debate upon party lines. Most democrats, including President Joe Biden, support the reform effort. Most republicans oppose the reform. The current composition and balance of power in the Congress, as well as the lingering effects of the pandemic

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[7] *See* Consumer Bankruptcy Reform Act of 2022, S. 4980, 117th Cong. (2022) ("CBRA"). An earlier version of the bill was introduced in 2020. *See* Consumer Bankruptcy Reform Act of 2020, S. 4991, 116th Cong. (2020). Both bills are nearly identical. *See* Mahlon J. Mowrer, *The Consumer Bankruptcy Reform Act: A Transformation of the Law*, 42 AM. BANKR. INST. L. REV. 8, 8 (Jan. 2023) ("[T]he CBRA has twice now been proposed in nearly identical form.").

CBRA is designed to address other shortcomings beyond the attorneys' fee issue, but such issues are beyond the scope of this Article. For example, see CBRA sections 101(b)(6)–(7) (allowing modification of car loans and home mortgages) and section 101(b)(8) (allowing widespread discharge of student loan obligations). For a concise overview of key aspects of the proposed reform, see Adam Levitin, *The Consumer Bankruptcy Reform Act of 2020*, CREDIT SLIPS (Dec. 9, 2020, 9:15am), https://www.creditslips.org/creditslips/2020/12/the-consumer-bankruptcy-reform-act-of-2020.html (outlining proposed chapter 10 provisions).

[8] CBRA effectively would undo the current consumer bankruptcy regime. *See* Abigail Faust, *The Acoustic Separation of Consumer Bankruptcy and Consumer Credit Law*, 95 AM. BANKR. L.J. 671, 672 (2021).

[9] *See* Faust, *supra* note 8, at 708; *see also* Belisa Pang & Emile Shehada, *One Size Fits None: An Overdue Reform for Chapter 7 Trustees,* 131 YALE L.J. 976, 1030 (2022).

[10] *See*, *e.g.*, CBRA § 101(b) (detailing the purposes of the reform, such as reducing costs, streamlining the bankruptcy process, making the system work better, and promoting fairness).

[11] *See* Pang & Shehada, *supra* note 9, 981 at n.19 (characterizing CBRA as a "radical reform").

[12] *See, e.g.*, Levitin, *supra* note 7 (characterizing CBRA as a "wholesale reform of the structure of consumer bankruptcy" that does much more than the last major reform of consumer bankruptcy in 2005 with the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005).

[13] *See, e.g.*, Pang & Shehada, *supra* note 9, at 1030 (CBRA would "eliminate the bifurcated consumer-bankruptcy system altogether").

[14] An example of this orientation in favor of the debtor is in the express directive in the bill to interpretate the provisions of CBRA "liberally in favor of relief for consumer debtors." *See* CBRA § 1010. Moreover, the twelve statutory purposes of CBRA articulated in the legislation all advance the interests of consumer debtors and ability to obtain relief under the Bankruptcy Code. *See, e.g.*, CBRA § 101(b)(1)–(12).

and other legislative priorities, make the passage of CBRA unlikely in the near term.[15] Even if the reform is not passed in its current form, aspects of the proposed legislation and the way it addresses access to justice can be instructive and, perhaps, lead to more targeted reforms. Bankruptcy policy reform should not be viewed as a singular event,[16] but rather an ongoing effort including incremental reforms, drawing on aspects of reform proposals that can enhance the bankruptcy system.

An important aspect of CBRA that can be instructive to policymakers is the treatment of debtors' attorneys' fees in consumer bankruptcy. CBRA creates a single chapter for relief[17] and makes it easier to pay for attorneys.[18] With this type of reform, individuals are not forced to choose between paying important pre-petition bills, such as food and utilities, or to save for attorneys' fees for filing bankruptcy. Nor would they be forced to choose chapter 13 over chapter 7 simply because of an inability to raise funds to pay for a chapter 7 attorney.[19] Rather, CBRA provides a mechanism to allow access to the bankruptcy system for debtors, while allowing a legal framework for the payment of attorneys' fees after filing.[20] This type of reform is a win for both debtors and attorneys representing consumers.

Drawing on CBRA, without overhauling the consumer bankruptcy system, this Article calls for targeted reforms to the payment and treatment of attorneys' fees in chapter 7. The current system can be modified to allow for payment of attorneys' fees post-petition and make them nondischargeable, without overhauling the entire consumer bankruptcy system. This targeted reform can help increase access to justice and the opportunity for a fresh start. This can help remove the economic barrier of paying for attorneys' fees.

Following this Introduction, Part I provides an overview of the current consumer bankruptcy system. This foundation leads to Part II which discusses the treatment of attorneys' fees in chapter 13 and chapter 7, with an overview of techniques currently employed to address the shortcomings of the current structure. Part III summarizes relevant aspects of CBRA related to attorneys' fees. Part IV provides incremental statutory reforms which can address the attorneys' fees issue. Part V provides the conclusion.

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[15] *See* Pang & Shehada, *supra* note 9, at 1030 (observing CBRA is not likely to gain much political support in the short term).

[16] *See* Robert J. Landry, III, *Credit Card Debt and Consumer Bankruptcy: Can we 'Nudge' Our Way Out?*, 27 AM. BANKR. INST. L. REV. 139, 140 (2019).

[17] *See* CBRA § 101(b)(2).

[18] *See id.* § 101(b)(4); *see also* Pang & Shehada, *supra* note 9, at 1030 (stating CBRA would make "it easier for consumers to afford bankruptcy representation").

[19] *See* Shane Stover, *The Nation's Antiracist Interventions to Fight Consumer Racism*, 33 LOY. CONSUMER L. REV. 441, 442 (2021) (recognizing that under CBRA the "inability to afford good legal representation . . . will no longer restrict filers from being able to choose the correct chapter under which to file").

[20] *See* Letter from 74 Law Professors to Sen. Elizabeth Warren (Dec. 14, 2020) at 2–3, https://bit.ly/3mj UHJM.

I. OVERVIEW OF DEBTORS' OPTIONS FOR RELIEF

The Code offers two primary options for consumers seeking bankruptcy relief: chapter 7 or chapter 13.[21] Chapter 7 is a relatively quick process, largely administrative in nature,[22] lasting just a matter of months[23] with the individual receiving a discharge of most unsecured debts,[24] other than certain debts that are statutorily excepted from the discharge.[25] The chapter 7 debtor must surrender pre-petition assets, except those assets that are exempt from collection,[26] to the trustee for distribution to creditors[27] under the statutory priority structure in the Bankruptcy Code.[28] Noteworthy, post-petition income and assets are shielded from collection efforts by creditors in chapter 7.[29] Although most nonexempt pre-petition assets are

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[21] *See* Pamela Foohey, Robert M. Lawless, Katherine Porter & Deborah Thorne, *"No Money Down" Bankruptcy*, 90 S. CAL. L. REV. 1055, 1061 (2017) [hereinafter Foohey, et al., *No Money Down*] ("People who cannot repay their debts have essentially two options in bankruptcy: filing under chapter 7 or under chapter 13."); *see also* Edward J. Janger, *Consumer Bankruptcy and Race: Current Concerns and a Proposed Solution*, 33 LOY. CONSUMER L. REV. 328, 329 (2021); Robert J. Landry, III, *The Policy and Forces Behind Consumer Bankruptcy Reform: A Classic Battle Over Problem Definition*, 33 U. MEM. L. REV. 509, 513 (2003). Individual consumer debtors can file for relief under chapter 11, but employing chapter 11 for individual consumer debtors is much less common than filing under chapters 7 or 13. *See* Robert J. Landry, III & Amy K. Yarbrough, *Global Lessons from Consumer Bankruptcy and Healthcare Reforms in the United States: A Struggling Safety Net*, 16 MICH. ST. J. INT. L. 343, 354 n.65 (2007) (discussing the low level of individual consumer chapter 11 filings).

[22] *See, e.g.*, Eric A. Posner, *Should Debtors be Forced into Chapter 13?*, 32 LOY. L.A. L. REV. 965, 976 (1999) (recognizing that "Chapter 7 cases are not heavily contested").

[23] *See* Foohey, et al., *No Money Down*, *supra* note 21, at 1062 (stating the typical case lasts four to six months receiving a discharge at the end of that period); Amanda M. Manke, *Bifurcating Chapter 7 Service & Fee Agreements in Arizona: A Legal and Ethical Quandary or a Viable Practice?*, 1 CORP. & BUS. L.J. 1, 4 (2020).

