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CONSUMER BANKRUPTCY IN THE BALANCE: THE NATIONAL BANKRUPTCY REVIEW COMMISSION'S RECOMMENDATIONS TILT TOWARD CREDITORS

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Introduction

The consumer credit industry began to criticize the National Bankruptcy's Review Commission's recommendations on consumer bankruptcy even before they were issued. [1] Apparently, this was a strategic move, because the Commission's recommendations, when evaluated objectively, strongly favor creditors' interests. If anything, the recommendations go too far and disturb the balance in the present Bankruptcy Code to favor creditors.

The Bankruptcy Review Commission heard from hundreds of witnesses on consumer bankruptcy over the course of its work. [2] A substantial majority of those witnesses were representatives of the consumer credit industry. [3] Many others were trustees, neutral academics, and judges. Advocates for consumer debtors were largely relegated to a two hour block of time during one Commission session¾ a period during which the Commissioner who most closely identified with creditor interests left the room. [4]

Even with this imbalance in testimony, very little evidence of consumer abuse of the Bankruptcy Code, beyond the anecdotal, was presented. [5] The one study which suggested that some debtors in chapter 7 have the ability to pay their debts was exposed as fundamentally flawed. [6] The study neglected to account for a debtor's need to make ongoing payments on car loans and other nondischargeable debts irrespective of the bankruptcy. [7] When this issue was raised and supporting raw data was requested by neutral academics who wished to review the industry−funded study, that data request was persistently ignored. [8] Consequently, its results should be discarded. [9]

Despite a lack of evidence of abuse, the Commission's recommendations appear to bend over backwards to accommodate the views of the credit industry. In fact, the Commission would go substantially further in favor of creditors, in many instances, than proposals for reform which were negotiated between credit industry representatives and consumer bankruptcy lawyers during sessions sponsored by the American Bankruptcy Institute. [10]

In September of 1997, [11] the credit industry attempted to preempt discussion about the Commission's recommendations by having Representatives McCollum and Boucher introduce a bill to overhaul the consumer bankruptcy system in unprecedented ways. [12] The bill appears to be designed to restructure the consumer bankruptcy system to have it function like a government−funded collection agency. [13] In addition, the bill would provide more leverage to creditors by allowing a wide variety of motions, which could make it impossible for low−income debtors to afford litigation expenses. [14] Ironically, these changes would impact much more heavily on low−income debtors, than on the higher income debtors who can afford representation on the wide range of new issues which would need to be addressed. [15] Particularly affected would be families in chapter 13 who need to focus all of their resources on saving a home. [16] New litigation costs and rules requiring large fixed payments to unsecured creditors will doom or undermine already overloaded budgets.

The credit industry's timing in pushing their wish list forward seems deliberately designed to set their proposals as one pole of the discussion with the Commission Report at the other pole. Decision−makers are being asked to assume that the Commission adopted the consumer side on most issues. [17]

The reality, however, is that the Commission's consumer recommendations are already largely pro−creditor. [18] In fact, the Commission ignored a variety of needs on the consumer side which would have been designed to address creditor abuses of the current bankruptcy system as well as imbalances in the law favoring creditors. [19]

In evaluating the Commission's consumer bankruptcy recommendations, this article will follow the division of issues used in the Commission report. Where appropriate, existing legislative proposals will also be addressed. Finally, consumer proposals for reform which have not yet been highlighted in the debate will be put forth.

The Commission Report is not a debtor friendly document and on many issues should not even be seen as a reasonable middle ground. Nevertheless, given the time and effort which went into the report and the Commission's assignment from Congress, [20] the credit industry's attempt to characterize the report as an inappropriate "starting point for discussion" [21] is an indication of how far the industry believes the process in Congress will be tilted towards its interests. Hopefully, Congress will see this aggressive lobbying approach for what it is¾ creditor overreaching.

I. National Filing System

The Commission recommended that Congress establish a national database to identify bankruptcy filers and ultimately to make information available about the status of those filings. [22] Presumably, such a system is necessary to deny relief to debtors who seek to refile [23] and for the use of future creditors who are considering lending to the debtor. [24]

Creditors maintain that they do not have adequate access to this information under the existing private credit reporting system. In reality, however, almost all bankruptcy information makes it into the private system, largely because creditors who receive notice of a bankruptcy report that information to the reporting agencies. [25] In addition, the credit reporting agencies obtain information directly from bankruptcy filing records.

The private system for credit reporting has not been without errors. [26] In many cases, those errors have significant impact on the future credit standing of consumer borrowers. These errors occur despite broad provisions under the Fair Credit Reporting Act (FCRA) which provide for consumer initiated reinvestigation and correction of errors [27] as well as for an enforcement system designed to encourage accurate reporting. [28] In addition, consumers are protected, to some extent, by provisions which limit the purposes for which the information can be used. [29]

A national filing system for bankruptcy information seems likely to generate similar high levels of error without the corresponding consumer protections. [30] For this reason, perhaps expanded use of the private reporting system to include appropriate bankruptcy information is preferable to creating a stand alone system. At least, in that model, consumer protections would be available.

If the advantages to creditors in a national data base are thought to outweigh the potential for harm to debtors, consumer protections are necessary. [31] Although it may be easy to design a system which provides reasonably accurate information about filings, it will be very hard to include information about case outcomes, if that is contemplated. For example, information about the percentage of debts repaid under a chapter 13 plan requires calculations be made at the end of the case. Errors would be likely. [32] Similarly, other information on outcomes is subject to mistakes. Cases are dismissed and then reopened. [33] Others involve discharges which are subsequently revoked. [34] Whomever has handled a case for a debtor knows that clerks are fallible and sometimes record orders in the wrong docket and otherwise make errors which will affect reporting to the database. [35]

At a minimum, a national database should require that reported information be supplied to the consumer and an attorney of record for correction. [36] An enforceable correction of errors mechanism, similar to the protections under the Fair Credit Reporting Act, is also required.

Moreover, while it is easy to argue that debtors who use the bankruptcy system invite public scrutiny of their finances, is it true to say that there is no legitimate expectation of privacy, whatsoever, associated with filing? Certainly, vindictive or other abusive use of bankruptcy filing information should be controlled. [37] For example, limitations on republication would be appropriate. [38]

Last, of course, policy makers must consider whether there are resources available to pay the costs of this new system. New user fees will drive up the cost of the bankruptcy system for people who are already struggling to afford access. There is little evidence of a problem in this area or of public benefit which would justify a new burden on taxpayers.