[24] *See* 11 U.S.C. § 727(a) (2018) (providing for the discharge of most unsecured debts).

[25] *See id.* § 523(a) (providing categories of debts excepted from discharge such as student loans, child support and certain tax obligations); *see also* Manke, *supra* note 23, at 4.

[26] *See id.* § 522(d) (providing for certain assets exempt from liquidation).

[27] *See* Pollitzer v. Gebhardt, 860 F.3d 1334, 1337 (11th Cir. 2017).

[28] *See generally* 11 U.S.C. § 726(a) (providing the statutory scheme for distribution of assets among creditors); *see also* Foohey, et al., *No Money Down, supra* note 21, at 1061 ("In chapter 7, the debtor receives a relatively quick discharge in exchange for turning over all non-exempt assets, which are sold for the benefit of creditors.").

[29] *See Gebhardt*, 860 F.3d at 1337.

forfeited by a debtor,[30] the protection of post-petition income and assets from collection through the discharge provides the debtor a fresh start.[31]

In stark contrast to the relatively quick chapter 7 process, chapter 13[32] is a reorganization type of bankruptcy for individuals.[33] In chapter 13, a debtor normally keeps estate nonexempt assets, but must pay a percentage of the debtor's debts over three to five years in a chapter 13 plan, typically from a debtor's future earnings or income.[34] In a chapter 13 plan, unsecured creditors must be paid at least as much as such creditors would be paid under a chapter 7 liquidation.[35] The plan must provide that secured creditors will be paid in full or provide for the surrender of the collateral securing the debt.[36] The debtor normally is discharged of remaining unsecured debts when the plan is completed.[37] Chapter 13 is often used by the debtor in situations where the debtor has a home or vehicle that the debtor does not want liquidated in chapter 7 and seeks to retain the particular asset.[38] Thus, debtors with sufficient income to repay such debts over time[39] can use chapter 13 to retain the home, vehicle, or other asset.[40] However, some individuals may use chapter 13 for a panoply of other

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[30] In reality, most chapter 7 cases are no-asset cases which do not provide a distribution to creditors because there are no nonexempt assets of any value worth liquidating. *See In re* Gonzalez, No. 8:12-bk-19213-RCT, 2019 WL 1087093, *10 (Bankr. M.D. Fla. 2019); *see also In re* Corgiat, 123 B.R. 388, 389 (Bankr. E.D. Ca. 1991); Foohey, et al., *No Money Down*, *supra* note 21, at 1062 ("In practice, more than 90% of consumer chapter 7 cases are 'no asset,' meaning the debtor owns no property subject to liquidation."); *see also* Joan N. Feeney, *Statement to the House of Representatives Judiciary Committee on the Impact of Stern v. Marshall*, 86 AM. BANKR. L.J. 357, 363 (2012) (observing that most individual chapter 7 cases have no assets and make no distribution to creditors); *see also* Emily Gildar, Comment, *Arizona's Anti-Deficiency Statutes: Ensuring Consumer Protection in a Foreclosure Crisis*, 42 ARIZ. ST. L.J. 1019, 1028 (2010) (noting most chapter 7 cases are no-assets cases providing no distribution to unsecured creditors).

[31] *See Gebhardt*, 860 F.3d at 1337.

[32] *See generally* 11 U.S.C. §§ 1301–1330 (2018) (providing statutory information on chapter 13).

[33] Only individuals with regular income are eligible for chapter 13. *See* 11 U.S.C. § 109(e).

[34] *See* Pollitzer v. Gebhardt, 860 F.3d 1334, 1337 (11th Cir. 2017); *see also* Brown v. Gore (*In re* Brown), 742 F.3d 1309, 1316 (11th Cir. 2014) (summarizing the chapter 13 process concisely).

[35] *See* 11 U.S.C. § 1325(a)(4) (providing the requirement that the amount paid under a chapter 13 plan is as much as would be paid under a chapter 7 liquidation); *see also* M. Jonathan Hayes & James T. King, *A Chapter 13 Primer for Non-Chapter 13 Bankruptcy Attorneys*, 30 CAL. BANKR. J. 41, 41 (2009). For a concise summary of this statutory requirement, see *In re* Regan, No. 19-43585, 2019 WL 2867101, at *1 (Bankr. E.D. Mich. July 2, 2019).

[36] *See* Haynes & King, *supra* note 35, at 57.

[37] *See* 11 U.S.C. § 1328(a) (2018) (discharge is upon completion of a plan); *see also In re* Brown, 742 F.3d at 1316.

[38] *See* Foohey, et al., *No Money Down*, *supra* note 21, at 1062 (noting that chapter 13 is "popular with people who want to save their homes from foreclosure"); *see also In re* Johnson, 634 B.R. 806, 821 (Bankr. D. Colo. 2021) ("Many consumer bankruptcy cases are filed under Chapter 13 to save homes."); *In re* Brown, 121 B.R. 768, 771 (Bankr. S.D. Ohio 1990).

[39] *See, e.g., Gebhardt*, 860 F.3d at 1337 (noting chapter 7 is not designed for debtors with sufficient income to repay debts overtime).

[40] *In re* Johnson, 634 B.R. at 821 (recognizing chapter 13 affords individuals with sufficient income the opportunity to retain property and the retention or saving of property is the "entire design" of chapter 13).

reasons—some legal[41] and some personal—such as a genuine desire to repay creditors.[42]

The Bankruptcy Code was significantly modified[43] by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005[44] ("Reform Act"). The scores of changes brought about by the Reform Act are outside the focus of this piece.[45] Importantly, though, the Reform Act dramatically changed the theoretical framework and the underlying policy of the consumer bankruptcy from one that favored debtors to one that favored creditors.[46] To effectuate this policy shift, the Reform Act added additional paperwork[47] and other barriers[48] to debtors that increased the workload of an attorney filing a case, which have caused an increase in the attorneys' fees to file a case.[49] These increased attorneys' fees are an economic barrier to relief.

II. ATTORNEYS' FEES IN CHAPTER 13 VERSUS CHAPTER 7

Although an individual can file for bankruptcy relief under chapters 7 or 13 without the assistance of an attorney, such pro se representation is challenging as

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[41] For example, chapter 13 provides a broader discharge than other chapters and that can be a reason to use chapter 13. *See* Keith M. Lundin, *Discharge or Dischargeability Problems*, LUNDIN ON CHAPTER 13, § 8.11, at ¶ 1 (Sept. 24, 2023), http://www.lundinonchapter13.com.

[42] *See id.* at § 8.1, at ¶1.

[43] *See, e.g.*, George H. Singer, *The New Rules of Bankruptcy for Chapter 11 Business Reorganizations under the B.A.P.C.P.A.*, 28 CAL. BANKR. J. 194, 194 (2006) (characterizing the Reform Act as the "most comprehensive set of changes to the Bankruptcy Code in over twenty-five years"); George H. Singer, *The Year in Review: Case Law Developments Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 29 CAL. BANKR. J. 37, 88 (2007) [hereinafter "Singer, *Year*"] (noting that the landscape of consumer bankruptcy changed with the Reform Act).

[44] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.).

[45] For a survey of the main aspects of the Reform Act, see generally Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,"* 79 AM. BANKR. L.J. 191 (2005); Eugene R. Wedoff, *Means Testing in the New §707(b)*, 79 AM. BANKR. L.J. 231 (2005).

[46] The Reform Act removed the presumption in favor of the debtor. *See* Singer, *Year*, *supra* note 43, at 88 ("Prior to the effective date of the BAPCPA, there was a 'presumption in favor of granting the relief requested by the debtor.' The BAPCPA has fundamentally changed the landscape and dynamics of consumer bankruptcy.") (citation omitted). For a concise summary of how the Reform Act changed the presumption and how it functions in chapter 7, see McDow v. Dudley, 662 F.3d 284, 288–89 (4th Cir. 2011).

[47] The primary additional paperwork is associated with the completion of a means test. *See* Singer, *Year*, *supra* note 43, at 88. Although the means test requires additional paperwork, it is in effect a legal barrier to seeking bankruptcy relief. *See* Pamela Foohey, *Access to Consumer Bankruptcy*, 34 EMORY BANKR. DEV. J. 341, 342 (2018) [hereinafter Foohey, *Access*] (noting the Reform Act's means test "created a legal barrier to entry"). The reality is that for most debtors their income is so low that the "means test is irrelevant." Foohey, et al., *"No Money Down" Bankruptcy*, 90 S. CAL. L. REV. 1055, 1063–64 (2017). For a concise primer on the mechanics of the means test, see Wedoff, *supra* note 45, at 240–77.