II. Audits

The crux of the Commission's Report concerning accurate information is a recommendation for random audits to verify the accuracy of information reported to the court. [39] The concept of audits appears to have its roots in audits conducted by the Internal Revenue Service to review taxpayer filings.

Again, this is a recommendation designed to protect creditors perhaps based on an inaccurate belief about fraud in the system. Audits would supplement Rule 9011, [40] objections to discharge, [41] complaints to determine dischargeability, [42] good faith requirements, [43] Rule 2004 examinations, [44] creditor's meetings, [45] dismissals for substantial abuse, [46] and criminal sanctions [47] as tools to root out fraud. [48] This is in contrast to the Internal Revenue Service which uses audits, and the fear of discovered fraud, as its primary fraud prevention tool. [49]

In addition to numerous existing fact finding tools and processes for rooting out abusive cases, three other factors make dishonesty in bankruptcy comparatively unlikely. First, bankruptcy schedules and financial information are public documents (unlike tax returns) which are subject to potentially broad evaluation. [50] The public nature of significant misrepresentations is a strong deterrent to dishonest disclosure. [51] Second, debtors and their attorneys know that a trustee has responsibility to evaluate every case, with fiduciary duties to creditors. [52] Third, most bankruptcy debtors have attorneys (unlike most taxpayers). [53] An attorney's ethical obligations and perhaps fear of disbarment makes it unlikely that a case involving an attorney will knowingly be fraudulent. [54]

These existing protections illuminate the reasons why there was little or no evidence of fraud, beyond the anecdotal, presented to the Review Commission. No evidence of fraud, at all, was presented by neutral parties such as judges and academics, and not even the trustees who testified raised fraud as an issue.

Bankruptcy audits will be very expensive. Unlike IRS audits which involve review of income and a limited number of expenses giving rise to deductions, bankruptcy audits will require evaluation of income, expenses, debts, and assets, as well as of property transfers and unexplained losses.

The typical consumer debtor, unlike most businesses, has sketchy records, incomplete income verifications going back more than a few months, and minimal records of expenses. [55] Values of small items of personal property are particularly difficult to substantiate; [56] this is not because debtors are committing fraud, but rather because standards for consumer record−keeping are low. [57] There is simply no reason for most consumers to keep proof of the amount of their utility payments or to get a receipt when they give a VCR to a favorite aunt for her birthday.

Moreover, the legitimate expectations of most debtors are different from those who are audited by the IRS. Taxpayers know that they may be audited in the future so they keep records to substantiate their income and deductions. Bankruptcy debtors don't necessarily know very far in advance that they will file bankruptcy or what information will be required to do so. [58] They are unlikely to keep records beyond their memory about many of the issues which are going to be investigated in a bankruptcy audit. [59]

Bankruptcy audits are also likely to be time consuming. [60] Because they will be complicated, the debtor and his or her attorney will need to prepare and to participate in the audit process over a period of many hours. In many cases debtors have precarious jobs, [61] and will lose employment income at hourly rates or will endanger their jobs by needing to take time off. [62]

Bankruptcy debtors tend to be poor, making payment of attorney fees difficult. If preparation for an audit and participating in the audit process takes 5 hours, few debtors will be able to afford the additional attorneys' fee. [63] In chapter 13, which requires that all disposable income be paid to unsecured creditors for the duration of the plan, [64] payment for an attorney for the audit process will be impossible without a substantial modification to the plan. [65]

Attorneys will be faced with a dilemma. Since the debtor’s expectation is likely to be that their attorney will help them prepare for an audit, (as it is now for tax accountants), an attorney will need to build a fee structure to cover potential audits. Since the audited debtor is unlikely to be able to pay the full cost of an audit, fee spreading is likely to be the norm; a general increase in attorneys fees is the likely result.

If bankruptcy attorneys fees increase, as they almost certainly will, the poorer consumer is likely to be kept out of the system entirely. [66] Ironically, it is these consumers who are most likely to be legitimately in need, as opposed to higher income debtors who can afford higher up front fees. [67]

Bankruptcy audits will also increase the expense of maintaining the bankruptcy courts and will require an expanded bureaucracy. [68] The bankruptcy system will require substantial new funding to cover the cost of audits; it is unclear where a source of new funding can be found. [69]

Finally, it is clear that audit procedures have worked imperfectly at the Internal Revenue Service and have generated a substantial number of complaints from taxpayers. [70] There is no evidence that bankruptcy audits will have benefits commensurate with tax audits in order to justify these problems, particularly at public expense. At least, however, taxpayer audits benefit the public by collection of money for public purposes. Even if the tenuous connection between audits and increased receipts were clear, collection of monies for unsecured creditors is less worthy of public expense. [71]

III. Sanctions for False Claims

On the other side of the ledger, the Commission's recommendation for sanctions against creditors who file false claims is a step in the right direction. Some in the credit industry have long used the bankruptcy process to file padded and sometimes downright fraudulent claims. [72] Consumers generally cannot afford to litigate about the amount of claims, because the amount of the error is less than the amount of the potential attorney fees.

However, this provision, like many of the Commission's recommendations is more of a boon to unsecured creditors than it is to debtors. In chapter 7, as currently structured, the amount of an inflated claim is irrelevant, because few cases pay out 100 cents on the dollar. If the case is paying less than 100% of filed claims, a reduction in one claim serves only to increase the payout to others. This has no benefit to the debtor. Thus, for chapter 7, this recommendation runs to the benefit of chapter 7 trustees and honest unsecured creditors.

In chapter 13, it will be somewhat more common for debtors to benefit from reduction of other claims, but only slightly. If a claim is reduced in chapter 13, only unsecured creditors will benefit in most cases, because if debtors can reduce an obligation to one creditor, their obligation to pay other creditors increases based on the disposable income test. [73]

Creditor abuses of the bankruptcy process have received increasing attention in the last few years. [74] The Commission's recommendations for enhanced sanctions are insufficient to bring these problems under control, because creditors have significant economic leverage based on their financial ability to litigate contested matters and adversary proceedings¾ they have financial resources which consumers are not able to match. Back end awards tied to the "unreasonableness" of the creditor's position are insufficient to meet the problem, because consumer debtor lawyers can neither afford to front litigation expenses based on an uncertain recovery, nor resist the pressure to compromise fees in the settlement process. In addition, of numerous creditor litigation abuses, the Commission Report addresses only the filing of false claims. Other abuses, including litigation brought to obtain leverage against the debtor, are not confronted.