[48] *See* Katherine Porter, *The Potential and Peril of BAPCA for Empirical Research*, 71 MO. L. REV. 936, 979 (2006) (observing that the Reform Act added additional barriers to filing for relief).

[49] *See* Foohey, *Access*, *supra* note 47, at 343.

bankruptcy is a deceptively complex area of the law.[50] Hence, most individuals file their bankruptcy cases with attorney representation.[51] A practical issue for the individual to address is how to pay the attorney for the bankruptcy representation, as bankruptcy is not free.[52] And the individuals must consider how attorneys' fees are dealt with in very different ways under chapter 7 and chapter 13.

A. Chapter 13 Attorneys' Fees

Under chapter 13, most attorneys' fees are paid post-petition through a plan with the fees approved by the bankruptcy court.[53] In most jurisdictions, the bankruptcy courts have standing orders that set a fixed fee for routing chapter 13 representation,[54] and payment of that fee is in the chapter 13 plan.[55] This ability to pay attorneys' fees after filing for relief allows individuals to file for bankruptcy without incurring any upfront attorneys' fees,[56] and, importantly, obtain immediate relief from various collection efforts and the other pressures caused by financial stress.[57] The filing of chapter 13 cases with no upfront attorney fee, or just part of the fee paid, is not new, but appears to be an ever-increasing phenomenon.[58] This type of payment of attorneys' fees in chapter 13 is often referred to as a "no money down" chapter 13.[59]

The amount of the chapter 13 attorneys' fees varies greatly from jurisdiction to jurisdiction. In 2015, one study estimated the chapter 13 attorneys' fees were, on average, about $3,200.[60] Current chapter 13 attorneys' fees are about $4,000,[61] with

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[50] The complexities of consumer bankruptcy make pro se cases less successful. *See* Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for its Surprising Success*, 52 WM. & MARY L. REV. 1933, 1959 (2011); *see also* Michael B. Joseph, *Consumer Pro Se Bankruptcy: Finding Hope in Hopelessness*, 35 AM. BANKR. INST. J., May 2016 at 32, 33 (discussing the difficulties of pro se representation, particularly in chapter 13).

[51] *See* Pamela Foohey, Robert M. Lawless, Katherine Porter & Deborah Thorne, *Attorneys' Fees and Chapter Choice: Exploring "No Money Down" Chapter 13 Bankruptcy,* 36 AM. BANKR. INST. J., June 2017, 20, 62 [hereinafter Foohey, et al., *Attorneys' Fees*] (noting most consumers hire an attorney to file for bankruptcy relief). However, it should be noted as attorneys' fees increase, pro se representation will likely increase.

[52] *See* Katherine A. Porter & Deborah Thorne*, The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67, 122 (2006) (recognizing the obvious, but important, observation that bankruptcy is not free).

[53] *See* Foohey, et al., *Attorneys' Fees*, *supra* note 51, at 20 (noting that chapter 13 attorneys' fees are normally paid under the chapter 13 plan).

[54] *See* Bruce M. Price, *"No Look" Attorneys' Fees and the Attorneys Who Are Looking: An Empirical Analysis of Presumptively Approved Attorneys' Fees in Ch. 13 Bankruptcies and a Proposal Reform*, 20 AM. BANKR. INST. L. REV. 291, 296 (2012) (noting presumptive fees are set locally, and the process of awarding such fees varies from district to district) (footnote omitted).

[55] *See* Foohey, et al., *No Money Down*, *supra* note 21, at 1066.

[56] *See* Foohey, et al., *Attorneys' Fees*, *supra* note 51, at 20.

[57] *See id.* at 62 (identifying such collection efforts and other pressures caused by financial stress include "threats of wage garnishment, vehicle repossession or a foreclosure sale").

[58] *See id.*

[59] Foohey, et al., *No Money Down*, *supra* note 21, at 1058 (employing the phrase "no money down" bankruptcies when a debtor "begins the process of purchasing legal help without an initial payment").

[60] Foohey, et al., *Attorneys' Fees*, *supra* note 51, at 20.

[61] *See* Letter from 74 law professors to Sen. Elizabeth Warren, (Dec. 14, 2020), https://bit.ly/3mjUHJM.

variation from district to district.[62] Regardless of the exact chapter 13 fee in a particular district, the fact is that chapter 13 attorneys' fees are substantially more than chapter 7 attorneys' fees.[63]

B. Chapter 7 Attorneys' Fees

In chapter 7—in contrast to chapter 13's typical "no money down" pre-petition payment of attorneys' fees—most attorneys require payment of the full flat fee prior to filing.[64] The reason is rooted in the fact that, under the Bankruptcy Code, any balance of an attorney fee that is owed when a case is filed is subject to the chapter 7 automatic stay prohibiting post-petition collection and once the discharge is entered,[65] the collection is forever enjoined.[66] As such, if an attorney wants to ensure getting paid for chapter 7 services, the attorney has to require full payment upfront prior to filing the bankruptcy petition.[67]

The amount of the chapter 7 attorneys' fees varies greatly from jurisdiction to jurisdiction. In one 2015 study, the average chapter 7 attorney fee is about $1,200.[68] Chapter 7 attorneys' fees currently average about $1,300,[69] with wide variation from district to district.

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[62] For example, in the Northern District of Alabama the flat fee for chapter 13 attorneys' fees is $4,500. *See Chapter 13 Maximum Attorney Compensation Exempt from Fee Application Effective for Cases Filed On or After October 1, 2022*, UNITED STATES BANKRUPTCY COURT, NORTHERN DISTRICT OF ALABAMA (Aug. 16, 2022), https://www.alnb.uscourts.gov/news/chapter-13-maximum-attorney-compensation-exempt-fee-application-effective-cases-filed-or-after.

[63] *See* Edward R. Morrison et al., *Race and Bankruptcy: Explaining Racial Disparities in Consumer Bankruptcy*, 63 J.L. & ECON. 269, 274 (2020) ("Relative to Chapter 7, [Chapter 13] is substantially more expensive.").

[64] *See* Foohey, et al., *Attorneys' Fees*, *supra* note 51, at 20; Robert J. Landry, III & Amy K. Yarbrough, *An Empirical Examination of Direct Access Costs to Consumer Bankruptcy: A Pilot Study in the Northern District of Alabama*, 82 AM. BANKR. L.J. 331, 334 (noting most chapter 7 attorneys charge a flat fee that is required to be paid prior to filing for relief); *see also In re* Suazo, 642 B.R. 838, 859–63 (Bankr. D. Colo. 2022) ("[L]egal counsel in Chapter 7 bankruptcy cases almost universally require full payment of legal fees and costs before a bankruptcy petition is filed.").

[65] *See* Adam D. Herring, *Problematic Consumer Debtor Attorneys' Fee Arrangements and the Illusion of "Access to Justice"*, 37 AM. BANKR. INST. J., Oct. 2018 at 32; *see also* Foohey, et al., *Attorneys' Fees*, *supra* note 51, at 20 (noting that pre-petition attorneys' fees are unsecured debts that will be discharged). For an explanation of the statutory interplay leading to the legal consequence of discharge of pre-petition attorneys' fees in chapter 7, see *In re* Suazo, 642 B.R. at 859–63.

[66] The discharge serves as a statutory injunction against collection of discharged debts. 11 U.S.C. §§ 524(a)(2)–(3) (2018).

[67] *See* Foohey, *Access*, *supra* note 47, at 360 ("Because of Code section language providing attorney payment, as well as a Supreme Court decision interpreting that language, attorneys require their clients filing chapter 7 to pay attorneys' fees before filing . . . ."); *see also* Foohey, et al., *No Money Down*, *supra* note 21, at 1058 ("Because of the Bankruptcy Code's provisions regarding payment to professionals, attorneys require consumers in chapter 7 to pay all attorneys' fees prior to filing.").

[68] *See* Foohey, et al., *Attorneys' Fees*, *supra* note 51, at 20.

[69] Letter from 74 Law Professors to Sen. Elizabeth Warren (December 14, 2020), https://bit.ly/3mjUHJM.