A more thorough and well−reasoned approach to sanctions has been proposed in Title II of S. 1301. [75] Those provisions awards attorneys fees and costs to debtors who prevail in most types of bankruptcy litigation and ties sanctions to the reasonableness of the creditor's position. [76] Creditors have little reason to object to this approach, since they are protected for their fees when they prevail by the terms contained in most consumer contracts. [77]

IV. Exemptions

The Commission's recommendations on exemptions, with one exception, are unremarkable and should not be controversial. There would be little substantive change to the total amount of exemptions available. The sole exception, [78] however, is designed to advantage creditors, by substantially reducing the exemptions available to married couples who own their residence. This change is illogical, would penalize families and would create perverse incentives which would lead to inefficiencies in the system.

In essence, four changes are recommended. Three are intended to rationalize exemption policy, rather than change the underlying allocations between debtors and creditors. Ultimately, neither creditors, nor debtors are favored by these recommendations.

One recommendation would, for the first time, put a cap and floor on state law homestead exemptions available in bankruptcy. [79] The trade−off here is that a few states, notably Florida, Texas, and Kansas provide for unlimited potential homestead exemptions, [80] while other states like Rhode Island and Delaware provide for none. By setting a floor of $20,000 and a cap of $100,000, the proposal addresses a hardship for creditors of debtors living in states with high homesteads and an impediment for debtors who wish to file in states with lower homesteads. [81]

If anything, this proposal would enhance total creditor recoveries. Termination of unlimited homesteads, where they are available, will increase receipts to creditors since very well off individuals will not be able to shield huge amounts of assets in the form of home equity. [82] These large recoveries seem likely to be far greater than any losses associated with being unable to sell the homes of debtors who have less than $20,000 of home equity in those states with limited homestead exemptions. [83]

A second recommendation would make the revised federal exemptions available to all debtors. [84] Again, this simply rationalizes the exemption policy rather than change it in either direction. It levels the playing field by making the same exemptions available as an option for debtors across the country. [85] There are few states in which the result will be a large substantive change in the amount of exemptible property. [86]

The third proposed change would equalize the amount of exemptible property for debtors, by making the personal property exemptions available in a lump sum. [87] This change would correct the anomaly in current law under which some debtors get to keep additional property because they have accidentally or deliberately accumulated property in exemptible forms, [88] while others, equally needy, lose property of the same value because their choices about what to accumulate have involved non−exempt property. [89] Like the first two recommendations, this would change the random justice that the existing scheme provides by leveling the playing field for debtors without changing substantive recoveries for creditors. [90] As the Commission notes, the total amount of the available exemptions would actually go down. [91]

The fourth recommendation, however, would inappropriately disadvantage married couples who co−own their homes. If unmarried people own property jointly, they would each be entitled to a separate exemption which protects their interest in property. Each could file bankruptcy, their fractional interest in the property would come into their estate and the full amount of their homestead would apply. However, under the Commission proposal, when married people file jointly such that both of their interests in the property come into the estate, only one exemption would be available. [92]

This provision would change current law, [93] reduce the currently available federal homestead exemption, [94] and would serve as a "marriage" penalty. It would also serve to increase the number of bankruptcy filings because properly advised married couples with equity in property exceeding the amount of a single exemption would be advised to file separately. [95] Separate filings would be expensive and inefficient. [96] Poorly advised married couples who file together (or those who have an inaccurately low opinion of the value of their property) would be disadvantaged over their outcome under current law and family homes would inevitably be lost.

Ultimately, the cornerstone of bankruptcy policy is the fresh start, [97] and households that use the bankruptcy system need homes, cars, personal property and retirement resources to manage their lives after bankruptcy. [98] The Commission's recommendations do little to enhance the amount of available exemptions and do not favor debtors. [99] In some key respects they disadvantage debtors substantially. To the extent the Commission's recommendations rationalize exemption policy, they should be carefully considered by Congress. To the extent they undermine the fresh start, penalize families, or trap the unwary, they should be rejected outright.

V. Reaffirmation and Treatment of Secured Debt in Chapter 7

Reaffirmation agreements have recently become the focus of attention. [100] Consumers have been pressed aggressively by creditors, often by means which have been found to be illegal, for agreements which reinstate liability for a discharged or dischargeable debt. [101] This is perhaps the only area of the Commission Report which is alert to a real problem for debtors—a problem which has seriously undermined many debtors' fresh start.

A primary concern is aggressive pursuit of questionable security interests in valueless personal property by retailers seeking reaffirmation. [102] The other major problem is the growth of doubtful non−dischargeability proceedings to obtain leverage against low and moderate−income debtors who cannot afford to defend these claims. [103]

In 1977, Congress found:

> Most often in a consumer case, a secured creditor has a security interest in property that is virtually worthless to anyone but the debtor. The creditor obtains a security interest in . . . the debtor's furniture, clothes, cooking utensils, and other personal effects. These items have little or no resale value. They do, however, have a high replacement cost. The mere threat of repossession operates as pressure on the debtor to pay the secured creditor more than he would receive were he actually to repossess and sell the goods. [104]

The same problem is still prevalent twenty years later. Some retail chains use obscure provisions that are buried in the boiler plate language of their credit agreements and charge slips to assert security interests in items bought with credit cards. [105] Consumers are unaware of the existence of those interests and the retail chains claim the interests even though they encourage their customers to buy gifts and other disposable items on credit. [106] No meaningful collateralization is intended.

When consumers file bankruptcy, these claimed security interests surface for the first time, often with threats of civil or criminal prosecution for conversion of collateral. [107] The retailer thus obtains leverage for reaffirmation even though it has no resale market for (and possibly no real intention to repossess) the essentially worthless items in the hands of the consumer. [108]

The problem of bad faith non−dischargeability actions has also reemerged. As creditors have learned that most consumers cannot afford to pay their lawyers to defend nondischargeability actions, these claims have become a tactical maneuver by creditors. [109] A claim made on the thinnest of facts concerning the debtor's ability to pay a credit card debt when incurred is now frequently traded for a reaffirmation agreement. [110] The fee shifting provision in section 523(d) has been inadequate to address this problem because courts are reluctant to award these fees [111] and because bankruptcy lawyers cannot afford to fund non−dischargeability litigation based on the uncertain return of fees at the end of the case. [112]

Enacting the Commission's recommendations would go part of the way toward fixing the problem without hurting the legitimate economic interests of creditors. The proposals would eliminate reaffirmation agreements on unsecured debts. [113] Unsecured reaffirmation agreements serve no legitimate purpose commensurate with the cost to the system of the loss of debtors' fresh starts. Reaffirmation is not necessary to protect a creditor whose debt is legitimately nondischargeable. Those creditors can obtain a consent judgment consistent with the court's authority to supervise settlements. [114]

Creditors with valid security interests will continue to be able to enforce their rights in collateral in the event of non−payment and to obtain reaffirmation agreements to the extent of the allowed secured claim. [115] Allowing reaffirmation only to the extent of an allowed secured claim would protect those creditors from economic loss associated with inability to repossess collateral. [116] Either the debtor is making payments under the contract or not. If the debtor is making payments, the creditor will receive the value of its collateral. [117] If they are not, the creditor may repossess and obtain the value of its collateral in the sale process. [118] In either scenario a secured creditor is protected to the extent of the value of its security.