C. Chapter 7 Disguised as a Chapter 13

Even though there is great disparity in the amount of attorneys' fee charged between chapter 7 and chapter 13, the requirement to pay the whole fee upfront in a chapter 7 is problematic for many individuals in dire financial distress. The ability to raise enough money upfront to pay attorneys' fees can be a tremendous hurdle for individuals. The allure of immediate relief under chapter 13, with no money down for attorneys' fees, apparently acts as an incentive to some individuals to seek relief under chapter 13 rather than chapter 7.[70] Some individuals who cannot afford to pay chapter 7 attorneys' fees upfront may file chapter 13 so that the individual can pay the attorneys' fees.[71] In such cases, the chapter 13 filing is really a chapter 7 case disguised as a chapter 13.[72] The chapter 13 case is effectively a financing vehicle for the debtor's attorneys' fees.[73] Choosing chapter 13 over chapter 7 in light of inability to pay upfront the full attorneys' fee in chapter 7 seems to be done even though chapter 13 may not be the best option for many individual debtors,[74] and may make debtors vulnerable to overreaching attorneys.[75]

The reality is that many, if not most, chapter 13 cases are not successful.[76] Some estimate that two-thirds of all plans fail,[77] whereas others offer estimates at the other

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[70] *See* LUNDIN, *supra* note 41, at § 27.4, ¶ 12 (observing that the ability to pay attorneys' fees over time in chapter 13 can be attractive to debtors unable to pay a lump sum fee upfront for other chapters of relief).

[71] *See* Jay Lawrence Westbrook, *Empirical Research in Consumer Bankruptcy*, 80 TEX. L. REV. 2123, 2143 (2002).

[72] *See In re* Provencher, No. 10–11263–DHW, 2010 WL 4064789, at *2 (Bankr. M.D. Ala. 2010) (finding that such plans are disguised chapter 7 cases); *see also* James Massey et al., *Consumer Bankruptcy Panel: Attorneys' Fees in the Northern District of Georgia*, 25 EMORY BANKR. DEV. J. 377, 381 (2009) (discussing the problems of the fee only chapter 13 cases and characterizing them as a disguised chapter 7 case).

[73] *See Provencher*, 2010 WL 4064789, at *2.

[74] For an example of a fee-only chapter 13 case in which chapter 7 was a better option, see *In re* Brown, 742 F.3d 1309, 1312 (11th Cir. 2014).

[75] *In re* Puffer, 674 F.3d 78, 86 (1st Cir. 2012) (Lipez, J., concurring) (disguising chapter 7 cases as a chapter 13 may leave "debtors vulnerable to attorneys seeking to maximize compensation") (citation omitted).

[76] *See* Janger, *supra* note 21, at 333 (between 1994 and 2000, the completion rate of chapter 13 cases was about 33%); Morrison et al., *supra* note 63, at 275 ("A debtor fails to receive a discharge in two-thirds of Chapter 13 cases . . . .").

[77] *See* Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103, 107 (2011) (finding "only one in three cases filed under Chapter 13 ended in a completed payment plan."); *see also* Scott F. Norberg & Andrew J. Velky, *Debtor Discharge and Creditor Repayment in Chapter 13*, 39 CREIGHTON L. REV. 473, 509 n. 74 (2006) (reporting that the failure rate in chapter 13 is about two-thirds) (citing Lynn M. LoPucki, *Common Sense Consumer Bankruptcy*, 71 AM. BANKR. L.J. 461, 474–75 (1997)); Scott F. Norberg, *Consumer Bankruptcy's New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13*, 7 AM. BANKR. INST. L. REV. 415, 439 (1999) (finding "one-third of Chapter 13 filers completed a plan and obtained a discharge"); STAFF OF NAT'L BANKR. REV. COMM'N, 105TH CONG., BANKRUPTCY: THE NEXT 20 YEARS (1997) ("For more than a decade, two-thirds of all Chapter 13 plans have failed before the debtor completes payments, and sometimes before unsecured creditors have received anything at all."). Bankruptcy courts have also recognized the high failure rate. For an example, see *In re* Hobbs, No. 6:11–bk–19132–WJ, 2012 WL 1681981, at *3 (Bankr. C.D. Cal. 2012) (reporting that, within a

end of the spectrum.[78] The Supreme Court has observed the high failure rate in chapter 13. For example, in 2004, the Supreme Court reviewed the scholarship on the issue and noted the post-confirmation failure rate of near 60%.[79] In 2005, it is estimated that 59% of chapter 13 cases were dismissed.[80] The estimates vary, but the consensus drawn from empirical analysis is that most chapter 13 plans do in fact fail. One bankruptcy court has characterized the failure rate of chapter 13 cases as "abysmal."[81] The failure rate has been consistent over time—persisting for decades.[82]

Many chapter 13s fail because debtors are unable to make plan payments.[83] The inability to make plan payments typically stems from underlying reasons including unemployment, illness, or other reductions in income.[84] It has been suggested that the inability to make plan payments may also be based on "unrealistic plans that are doomed from the inception."[85] Regardless of the exact reason or reasons for the inability to make plan payments, it seems that if a debtor does not have the ability to

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single district, 97% of debtors "fail to make all payments required under the plans that they propose" and that in another single district 92% of chapter 13 cases fail); *In re* Solis, 356 B.R. 398, 413 (Bankr. S.D. Tex. 2006) (noting a 65% failure rate of chapter 13 cases nationwide) (citations omitted); *In re* Attanasio, 218 B.R. 180, 195 (Bankr. N.D. Ala. 1998) (recognizing the high failure rate of chapter 13 case in the context of a motion to dismiss a chapter 7 petition).

[78] In a dated single division study Professor Girth reported a 63.1%

success rate, or stated conversely a 37% failure rate. *See* Marjorie L. Girth, *The Role of Empirical Data in Developing Bankruptcy Legislation for Individuals*, 65 IND. L.J. 17, 40–42 (1989). One bankruptcy judge found that the success rate in its division within a district was 55%, or stated conversely a 45% failure rate. *See In re* Moore, 367 B.R. 721, 725 (Bankr. D. Kan. 2007) (reporting 55% of chapter 13 cases were closed upon completion within the district).

[79] *See*, *e.g.*, Till v. SCS Credit Corp., 541 U.S. 465, 493 n.1 (2004) (Scalia, J., dissenting) (estimating, at the lowest, a failure rate for chapter 13 cases of 37%) (citations omitted); *see also* Harris v. Viegelahn, 575 U.S. 510, 514 (2015) (observing that many debtors "fail to complete a Chapter 13 plan successfully") (citation omitted).

[80] *See* Timothy Layton, Frank McIntyre & Daniel Sullivan, *Did BAPCPA Deter the Wealthy? The 2005 Bankruptcy Reform's Effect on Filings Across the Income and Asset Distribution*, at *6 (Jan. 23, 2010), available at http://ssrn.com/abstract+1708119.

[81] *See* Brown v. Gore (*In re* Brown), 742 F.3d 1309, 1315 (11th Cir. 2014) (citation omitted).

[82] *See* Porter, *supra* note 77, at 113 (noting failure rate has persisted for over 30 years).

[83] *See* John Andreasen & Samuel Rabuck, *Water for the Plants: How Reserve Funds Keep Chapter 13 Plans Alive on Rainy Days and Benefit Unsecured Creditors*, 39 AM. BANKR. INST. J., February 2020, 18, 18 (noting that 66% of chapter 13 cases fail and that "[m]ost of these failures are due to nonpayment of monthly plans"); *see also* John Edward Pevy, *Few Things are Certain in Life, Even Less are Certain in Death and Bankruptcy*, 17 TENN. J. BUS. L. 309, 310 (2016) (referencing data collected in 2013 by the Bankruptcy Abuse Prevention and Consumer Protection Act Report revealed 90,000 cases, out of 300,000 filed, that were dismissed for failure to make plan payments); Rafael I. Pardo, *Reconceptualizing Present-Value Analysis in Consumer Bankruptcy*, 68 WASH. & LEE L. REV. 113, 142 n.136 (2011) (analyzing the data and calculating a 49% dismissal rate based on failure to make payments).

[84] *See* Joseph P. Corish & Michael J. Herbert, *The Debtor's Dilemma: Disposable Income as the Cost of Chapter 13 Discharge in Consumer Bankruptcy*, 47 LA. L. REV. 47, 64 n.80 (1986).

[85] STAFF OF NAT'L BANKR. REV. COMM'N, *supra* note 77, at 234.

save up funds for chapter 7 attorneys' fees pre-petition, the likelihood of making plan payments is quite low.[86]

The failure of a chapter 13 case has real consequences, particularly for a debtor. Granted, some debtors' cases may not be dismissed,[87] but may be converted to chapter 7[88] where the debtor will receive a discharge,[89] but other debtors are not as lucky. With dismissal, the debtor has no discharge of debts and may be left with more debt based on accruing interest during a chapter 13, and the debtor will have spent money for bankruptcy filing fees and attorneys' fees, all for naught.[90] The debtor may also have challenges in obtaining relief in future filings under statutory provisions that limit obtainability of the automatic stay in repeat filings.[91] Chapter 13 plan default is a waste of resources for debtors, creditors and the bankruptcy court system, all for the benefit of the attorney in a fee-only case.[92] In short, the failure to complete a chapter 13 plan likely leaves a debtor in the same financial quagmire—probably just exacerbated—the debtor was in prior to seeking chapter 13 relief.[93]

D. Techniques Employed to Address Chapter 7 Attorneys' Fees

1. Unbundling services and bifurcated fee agreements

One way bankruptcy attorneys address the problem with individuals' inability to fund the attorneys' fees upfront in chapter 7—and to avoid filing chapter 13 simply

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[86] *See* MARIANNE B. CULHANE, *No Forwarding Address: Losing Homes in Bankruptcy, in* BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 119, 123 (Katherine Porter ed., 2012); *see also In re* Brown, 742 F.3d at 1315 (observing that debtors in a fee-only chapter 13 have little incentive to make payments over the life of the plan) (citation omitted).

[87] *See* 11 U.S.C. § 1307(c) (2018) (providing for dismissal or conversion on request of a party in interest).

[88] The Code provides the debtor the right to convert a chapter 13 case to chapter 7 at any time. *Id.* § 1307(a). In 2005, it was estimated that 10% of chapter 13 cases were converted to chapter 7. *See* Layton *et al.*, *supra* note 80, at 6; *see also In re* Slaughter, 141 B.R. 661, 663 (Bankr. N.D. Ill. 1992) ("Chapter 13 debtors can choose, of right, between conversion or dismissal when a Chapter 13 fails."); *In re* Brown, 742 F.3d at 1316 (noting the statutory right of a debtor to convert or dismiss a chapter 13 case).

[89] *See* 11 U.S.C. § 727 (providing for the discharge of certain debts under chapter 7).

[90] STAFF OF NAT'L BANKR. REV. COMM'N, *supra* note 77, at 234–35.

[91] *See* 11 U.S.C. §§ 362(c)(3)–(4) (providing limitations on the availability automatic stay is successive filings).

[92] *See, e.g., In re* Jackson, No. 11-42528-JJR-13, 2012 WL 909782, *9 (Bankr. N.D. Ala. Mar. 16, 2012) (recognizing wasted resources of the debtor, such as time and expenses, involved in a dismissed fee-only case).

[93] Professor Porter provides the following portrait of debtors after a chapter 13 failure:

> Nearly all of the two in three families that file Chapter 13 and later drop out of their repayment plans do so in precarious financial straits. The majority of homeowners seem poised to lose their homes, and families are already experiencing an uptick in collection pressure. These families still owe their unsecured debts, and they are out of ideas and options. Some families may file another bankruptcy, some may simply avoid collectors for years, and some will simply tumble down the socioeconomic ladder, losing homes, cars, and their aspirations for middle-class prosperity.

Porter, *supra* note 77, at 162.

so that a debtor can pay legal fees—is by unbundling their bankruptcy services and using a bifurcated fee agreement.[94] Unbundling in this context means limiting or curtailing the scope of services to be provided in a routine chapter 7 case.[95] The limiting and unbundling of services theoretically permits the attorney to charge a lower fee for the limited services than the fee charged if the services in a routine chapter 7 case are not limited in scope.[96] The proposition of providing access to chapter 7 bankruptcy relief with a lower legal fee seems quite reasonable on its face. However, when the mechanics and details of unbundling in the consumer chapter 7 context are considered, it is problematic, even if purportedly done within the parameters of the Bankruptcy Code and rules of professional conduct.[97]

The difficulty with unbundling chapter 7 services is that in order for a debtor to achieve their main objectives—a chapter 7 discharge and the retention of exempt property—it requires representation in contested matters and adversary proceedings if they arise.[98] In light of these objectives, some courts have found that limiting the scope of services or unbundling cannot be ordinarily done because "[c]ompetent representation of a chapter 7 debtor requires that the attorney represent the debtor in all matters in the case that are necessary to the pursuit of the client's primary objectives . . . ."[99] The basic reasoning is that contested matters and adversary proceedings which impact the achievement of the client's primary objectives would not arise until after a case is filed, so that unbundling or limiting the scope of services on the front end is conceptually difficult to meaningfully do at the time the debtor retains the attorney. In this vein, some courts have found that, absent a court order permitting withdraw from a case, representation is required in all aspects of the case.[100] However, even these courts recognize that although an adversary proceeding may be a core obligation of an attorney, that service can be unbundled for additional fees provided applicable ethical rules are complied with.[101]

Other courts focus their analysis of the propriety of unbundling chapter 7 services on the adequacy of the consultation with the debtor, regarding unbundling as a key

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[94] *See* Herring, *supra* note 65, at 58 (noting one technique to address the problem is bifurcated fee arrangements). For an overview of such arrangements, see generally Daniel E. Garrison, *Liberating Debtors from 'Sweatbox' and Getting Attorneys Paid: Bifurcating Consumer Chapter 7 Engagements*, 37 AM. BANKR. INST. J. June 2018, 16, 66–68; Manke, *supra* note 23, at 11–14.

[95] *See* Manke, *supra* note 23, at 10.

[96] *See id.*

[97] *See generally In re* Brown, 631 B.R. 77, 91–103 (Bankr. S.D. Fla. 2021) (detailing the bankruptcy law, rules and ethical challenges surrounding such arrangements).

[98] *See In re* Egwim, 291 B.R. 559, 579 (Bankr. N.D. Ga. 2003) (noting the dual objectives and difficulty in limiting the scope of services).

[99] *Id.*

[100] *See id.* at 574 ("Unless and until a lawyer is permitted to withdraw from representation of the chapter 7 debtor, the lawyer is obligated . , , to represent the client in any matter filed in the Court or related to the bankruptcy representation.").

[101] *See id.* at 573; *see also In re* Seare, 493 B.R. 158, 187 (Bankr. D. Nev. 2013) (discussing unbundling adversary proceedings and highlighting that "several bankruptcy courts also have reached the conclusion that unbundling adversary proceedings is acceptable if the ethical rules are followed"), *aff'd*, *In re* Seare, 515 B.R. 599 (9th Cir. B.A.P. 2014).

inquiry as to whether bundling is permissible.[102] In practice, however, it is puzzling to conceive of the typical unsophisticated consumer debtor giving meaningful, informed consent in agreeing to unbundle and limit services because of the inability to predict the services that will be necessary to achieve the debtor's objectives.[103] It seems that it would be a rare case where informed consent would be of the nature in which unbundling of chapter 7 services would be permissible, outside of the imitations of adversary proceeding services.

2. Financing attorneys' fees and other approaches

In recent years, debtors' attorneys have begun to finance the attorney fee for filing chapter 7 through third parties—"factoring."[104] This approach effectively combines unbundling and bifurcated fee agreements with a post-petition financing agreement entered into post-petition by the debtor.[105] The attorney has an assignment agreement with the financing firm, giving the firm the right to collect the fee due from the debtor, and the attorney gets paid from the financing firm a discounted amount of the attorney fee from the debtor.[106] The debtor pays the financing firm post-petition under the agreement with automatic debits on a periodic basis.[107]

This raises the same issues that arise in unbundling arrangements, with the added wrinkle of the third-party financier. With the post-petition agreement entered into by the debtor and the assignment agreement between the attorney and the financing firm, the financier can collect the fees due post-petition, including suing and garnishing the debtor.[108] Moreover, this arrangement may cause the attorneys' fees for filing to be higher than other arrangements to take into account the lower payment the attorney will receive under the factoring agreement.[109] This may be, effectively, an undisclosed financing fee in exchange for the ability to make payments for the attorney fee post-petition.[110] These arrangements are also somewhat complex, which raises concerns about whether the debtor has a full understanding of the arrangement, financial costs, and potential post-petition collection efforts.[111]

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[102] *See In re* Slabbinck, 482 B.R. 576, 597 (Bankr. E.D. Mich. 2012).