Another noteworthy element of the Commission proposal involves voiding of personal property security interests in most types of otherwise exempt personal property worth less than $500. [119] Creditors would be required to petition the court to protect security interests in those items by proving that their value is more than $500.

Again, this provision recognizes the true economic value of such collateral. Putting aside the adhesion nature of security interests based in charge slips, the security interests themselves are simply worthless. It would cost more for a creditor to send a truck and personnel to repossess items worth less than $500 than it could ever hope to recover by resale. [120] This is especially true when storage, marketing and sales costs are factored in. [121] A creditor with a worthless security interest is an unsecured creditor and should be recognized as such. [122] Certainly, the creditor's desire to use the valueless security interest to obtain a reaffirmation agreement is not a relevant concern.

These Commission proposals, taken together, would go a long way toward rationalizing reaffirmation practices. The social benefit of the fresh start would be protected and creditors with valid security interests would not lose their rights. [123]

VI. Exceptions to Discharge and Application of Exceptions to Discharge

Two of the Commission's recommendations with respect to exceptions to discharge would involve substantial changes to the law. [124] The change proposed with respect to credit card debt would address some creditor abuse of the nondischargeability provisions, but would create new problems in this area, particularly for the most unfortunate debtors. Nevertheless, The recommended change which would make student loans fully dischargeable has merit and should be considered by Congress. [125]

A. Credit Card Debts

With respect to credit card debts, the Commission has proposed a bright line test. [126] Debts incurred on credit cards less than 30 days before filing would be nondischargeable. [127] Debts incurred more than 30 days before filing would be dischargeable, unless the amount of the charge exceeds the applicable credit limit. [128] The presumption under current section 523(a)(2)(C) [129] for debts incurred to pay for luxury goods or services would be repealed and the current fraud exception under section 523(a)(2)(A) [130] would be made inapplicable to credit card debts. [131]

The intent of the recommendation is to eliminate the litigation costs associated with individualized determinations concerning abuse of credit cards. [132] The report's drafters are aware that the provision involves "rough justice"—i.e. that this bright line test is only a rough proxy for identifying debtors with actual intent to run up their credit card debts in contemplation of bankruptcy. [133]

Elimination of litigation costs associated with objections to discharge under 11 U.S.C. § 523(a)(2)(A) would be a benefit to consumer debtors who can ill afford those costs. As discussed above, [134] consumers who cannot afford to litigate complex issues such as their intent to repay often fall victim to creditors who use litigation or the threat of litigation as a tool to obtain settlements conceding nondischargeable status or unwarranted reaffirmation agreements.

There has been a great deal of controversy concerning the role of credit cards in fostering the current increase in bankruptcy filings. [135] At least three studies persuasively make the case that there is a direct connection between expansion of credit card debt, credit card defaults, and the rise in bankruptcies. [136]

More than two billion credit card solicitations were sent out in 1995. [137] Solicitations have been supplemented with a blitz of advertising in every conceivable media outlet, encouraging people to use credit for expensive vacations, restaurant dining, purchase of luxury goods and even gambling at casinos. [138] It is thus not surprising that family credit card debt has increased dramatically between 1983 and today. [139]

The reason for the solicitations is that consumer credit lenders profit when people maintain a large balance on their cards. [140] Interest mounts at a rate which usually exceeds 15%. [141] Credit card lending has been one of the most profitable banking businesses. [142]

Given the desire to have consumers get in over their heads, it is not surprising that some consumers have financial problems which make it impossible for them to pay. [143] One family in six whose income is less than $25,000 is paying more than forty percent of that income to cover their debts. [144] When there is an unexpected expense or a temporary loss of income, it is not uncommon to use credit to fill the gap. [145]

A consumer's use of offered credit in these circumstances is hardly fraud. [146] The very idea of credit involves provision of a service to people who are not in a position to pay cash. [147] There is no basis to presume that the majority of people who use credit and then file bankruptcy did so with intent to defraud. If there is an abuse by a small minority of consumer debtors, that abuse is adequately addressed by the current presumption available under 11 U.S.C. § 523(a)(2)(C). [148] The abuses which are not covered by this expansive presumption do not justify attacks on the majority of debtors who are honest and have had real financial problems which entitle them to a fresh start.

Every legal system allows some dishonest persons to proceed with impunity. The small number of people whose abusive use of credit is not captured by the 523(a)(2)(C) presumption is unquestionably a tiny fraction of those who cheat on their taxes and are not caught. Furthermore, a minute percentage of people who commit crimes are not caught. [149] Designing a system which catches every instance of abusive behavior would undoubtedly trap many honest debtors. [150]

The cost to society of dishonesty in the bankruptcy system is much less than the cost in lost revenues of tax cheats or in unrecovered damages caused by criminals. [151] There is no evidence that abusive use of bankruptcy has any effect on credit card interest rates. [152] Even if there were, however, honest consumers ought to be willing to pay a price for access to a system, in the event of financial problems, which assumes their honesty and gives them a reasonable opportunity for relief from their debts. [153]

The Commission's proposal for a thirty day bright line test assumes dishonesty in a way which will undoubtedly capture the debts of many people whose use of credit was entirely without fraud. [154] Well advised debtors will be told to put their credit cards aside for 30 days before filing.

Two groups of innocent debtors will be caught unaware. The first group are debtors who see a lawyer at the last minute seeking to forestall imminent creditor action. These debtors may need to file to prevent an emergency such as foreclosure of their home, repossession of a car, or termination of utility service. There is no legitimate basis to presume that debtors caught in an unfortunate emergency situation used their credit privileges dishonestly in contemplation of bankruptcy.

The second group of debtors are those filing without an attorney, or with an attorney giving them bad advice. [155] Such debtors are typically less well off, [156] and by extension, more unfortunate in their life circumstances. Catching them in an irrebuttable presumption with poor predictive correlation to actual fraud is unfair and inappropriate.