[103] *See, e.g., In re* Castorena, 270 B.R. 504, 530 (Bankr. Idaho 2001) ("Proving competent, intelligent, informed and knowing consent of the debtor to waive or limit such services inherent to the engagement will be required.").

[104] *See* Herring *supra* note 65, at 58.

[105] *Id.* at 58–59.

[106] *Id.* at 59 ("The attorney then assigns the right to collect from the debtor under the post-petition agreement to the third-party finance company in exchange for a lump-sum discounted payment, perhaps 70% of the face value of the post-petition contract. Going forward, the finance company has the right to collect payments. . . .").

[107] *Id.* at 58–59.

[108] *See id.*

[109] *See id.*at 59.

[110] *See id.*

[111] *See id.*

Other approaches that have been employed include using post-dated checks to collect attorneys' fees post-petition. For example, in one such case, an attorney took fifteen post-dated checks for $100 each from a debtor for the attorney fee for a chapter 7 case.[112] After the petition was filed, the attorney would negotiate a check each month until all checks were negotiated.[113] Such an arrangement was not specifically disclosed in the bankruptcy or to the debtor.[114] This arrangement was designed to pay attorneys' fees post-petition.[115] A host of problems arise from this arrangement, including collecting a discharged pre-petition debt for the attorney fee,[116] improper disclosures,[117] and overreaching attorney conduct.[118] Bankruptcy courts have imposed sanctions, including disgorgement of all fees collected, for such arrangements.[119]

Other schemes with "extreme misconduct" have been advanced by attorneys to ensure payment.[120] For example, Upright Law would charge a flat attorneys' fee for chapter 7 representation, but engaged in a "repo scam" to pay the attorneys' fees.[121] If the debtor had an encumbered vehicle that the debtor planned to surrender, the debtor would agree to let a business partner take possession (tow) the vehicle and store it in another state.[122] Then, the business partner would notify the secured creditor that the vehicle was in storage and permit the creditor to pay loading, towing and storage fees to obtain possession.[123] If the creditor did not do so, the vehicle was sold at auction.[124] The business partner would pay the attorneys' fees from the profits of the vehicle auction.[125] The Upright Law "repo scam" is riddled with problems, including harming creditors and debtors by exposing debtors to potential civil and

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[112] *See In re* Davis, Nos. 13-40938-JRR, 13-42039-JRR, 2014 WL 3497587, at *1–2 (Bankr. N.D. Ala. 2014).

[113] *See id.* at *1.

[114] *See id*. at *2.

[115] *See id.* at *4.

[116] *See id.* at *5 (finding the act of negotiating each check post-petition after the debtors' discharge was a violation of the discharge injunction).

[117] *See id.* at *6–10.

[118] *See id.* at *14 (noting the conflict of interest and the post-petition check arrangements as a "slight-of-hand technique").

[119] *See, e.g., id.* at *12.

[120] Herring, *supra* note 65, at 58 (noting it was "extreme misconduct" when a national firm referred bankruptcy clients to a towing recovery that would pay the attorneys' fees to the law firm if the debtor transferred possession of the debtor's vehicle). For an overview of such types of conduct, see generally Roy M. Terry, Jr. & Elizabeth L. Gunn, *UpRight: A Cautionary Tale of a National Consumer Law Firm*, 37 AMER. BANKR. INST. J., July 2018 at 32–33, 63–64.

[121] Law Sols. of Chi. LLC v. Corbett, 971 F.3d 1299, 1307 n.4 (11th Cir. 2020).

[122] *See id.*

[123] *See id.*

[124] *See id.*

[125] *See id.*

criminal liabilities, as well as putting debtors' fresh start via a discharge at stake.[126] As such, several courts have imposed significant sanctions against Upright Law.[127]

III. CBRA AND ATTORNEYS' FEES

A. Basic Framework of CBRA

The current options for a typical consumer debtor seeking bankruptcy relief—chapter 7 or chapter 13—would be eliminated.[128] Chapter 13 would be repealed and chapter 7 would not be available for individual debtors.[129] Individual debtors with debts below $7.5 million would be eligible to seek relief under chapter 10—a single access portal for bankruptcy relief.[130] The current structure under the Code that permits a debtor choosing which chapter for relief is removed.[131]

Once the debtor files for chapter 10 relief, the debtor and estate property are protected under the automatic stay.[132] The debtor retains control of the debtor's property, has exemption rights in certain property, and attends a meeting of creditors.[133] Chapter 10, based on what is defined as a "minimum payment obligation,"[134] screens debtors between those that can pay and cannot pay back debts. The "minimum payment obligation" is based on both the debtor's future income[135] and nonexempt assets.[136] It provides the amount a debtor needs to pay in order to be entitled to a discharge in chapter 10.

The timing of the discharge in chapter 10 will vary depending on the "minimum payment obligation."[137] If the minimum payment obligation of a debtor is zero, the debtor can obtain a discharge shortly after filing the case.[138] If the debtor has a

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[126] *Id.*

[127] *See* Allen v. Fitzgerald, Nos. 7:18-cv-00134, 5:18-cv-00057, 2019 WL 6742996, at *10–11 (W.D. Va. July 31, 2018) (affirming monetary sanctions and practice ban for the car repossession scheme); U.S. Trustee v. Delafield, 57 F.4th 414, 416, 420 (4th Cir. 2023) (affirming imposition of monetary sanctions and revocation of filing privileges for a year for conduct associated with the car repossession scheme).

[128] *See* Levitin, *supra* note 7.

[129] *See id.*

[130] *See id.* Note, debtors above the debt limit, or those that wish for relief outside of chapter 10, can seek relief under chapter 11 or as a family farmer under chapter 12. *Id*.

[131] *See id.*

[132] *See id.*

[133] *See id.*

[134] CBRA § 104(a)(1)(O) (providing the definition and method for calculation the "minimum payment obligation").

[135] *See id.* (providing methodology to calculate income available for a "minimum payment obligation" which is rooted in the median family income, family size, and amount of excess income).

[136] *See id.* (providing calculation for debtor's interest in property considering exemptions).

[137] *See* Levitin, *supra* note 7.

[138] *See id*. (characterizing the timing of discharge as "immediately" when there is not a required repayment plan). The exact timing of the discharge is not statutorily set for debtors without a repayment plan, but the framework sets a relatively quick entry of discharge in such cases. *See, e.g.*, CBRA § 1031(a)(2) (providing

minimum payment obligation, the debtor must propose a repayment plan making that minimum payment over three years.[139] In such an instance, the debtor receives the discharge at the time of confirmation of the repayment plan.[140]

B. Attorneys' Fees under CBRA

With the single portal for filing, the choice between filing under chapters 7 and 13 is eliminated, as are any decisions related to chapter choice that are driven by paying attorneys' fees. CBRA makes several changes to approval and payment of attorneys' fees in chapter 10. First, the single portal modifies the current law regarding attorneys' fees in consumer cases and expressly provides for the allowance of compensation in chapter 10 cases.[141] This allowance will have an important result; the compensation will be an administrative expense, not subject to discharge, and can be paid from the bankruptcy estate. Second, CBRA provides a mechanism to pay attorneys' fees in chapter 10 over time,[142] at least for those debtors that are required to propose a repayment plan under chapter 10.[143] And, finally, CBRA has provisions that work to address some of the other problems associated with alternative techniques employed to pay attorneys' fees[144] that have the potential for overreaching by debtors' attorneys. Each aspect of the reform will be addressed in turn.

First, under the current statutory framework, there is no mechanism that expressly provides for payment of attorneys' fees in a chapter 7 case post-petition. However, in chapter 13, under section 330(a)(4)(B), the court has express authority to provide for reasonable attorneys' fees.[145] CBRA addresses this issue head on. Under CBRA and with the repeal of chapter 13, the reference to chapter 13 in section 330(a)(4)(B) is removed and replaced with a reference to chapter 10.[146] Section 330(a)(4)(B), as amended by CBRA, would provide as follows:

> In ~~a chapter 12 or chapter 13~~ *chapter 10* case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the

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for discharge upon the deadline for filing a repayment plan if no such repayment plan is required); 11 U.S.C. § 1121 (e)(1)(b) (the deadline for filing a repayment plan is not set by CBRA but will be provided for by the Judicial Conference in the bankruptcy rules).