Another effect of the Commission's proposal would be to create a new basis for coerced reaffirmations. If some or all of a credit card debt is presumed nondischargeable, and the consumer has no resources to pay the nondischargeable portion of the debt, then a creditor can use threatened collection activity as the basis to obtain a coerced reaffirmation of dischargeable debt. A threat to garnish wages, for example, based on the nondischargeable portion of the debt, would serve as substantial leverage to obtain an agreement that a larger debt is reaffirmed in exchange for payment terms less onerous than the wage garnishment. [157]

These disadvantages of a flat 30 day bright line test [158] outweigh the advantage to consumers of avoiding litigation costs in the current system. A better approach would be to leave the current presumption [159] in place, because it does capture fraud efficiently. Then, make the balance of section 523(a)(2) [160] inapplicable to credit card debts.

B. Student Loans

The other major change in this area is a recommendation to treat student loan debts the same, for dischargeability purposes, as other unsecured debts. [161] The Commission's discussion of this issue is thorough and well considered. As student loan debts mount, [162] they cause increasing hardship when debtors have financial problems. [163] Current preferred treatment of student loan creditors, absent dishonesty by the student, goes well beyond a legitimate concern about students with significant income potential obtaining early discharges. [164] Many debtors simply have life circumstances which change for the worse, despite their education, and cannot manage their debts. [165]

The current system has generated particular hardships for debtors whose student loan debts are nondischargeable in chapter 13. [166] These debtors often find that even though Congress has singled these debts out for the special protection of non−dischargeability, courts will not let them pay those debts during their chapter 13 plan. [167] Since interest continues to run, [168] debtors in chapter 13 often leave bankruptcy after having made their best efforts to pay creditors under the ability to pay test for three to five years, [169] owing more to their student loan creditors than when the bankruptcy case began. Sometimes the student loan debt increases by an amount which exceeds the total amount of other debt which is discharged under the bankruptcy case. [170]

The Commission's recommendation on this issue makes sense. It is time for Congress to reevaluate the policy which gave rise to this expansive exemption from discharge. [171] Moreover, the vast bulk of creditor interests under the Bankruptcy Code will not be affected. [172]

VII. Repayment Plans in Chapter 13

The Commission has collected a set of recommendations under the rubric of "Chapter 13 Repayment Plans," although the impact of some of these proposals would not be limited to chapter 13. [173] The proposals, taken together, would do little to address the current high failure rate in chapter 13, [174] and even less to encourage use of that chapter by consumer debtors. If enacted, these proposals would result in unnecessary additional loss of homes and essential transportation by debtors seeking to repay their creditors by reorganizing.

Chapter 13 plans require substantial commitment on the part of the participating debtors. [175] Debtors must make payments from their income over a period of three to five years, which, under current law, includes all funds not required for maintenance and support of the debtor's household. [176]

If such plans are not entered voluntarily by the debtor they have little chance of success, absent extensive and impracticable coercive mechanisms. [177] For this reason, forced participation in chapter 13 was consistently rejected by Congress and the government sponsored commissions which have studied bankruptcy. [178]

The alternative to forced use of chapter 13 is, of course, creation of sufficient incentives for debtors to voluntarily choose that chapter. [179] Among other things, appropriate incentives include making chapter 13 a vehicle for debtors to achieve some goals which are unattainable in chapter 7, [180] providing a more complete discharge than chapter 7, and protecting chapter 13 debtors from creditor collection activities for a longer period of time. [181] Similarly, flexibility, affordability and a reasonable chance of success are factors which would increase the likelihood of debtors choosing chapter 13. [182] The Commission's recommendations, instead of enhancing the remedies available to debtors in chapter 13 and increasing the potential for successful outcomes, when viewed in their entirety, would undermine use of that chapter.

VIII. Home Mortgages and Treatment of Secured Debt

Perhaps the primary incentive for debtors to choose chapter 13 is the availability of provisions which allow them to manage their secured debt in order to retain residences and automobiles which would otherwise be lost to foreclosure or repossession. These provisions include the right to cure defaults, [183] the potential to modify secured claims other than a secured claim involving a home mortgage, [184] the ability to pay off secured claims at their present value, [185] and lien avoidance in limited circumstances. [186]

Addressing secured debt in bankruptcy can be very expensive. A debtor seeking to cure a default on a home mortgage, for example, must resume full monthly mortgage payments as they come due, pay a portion of the arrears each month to reinstate under the plan, [187] in most cases pay interest on the arrears, [188] and fund the required trustee's commission. [189]

Thus, debtors in chapter 13 seeking to save a home typically face housing costs which exceed their pre−default costs by twenty−five to fifty percent. For a family in the process of recovering from recent financial problems, [190] this is a significant increase in fixed expenses which undoubtedly contributes to plan defaults and the low success rate under current chapter 13. [191] Similar expense increases may be required to maintain an automobile to get back and forth to work.

The Commission's recommendations will exacerbate the costs of chapter 13 overall, and consequently will result in more plan failures. There is little in the Commission Report to compensate for the costs which would be added and thereby to encourage more debtors to encounter the difficulties inherent in chapter 13.

A. Home Mortgage Stripdown

The norm in bankruptcy is to recognize collateral for its true economic value. A claim is allowed as a secured claim only to the extent the collateral involved serves as a basis for recovery in the event of nonpayment. This principle equalizes treatment of creditors that are effectively unsecured. [192]

The exception to this principle for claims based on home mortgages was fixed in the law only since the Supreme Court's decision in Nobelman v. American Savings Bank [193] which adopted an expansive view of the protection for mortgages contained in the Code. [194] Prior to that time, in many jurisdictions, all home mortgages were subject to stripdown. [195]

There has been an explosion of second mortgage lending since 1986. [196] Tax Code changes which provide favorable treatment for mortgage interest has convinced many homeowners to borrow against their equity. [197] These loans greatly expand the risk to the homeowner of foreclosure and increase the costs to homeowners of dealing with defaults. Nevertheless, such loans are used to consolidate unsecured debts, to pay for vacations, to pay for children's education, to manage temporary financial problems, to provide a line of credit for general purposes and to pay for home improvements. [198]

While encouraging lenders to make loans to allow consumers to purchase homes may be good policy, there is no similar basis to provide special protections for lenders providing secured loans to existing homeowners. [199] Such loans are typically made at higher rates of interest. [200] By obtaining a mortgage, the lender enhances its security beyond that of credit card lenders and other creditors—even though the loan is for the same purpose in many cases. [201] There is no societal reason for second mortgage creditors to have special protections for the unsecured portion of their loans when other creditors making similar loans do not. [202] The normative rule of bankruptcy that recognizes the true value of the collateral should apply. [203]

The Commission has recommended that the holder of a junior mortgage be subject to stripdown only to the extent that the secured claim is more than the appraised value of the property at the time the mortgage was made. [204] The Commission's recommendation on this issue will not achieve the goal of equality among similarly situated creditors and it will hurt debtors by failing to allow all effectively unsecured claims to be treated alike. [205]

Three problems emerge in thinking through the Commission's recommendation in this area. The first is that a lender will be able to protect its interests by obtaining an appraisal at the time the loan is made which creates an appearance that the loan is fully secured even if it is not. [206] Appraisal is hardly an exact science and appraisers tend to reach opinions of value which are at least somewhat consistent with the interests of their clients. [207]

Second, the question of what the property was worth at the time the loan was made is irrelevant to the question of whether a claim is secured at the time of the bankruptcy. [208] The assets of the estate are worth what they are worth to the estate, not what they might have once been worth under different circumstances. [209]

Third, as a practical matter, the factual question of the value of property at some point in the past is one which will be absurd to litigate. An appraiser today cannot inspect the property as of some date in the past to form an opinion about its value as of that date. Thus, it will be virtually impossible to develop evidence about the issue in question.

Rather than enact the Commission's recommendation, Congress should allow stripdown except on purchase money mortgages on the debtor's principal residence. [210] This will protect those mortgages which are made to help a debtor buy a home, and will allocate risks to other lenders consistent their decisions about the value of their underlying security.

B. Valuation of Collateral

As stripdown is largely irrelevant for home mortgages, [211] the Commission's proposed valuation standard for real property in consumer cases would have no practical impact. [212] The wholesale valuation standard being recommended for automobiles and other personal property overcompensates secured claimants, because if they were forced to resort to the collateral they would recover less than the wholesale value. [213]

The wholesale market is not the market in which repossessed personal property is liquidated. Even if it were, a creditor would have costs associated with repossession and liquidation which would be deducted from the wholesale recovery.

Importantly, repossessed automobiles are liquidated at dealer only auto auctions which bring far less than the wholesale price. [214] Outside bankruptcy, lenders use the low price obtained at such auctions to justify large deficiency judgments. [215] In bankruptcy, the secured creditor's recovery should be no greater than the real value of its collateral to it, which is a price substantially below wholesale. [216]

C. Secured Debt Payments Over the Life of the Plan

The Commission has recommended that unsecured debt payments be paid simultaneously with secured debts and spread over the term of the plan. [217] While seemingly innocuous, this provision would spell potential disaster for many debtors seeking to deal with defaults in order to save their homes and cars.

Since a large majority of chapter 13 cases fail before completion, [218] it is essential that debtors be able to address defaults on secured claims as early as possible in the plan term. [219] If the plan should fail after the default is addressed, at least the family will not be at risk of losing their home or car when the case is dismissed. [220]

IX. Unsecured Debt Repayment in Chapter 13

The Commission has proposed that payments to unsecured creditors in chapter 13 be fixed based on a graduated percentage of the debtor's income in all cases. [221] Under this proposal, a chapter 13 payment plan would no longer be based on the debtor's budget, but rather would be fixed based on supposedly objective standards. [222] If a debtor were unable to meet the additional obligations fixed in the Code, chapter 13 relief would be unavailable. [223]

The major consequence of this approach would be to try to shoehorn one more fixed obligations into the limited budgets of chapter 13 debtors. Under present law, debtors develop a personal budget which covers necessities, secured and priority claims and money left over is paid to unsecured creditors. [224] This budget is based on the actual circumstances of the debtor's life, [225] but the system does not allow a debtor to maintain an unreasonable lifestyle. [226] Budget choices which go beyond the debtor's real needs can be challenged by the trustee or a creditor for resolution by a judge. [227]

Under the Commission's proposal, the additional fixed obligation to unsecured creditors would be due regardless of whether the debtor's circumstances warrant. [228] Debtors who could not afford the amount set in the schedule would be forced to litigate the circumstances which warrant an exception [229] —often incurring costs which would further exacerbate the problem. Debtors who could not afford the necessary litigation, which would include anyone on a tight budget, would be kept out of the system entirely. [230] Other debtors would have no potential realistic budget so that their plans would inevitably fail. [231] The consequence would be that these debtors would have no opportunity to use the law to protect their homes and cars or to pay their priority debts. [232]

Debtors who have consolidated unsecured debts by taking out a mortgage on their residence would be especially hurt by an objective test. Although their secured payment obligations would be higher for having taken a conscientious step to deal with their unsecured debts, their obligations to other unsecured creditors would not be commensurately reduced. [233] These debtors would have the same fixed obligation to their unsecured creditors as a debtor with less secured debt who did not pay off his credit cards. The existing disposable income test deals with this problem by treating the higher secured debt payments as a reduction of available income.

The stated rationale for this proposed change does not justify its enactment. The cases which scrutinize debtors' budgets under the disposable income test tend to focus on limited issues. [234] Congressional guidance on this narrow range of issues would eliminate the majority of the disputes. [235]

The specter of debtors "over−encumbering" their budgets to avoid payments to unsecured creditors is easily policed by trustees who examine each debtor's budget at the meeting of creditors. [236] Most overstated expenses are addressed informally and do not come before a judge. [237] When an issue cannot be resolved informally, a short hearing is necessary. [238]

On the other hand, the Commission identifies a problem for debtors generated by judges who impose their own minimum payment obligations on chapter 13 creditors. [239] This can be addressed by appeals based on existing Code language or by a minor statutory amendment. [240] Altering the delicate balance of chapter 13 in favor of unsecured creditors is unnecessary. [241]

X. Consequences of Incomplete Payment Plans

A. Conversion to Chapter 7 as the Presumptive Result of Plan Failure

The Commission has recommended that debtors who are unable to complete a chapter 13 plan have their cases automatically converted to chapter 7. [242] A debtor could object to conversion without grounds, and if so, the case would be dismissed. [243] By changing the Code so that conversion is the presumptive result of plan failure, debtors who cannot maintain their chapter 13 plans would at least get the benefit of chapter 7 relief. [244]

Under current law, debtors have the option of converting if their plan fails or for any other reason, although conversion requires an affirmative election. [245] At present, some debtors who would benefit from conversions may be poorly advised or may lose touch with their attorneys, and as such, they may lose their right to obtain chapter 7 relief. [246] These debtors would benefit from the Commission's proposal.