[139] *See* Levitin, *supra* note 7.

[140] *See* CBRA § 1031(a)(1); *see also* Levitin, *supra* note 7.

[141] *See* CBRA § 104(o) (subsection amending Bankruptcy Code section 330(a)(4)(B), which currently allows compensation for chapter 13 attorneys, by removing the reference to chapter 13 and replacing it with chapter 10).

[142] *See* Levitin, *supra* note 7.

[143] *See* CBRA § 1024(6) ("Any compensation paid under the plan to the attorney of the debtor is reasonable and satisfies the requirements of section 329(c).").

[144] *See id.* § 104(n)(2).

[145] *See* 11 U.S.C. § 330(a)(4)(B) (2018).

[146] *See* CBRA § 104(o)(1)(A).

> benefit and necessity of such services to the debtor and the other factors set forth in this section.[147]

Therefore, under CBRA there is express statutory authority for the court to approve reasonable attorneys' fees for cases filed under chapter 10.

This is important because compensation under section 330(a)(4)(B) is treated as an administrative expense under the Bankruptcy Code.[148] As an administrative expense, such compensation is a priority claim[149] and can be paid from the bankruptcy estate as any other administrative expense, just as current chapter 12 and chapter 13 attorneys' fees are.[150]

The approval of compensation under section 330(a) leads to another important legal outcome. Such compensation would not be subject to a discharge. The discharge under chapter 10, as under current law in chapter 7,[151] pertains to pre-petition debts.[152] The court approval of an obligation to pay compensation post-petition would fall outside the discharge provisions.

Second, CBRA provides such approved compensation under section 330(a)(4)(B) can be paid over time from the bankruptcy estate through a plan, if a case has a plan.[153] This is akin to the treatment of attorneys' fees under current chapter 13.[154] Thus, in the context of a chapter 10 plan, allowance of compensation likely will occur when the court approves the plan, as under the current chapter 13 procedure.

Third, outside of an approved plan, the allowance of compensation is certainly contemplated by the CBRA, but there is a lack of clarity in the statutory framework. Compensation can be "allowed" provided the requirements of new subsection (c) of section 329 are satisfied.[155] Section 329 currently requires disclosure of fees in chapter 7 (and other chapters)[156] with the opportunity for the court to examine and modify the fee,[157] but normally no action is taken by the court in most cases. New subsection (c) provides that "no compensation shall be allowed" absent meeting certain conditions in the statute.[158] A potential gap in the CBRA framework is that it

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[147] *See* 11 U.S.C. § 330(a)(4)(B); *see also* CBRA § 104(o)(1)(A).

[148] *See* 11 U.S.C. § 503(b)(2) (expressly providing that compensation and expenses awarded under section 330(a) are administrative expenses).

[149] *See id.* § 507(a)(2) (providing that section 503(b)(2) administrative expenses, including compensation under § 330(a), are afforded priority treatment).

[150] *See id*. § 330(a)(4)(B).

[151] *See id.* § 727(b).

[152] CBRA § 1031(c) ("[A] discharge . . . discharges the debtor from all debts that arose before the date of the order for relief . . . . ").

[153] *See id.* § 1025(c)(2) (providing the trustee must first pay priority claims under section 507, including administrative expenses, before making a payment under a repayment plan).

[154] *See* 11 U.S.C. § 1326(b)(1).

[155] *See* CBRA § 104(n)(2) (adding new subsection (c) to section 329).

[156] 11 U.S.C. § 329(a).

[157] *Id.* § 329(b).

[158] CBRA § 104(n)(2).

does not expressly require court approval or action regarding compensation disclosure under section 329(c).

An attorney could seek compensation by filing a fee application under section 330(a), which is subject to section 329(c), and the court will be able to allow or disallow the compensation request.[159] However, it seems that in the vast majority of chapter 10 cases there will be no repayment plan, and in such cases, there will likely be no estate property to pay attorneys' fees. Therefore, there would be no reason to file a fee application under section 330(a). In such cases, by local rule or administrative order, bankruptcy courts can implement the intent behind section 329(c) and provide that compensation disclosed in accordance with section 329(c) is allowed absent an objection. This likely would be the vast majority of chapter 10 cases.

It will be imperative that the process is simple and streamlined to avoid a bureaucratic hurdle in the process, increasing costs in terms of money and time for debtors and the bankruptcy courts. Bankruptcy courts have been creative in streamlining, approving, and paying attorneys' fees in chapter 13 with local orders and rules. Similar local orders and rules can be implemented for chapter 10. Attorneys would simply file the proper disclosures and without a specific order in the case, the payment under the terms and conditions of the disclosure would be allowed by the bankruptcy court. Such allowance could specify allowance of such fees under section 330(a), so that they are treated as administrative expenses, not subject to discharge, permitting payment of the attorneys' fees under the terms and conditions in the disclosure.[160]

Fourth, CBRA provides important statutory safeguards in place to address the potential for overreaching by attorneys as seen currently in consumer bankruptcy practice, such as financing attorneys' fees, post-dated check arrangements and other questionable transactions.[161] Beyond disclosing the terms of compensation and exact scope of services,[162] CBRA prohibits fees or charges for delays or the risk associated with payment of compensation.[163] Moreover, CBRA prohibits factoring and financing arrangements of attorneys' fees.[164] And, finally, pre-dispute arbitration

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[159] *See* 11 U.S.C. § 330(a) (providing for an award of compensation, subject to the requirements of section 329).

[160] *See supra* notes 147–150 and accompanying text (outlining the legal ramifications of a compensation award under section 330(a)).

[161] *See supra* notes 94–126 and accompanying text (explaining various practices of attorney fee overreaching).

[162] *See* CBRA § 104(n)(2) (providing detailed disclosures in new §§ 329(c)(1)(A)–(C)).

[163] *See id.* § 104(n)(2). New section 329(c)(1)(D) provides that the agreement for compensation cannot "provide for the payment of interest or any additional fees based on delay in payment or risk of nonpayment or for costs of collection on installment payments." *Id.*

[164] *See id.* § 104(n)(2). New section 329(d) provides "any assignment, factoring, or transfer of rights or amounts, or of rights or authority to collect any such amounts, due under an agreement between the debtor and the debtor's attorney is void." *Id.*

agreements regarding attorneys' fees are prohibited,[165] and the bankruptcy court has exclusive jurisdiction over any disputes under the fee agreement, whether the bankruptcy case is open or closed.[166]

These provisions address current problematic scenarios that have arisen in the compensation arena around chapter 7. It should help limit overreaching by attorneys on consumer debtors. Certainly, other issues or compensation arrangements not considered here will arise in the future. The exclusive jurisdiction of the bankruptcy court provides the ability of the courts to address issues that may arise in the future that fall outside the exact parameters of the current statutory framework. Bankruptcy court judges, as experts on compensation issues, are uniquely situated to consider future compensation arrangements that evolve to ensure a level playing field between attorneys and consumer debtors.

IV. NEEDED STATUTORY REFORMS

The mechanics of ensuring payment of debtors' attorneys under chapter 10, as outlined above, are quite intricate and complex.[167] The complexity arises from creating a single chapter of relief to encompass both repayment plans and cases without such plans. Under current law, chapter 13 provides adequate mechanisms for payment of attorneys' fees.[168] The shortcomings of current law in paying debtors' attorneys arise in chapter 7. Improvements need to be made that enhance the ability to pay attorneys in chapter 7 cases and ensure such payments are reasonable, without overreaching by attorneys. Targeted reforms to chapter 7 pertaining to attorneys' fees can be made without the level of complexity proposed in CBRA for chapter 10. However, CBRA provides a roadmap for targeted reforms to help enhance payment of attorneys in chapter 7 and provide safeguards to protect debtors.[169]

A. Provide for Allowance of Debtors' Attorneys' Fees

First, the Bankruptcy Code should expressly provide for payment of attorneys' fees in a chapter 7 case post-petition. This can be easily accomplished by adding "chapter 7" to the current statutory framework permitting compensation to debtors' attorneys in chapter 12 and chapter 13. Section 330(a)(4)(B) should be amended as follows:

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[165] *See id.* § 104(n)(2). New section 329(c)(1)(E) prohibits the allowance of compensation if the agreement includes "a pre-dispute arbitration agreement or a pre-dispute joint-action waiver with respect to any dispute under the agreement." *Id.*

[166] *See id.* § 104(n)(2). New section 329(e) provides that "[t]he bankruptcy court . . . shall have exclusive jurisdiction over any disputes under an agreement that is subject to this section, whether or not the case has been closed." *Id.*

[167] *See supra* Part III.B.