However, two groups of debtors would be hurt by the change. The first are debtors who are poorly advised or who lose contact with their attorneys, but for whom conversion to chapter 7 would entail liquidation of property which the debtor would prefer not to liquidate. One reason that some debtors choose chapter 13 is that their property which exceeds available exemptions need not be liquidated. [247] Under the Commission's proposal, these debtors may inadvertently fail to respond to conversion and find that their property is suddenly being sold.

Another group who might be hurt are debtors who would prefer not to have a chapter 7 discharge because of its impact on a later refiling. [248] Some debtors using chapter 13 to save their homes are likely to prefer dismissal of the existing case to conversion so that they can preserve the potential for a new chapter 13 filing if their circumstances improve. [249] The Commission's proposal, if enacted, would be a trap for the unwary. [250]

B. Repeat Filings

There are a small number of debtors who file more than one bankruptcy in a given period of time. [251] The best estimate is probably that about 8% of debtors file more than one case in a six year period. [252]

Of these debtors, a large majority refile for legitimate reasons. These reasons include that the first case was dismissed for failure to file required documents, a problem which can be easily fixed in a second case. [253] Another common reason for refiling after a dismissed chapter 13 case is that the debtors' circumstances have improved so that a second case is feasible and likely to be successful. [254] This can provide an important opportunity to save a home or a car.

Any legislative action in this area must be careful to create a tool which is finely honed enough to catch abusive refilings without capturing the legitimate ones as well. The Commission has attempted to strike a reasonable balance in this area and has put forward a thoughtful proposal. [255] No stay would be available in a new case if the debtor had already filed twice in the previous six years and if at least one of those cases had been pending in the previous 180 days. [256] Importantly, the Commission's recommendation allows a debtor whose case is filed within that period to apply affirmatively for and receive a stay so that legitimate refilings would be protected even if they fall within the statutory period. [257]

While some provision to address this abuse is probably necessary, recommendation of such a provision should clearly be seen as a Code improvement designed for creditors rather than debtors. [258]

XI. Conclusion: Consumer Concerns Which are Missing from the Report

The Commission Report, taken as a whole, goes much further toward addressing creditor concerns about the current system, than it does concerns of consumer debtors. Its major proposals, with the exception of the reaffirmation recommendations, [259] are designed to benefit creditors rather than debtors. While this does not necessarily mean that the Report should be discarded, it does mean that the report cannot legitimately be characterized as favoring consumer interests.

The Commission Report is also notable for failing to do more to encourage the use of chapter 13 and to create a higher percentage of successful outcomes in that chapter. Among the forgotten options are recommendations which would:

- expand the ability of a consumer making substantial efforts to pay back due income taxes to discharge the balance at the end of a plan; [260]
- allow debtors flexibility to manage housing costs under a chapter 13 plan by providing incentives for consensual mortgage modifications between debtors and creditors; [261]
- clarify that postpetition payments to a mortgage creditor may be paid directly to that secured creditor without a commission payable to the chapter 13 trustee; [262]
- allow a debtor to propose that 10% of plan payments be put aside in a savings account to cover emergencies arising during the plan including temporary financial difficulties, and to have the account paid to unsecured creditors only if no exigencies arise; [263]
- broaden the anti−discrimination provision of the Code to add additional protections for debtors who complete a chapter 13 plan; [264]
- fully overrule the interest on arrears requirement of Rake v. Wade; [265] and
- clarify that the protections of the automatic stay are available until the close of the case. [266]

In addition, the Commission failed to recommend legislation that would force the credit industry to accept at least some of the responsibility for over extension of credit with the resulting defaults and increases in bankruptcy filings. [267] Congress should consider legislation aimed at getting abusive credit practices under control. [268]

On a procedural level, the Supreme Court has held that credit card lenders can rely on the law in the state where they are incorporated in setting the interest rate and many of the other terms of credit for consumers nationwide. [269] This has led to a "race to the bottom." [270] States deregulate in order to create the best possible environment in order to encourage a credit card company to locate there so it can export terms of credit across the country. [271] This helps certain states create jobs. However, it means that those other states that do want to regulate for the benefit of their citizens can no longer do so. Either states should be free to create and enforce meaningful regulations, or the federal government should step in with consumer protections.

Additionally, appropriate consumer protections might include disclosure to consumers about the consequences of making minimum payments, [272] enhanced disclosures concerning teaser rates of interest, [273] protections against unilateral interest rate increases which are unrelated to a change in the lender's cost of funds, [274] prohibition of unilateral credit limit increases, [275] prohibition of security interests based in credit card agreements, [276] protection against so called "cashed check loans," [277] prohibition of credit card cash advance machines in casinos, [278] prohibition against making credit cards available to persons such as college students who have no present ability to make more than nominal payments, [279] and limits on credit card advertising. [280] Some of these provisions are in a bill which has been filed in the House of Representatives. [281]

Regulating the credit card industry outside the context of bankruptcy is not the only potential curb on lending abuses. Bankruptcy protections can also be designed to reduce overly aggressive credit card lending practices. For example, credit card issuers who grant additional credit when the consumer's existing credit card bills already exceed fifty percent of reported annual income should be barred from participation and recovery in the bankruptcy process. The debts should be discharged nonetheless. [282]

On a final note, bankruptcy is the only significant American legal system which bars access to those who are too poor to afford its filing fees. [283] The cost of filing has increased greatly over the years [284] and, ironically, many Americans are too poor to be bankrupt. [285] Debtors who qualify as indigent should be granted fee waivers which allow them to file. [286]

The in forma pauperis pilot project has worked well in the jurisdictions where it has been tested. [287] It should be expanded across the country for poor people who can establish that they qualify.

The credit industry is pursuing a broad campaign for "reform" based on anecdotal evidence of supposed bankruptcy abuses by the well−to−do. It would be hypocritical for the industry to deny that there are people at the other extreme who desperately need access to a system that is designed to relieve them of unmanageable debts.