[168] *See* 11 U.S.C. § 330(a)(4)(B).

[169] *See* CBRA § 104(o).

> In a *chapter 7,* chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.[170]

Compensation allowed under section 330(a) will be an administrative expense, payable from the estate, and not subject to discharge.[171] In most chapter 7 cases there are no assets available to pay attorneys' fees as an administrative expense from the estate. Thus, there would be no payment from the estate for chapter 7 attorneys' fees. This is in contrast to chapter 12 and chapter 13, where there will be an "allowance" in the context of the plan of reorganization and payment from the estate under the plan. With most chapter 7 cases having no estate assets, i.e. no asset cases, there is no comparable opportunity for allowance of attorneys' fees in chapter 7.

The allowance of reasonable compensation in a chapter 7 case under the proposed section 330(a) is not limited to payment from the estate; thus, it would not prohibit payment from non-estate property. Chapter 7 needs to provide for not only allowance of compensation as this amendment would do, but also the allowance of the terms and source of compensation—an agreement to pay the debtor's attorney—whether it be from the estate or non-estate property.

B. Provide for Allowance and Approval of Compensation Agreement

In most chapter 7 cases, the bankruptcy process functions in a largely administrative fashion without direct court intervention outside of a specific dispute. Beyond allowing compensation to chapter 7 debtors' attorneys by amending section 330(a)(4)(B), as outlined above,[172] the Bankruptcy Code needs a mechanism that allows the terms and source of compensation post-petition, whether payment is from the estate or non-estate property. This allowance needs to be done without requiring action from the bankruptcy court, absent an objection. Otherwise, the efficient and administrative nature of the chapter 7 process will be lost. Moreover, bankruptcy courts do not have the resources to individually review and allow or approve attorneys' fees in all chapter 7 cases.

The allowance and approval of compensation agreements in chapter 7 can be accomplished with several reforms. First, a new subsection of section 330 following amended section 330(a)(4)(B), is needed. This proposed reform expressly would allow post-petition payments reflected in an agreement for compensation with certain

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[170] 11 U.S.C. § 330(a)(4)(B).
[171] *See supra* notes 147–150 and accompanying text.
[172] *See supra* notes 170–171 and accompanying text.

safeguards to avoid overreaching. Proposed section 330(a)(4)(C) would provide as follows:

> (C) In a chapter 7 case in which the debtor is an individual, the court may allow reasonable compensation, including, but not limited to post-petition installment payments, reflected in an agreement for compensation between the debtor and the debtor's attorney. The court shall not allow compensation under subsection (B) for-
>
> (i) the payment of interest or any additional fees based on delay in payment or risk of nonpayment or for costs of collection on installment payments;
>
> (ii) any agreement for compensation between the debtor and debtor's attorney that provides for assignment, factoring, or transfer of rights or amounts, or of rights or authority to collect any such amounts, due under an agreement between the debtor and the debtor's attorney; or
>
> (iii) any agreement between the debtor and the debtor's attorney providing for compensation unless the agreement –
>
> (I) was made not more than 90 days before the date of the filing of the petition;
>
> (II) specifies the services provided or to be provided by the debtor's attorney and the attorney's related fees and expenses; and,
>
> (III) provides that the debtor will not be requested to pay or be liable for any amounts other than attorneys' fees and expenses specified in the agreement; for any adversary proceeding in which the debtor is a party; or for services required by the debtor or the court that the attorney should not have reasonably anticipated at the time of the agreement.

To implement this provision and ensure compliance with the provisions thereof, an additional subsection is necessary. This proposed reform would place the burden on the debtor's attorney to certify compliance with the statutory framework and ensure the debtor has been fully informed of the terms of the compensation agreement. Proposed section 330(a)(4)(D) would provide as follows:

> (D) In a chapter 7 case in which the debtor is an individual, the debtor's attorney shall file a certification, in accordance with rule 9011 of the Federal Rules of Bankruptcy Procedure, with respect to the agreement between the debtor and debtor's attorney providing for compensation that -

> (i) the attorney has discussed with the debtor the attorney's fees and expenses under the agreement, and, after full disclosure, the debtor consents to the filing of the certification;
> (ii) that the requirements of subsection (C) in this section are satisfied; and
> (iii) that the enforcement of the agreement would not impose an undue hardship on the debtor or the debtor's dependents.

The mechanics of filing the certification can be handled by amending the disclosure form that chapter 7 debtors' attorneys currently file. Under the Bankruptcy Code, debtors' attorneys file a Disclosure of Compensation of Attorney for Debtor[173] reflecting the disclosures required by section 329(a) and Federal Rule of Bankruptcy Procedure 2016.[174] This disclosure can be amended to add the additional information and the requisite certification required by the proposed statutory amendments to section 330(a)(4). This will not add significant additional work on the part of debtors' attorneys as a disclosure is already required.

Thus far, the statutory proposals outlined above provide for allowance of compensation by bankruptcy courts. A mechanism for such allowance is needed. The actual allowance of compensation by a bankruptcy court can be accomplished by local administrative order by a particular bankruptcy court. For example, a local administrative order can provide for allowance of reasonable compensation allowed under section 330(a)(4)(B)–(C), with proper disclosure under section 329(a) and Federal Rule of Bankruptcy Procedure 2016(a), after notice and opportunity for objection by parties in interest. Allowing bankruptcy courts to decide on the exact mechanics of allowance permits the courts to adopt procedures that are consistent with the local legal culture. Some bankruptcy courts may provide more specific parameters for the allowance and approval of fees, such as a flat fee cap with opportunity to seek higher fees with a detailed fee application. Other courts may take a more hands-off approach allowing the debtor and debtor's attorney to agree to compensation terms, provided they are consistent with the statutory requirements and no party in interest objects. And, importantly, this flexibility will allow courts to adapt to changes in the way attorneys seek compensation.

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[173] *See* Form B2030, Disclosure of Compensation of Attorney for Debtor, https://www.uscourts.gov/forms/bankruptcy-forms/disclosure-compensation-attorney-debtor-0.

[174] *See* 11 U.S.C. § 329(a) (stating that a debtor's attorney must file a statement of compensation with the court); FED. R. BANKR. P. 2016 (requiring compensation for services rendered and reimbursement of expenses).

C. Provide for Nondischargeability of Allowed Chapter 7 Attorneys' Fees

A final statutory reform is needed to address an important issue. The default statutory law is that the chapter 7 discharge applies to pre-petition obligations.[175] Therefore, pre-petition attorney compensation agreements between the debtor and debtor's attorney would be subject to discharge, just as they are now. To avoid this result, the following statutory exception should be added to section 523:

> (a) A discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
> . . .
> (20) for reasonable compensation allowed under section 330(a)(4)(B)–(E).

CONCLUSION

The proposed incremental reforms will provide meaningful benefits to the bankruptcy process and the panoply of players in the bankruptcy system. Chapter 7 will function better with a clear and transparent way to allow attorneys reasonable compensation for representing debtors. It will help relieve the pressure of attorneys to find ways to provide representation through unbundling, filing chapter 13 with little chance for success and other alternative approaches used by attorneys to get compensation post-petition in a chapter 7 case. Without that pressure, the focus can be on providing the services the attorney is retained for. Debtors will have an avenue to pay the attorney post-petition that is allowed under the Bankruptcy Code. Hopefully, this will enhance the ability of the debtor to afford the bankruptcy system and obtain a fresh start. Bankruptcy judges and the court system will not have to devote as many resources to ferret out and sanction overreaching attorneys pushing the ethical boundaries to ensure payment.

Implementing these reforms is not a panacea to the access-to-justice issues a consumer debtor faces. However, it can address one important barrier—an economic barrier raised by challenges in paying an attorney. With that barrier lowered, the door can be opened to the bankruptcy system for more individuals. Those individuals will at least have a shot at obtaining a fresh start.

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[175] *See* 11 U.S.C. § 727(b) (discharge applies for debts arising prior to filing the petition).