FOOTNOTES:

[*] The author is a staff attorney at the National Consumer Law Center in Boston and co−author of National Consumer Law Center, Truth in Lending (3d ed. 1995) and Surviving Debt: A Guide for Consumers (2d ed. 1995) as well as editor of National Consumer Law Center, Consumer Bankruptcy Law and Practice (5th ed. 1996 and Supp). Mr. Klein is director of NCLC's Sustainable Homeownership Initiative and a member of the board of directors of the National Association of Consumer Bankruptcy Attorneys. The author wishes to acknowledge assistance from Henry Sommer of the Consumer Bankruptcy Assistance Project in Philadelphia, Professor Karen Gross of New York Law School, and John Rao and Richard DuBois of the National Consumer Law Center.Back To Text

[1] *See* Rodney Ho, *Bankruptcy Panel's Ideas Anger Creditors*, Wall St. J., Oct. 16, 1997, at A2. Philip Corwin, a key industry lobbyist, asserts the recommendations are not "even a starting point for Congressional consideration." *Id. See also* Letter from the National Consumer Bankruptcy Coalition to all members of Congress, July 14, 1997. That letter states: "[t]he member organizations of the National Consumer Bankruptcy Coalition urge Congress to reject the Commission's consumer bankruptcy recommendations as adopted to date as a starting point for any legislative consideration of consumer bankruptcy reform. We will strongly oppose any legislation which incorporates the fundamental elements of the Commission's recommendations." *Id.* The letter was sent more than three months before the Commission's report was delivered to Congress and before most of the Commission's final consumer bankruptcy recommendations were in place. Signatories to the letter included the American Bankers Association, American Financial Services Association, America's Community Bankers, Community Bankers Association, Credit Union National Association, Independent Bankers Association of America, National Retail Federation, MasterCard International and Visa U.S.A. *See id.Back To Text*

[2] *See* Nat’l Bankr. Rev. Comm’n, Bankruptcy: The Next Twenty Years, Final Report 66 [hereinafter Commission Report].Back To Text

[3] *See generally* Commission Report, *supra* note 2, at 67 nn.84, 85. Many witnesses were heard during open forum periods at each commission meeting. *See id.* at 67. The economics of the bankruptcy system allowed a great deal more credit industry representatives to travel to and make presentations at the meetings. In addition, the credit industry was given a three hour block of time to make a presentation in a Senate hearing room at the Commission's December meeting. *See* Witness List, National Bankruptcy Review Commission meeting of December 17, 1996 [hereinafter Witness List].Back To Text

[4] *See* Witness List, *supra* note 3; *see also* Commission Report, *supra* note 2, at 67−68 n.86 and accompanying text. The consumer presentation was made in a small basement room at George Washington University Law School. The commissioner who left the room at the commencement of the consumer testimony, Judge Edith Jones of the Court of Appeals for the Fifth Circuit, has rejected the Commission's consumer recommendations as creating "an all purpose consumer protection law" and she calls some of the Commission's proposals "simply outrageous." *See* Ho, *supra* note 1, at A2. *See also* Hon. Edith H. Jones & Commissioner James I. Shepard, *Additional Dissent To Recommendations for Reform of Consumer Bankruptcy Law*, *in* Commission Report, *supra* note 2, ch. 5, Individual Commissioner Views [hereinafter *Dissent*]. This dissent begins with the remarkable point that a Commission appointed to "review" the bankruptcy laws was entrusted to reform those laws and that this commission was composed of "defenders of the institution that needs reforming." *Id.* at 3. Judge Jones has assumed her conclusion, that the system needs "reforming." *See id.* Although there would be nothing wrong with a review commission deciding, upon review, that nothing needs to be reformed, that is not what this commission has done. The Commission has offered substantial reforms, many of which favor creditor interests. However, these are apparently not the reforms which Commissioner Jones would like to see. Back To Text

[5] Every lender has its favorite anecdote about how a debtor abused the Code. Most of the stories, when examined, establish how well the current Code actually works. The abuses come to light because the system worked effectively and brought the problem to the attention of the public. Back To Text

[6] *See* Dr. John M. Barron & Dr. Michael Staten, Monograph 33, Georgetown U. Credit Research Center, Personal Bankruptcy: A Report on Petitioners' Ability to Pay (1997). The report is reprinted as Appendix G−2.b to the Commission Report. *See also* Commission Report, *supra* note 2, at 90 n.149 and accompanying text; Letter from Kim Kowalewski, Chief, Financial and General Macroeconomic Analysis Unit, Congressional Budget Office, to Commission Chairman Brady C. Williamson (Oct. 6, 1997); *Personal Bankruptcy Consumer Credit Crises, Statement to the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 105th Cong. 18−25 (1997) (statement of Professor Ian Domowitz).Back To Text

[7] *See* Barron and Staten, *supra* note 6, at 11−12. 100% of these debts must be borne by the debtor. The ability to make partial payments on the balance of the debts is substantially lower than Barron and Staten calculate after these debts are separated out. *See* Statement of Professor William Whitford before the National Bankruptcy Review Commission (June 9, 1997); Letter from Kim Kowalewski, Chief, Financial and General Macroeconomic Analysis Unit, to Commission Chairman Brady Williamson (October 6, 1997). Back To Text

[8] *See Personal Bankruptcy Consumer Credit Crises, Statement to the Subcomm. On Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 105th Cong. 18−25 (1997) (statement of Professor Ian Domowitz); *see also* Letter from Kim Kowalewski, Chief, Financial and General Macroeconomic Analysis Unit, to Commission Chairman Brady Williamson (October 6, 1997). Back To Text

[9] Interestingly, even with its fundamentally flawed approach, the Credit Research Center study shows that relatively few chapter 7 debtors could afford to pay back a portion of their debts in chapter 13. According to the study only 18% of chapter 7 debtors could pay more than 30% of their non−housing debt in a hypothetical three year chapter 13 plan. *See* Barron and Staten, *supra* note 6, at 24−25. It is unclear why the creditor community does not believe that the small number of cases where significant repayment appears possible are not resolvable under the "substantial abuse" test of 11 U.S.C. § 707(b). That is the provision which Congress added to the Code in 1984 and which has functioned to root out debtors who can afford to pay their creditors. *See, e.g.*, In re Kelly, 841 F.2d 908, 913−14 (9th Cir. 1988) (dismissing chapter 7 petition where debtor was able to repay its debts); In re Krohn, 886 F.2d 123, 128 (6th Cir. 1989) (finding substantial abuse found where debtors could pay back their debts with "good, old fashioned belt

tightening"). It is also unclear whether the recoveries involved in forcing more debtors into chapter 13 would justify the increased expense required to administer each case.Back To Text

[10] *See* ABI Consumer Bankruptcy Reform Forum Summary and Report on Options (presented to the NBRC on June 19, 1997) [hereinafter ABI Report]. The report was prepared by Professor Jeffrey Morris of the University of Dayton Law School, Bankruptcy Judge Eugene Wedoff of the Northern District of Illinois, Richard Kilpatrick of Shermeta, Chimko and Kilpatrick, and Samuel J. Gerdano, ABI Executive Director, based on discussions held by more than 50 creditors' lawyers, judges, trustees, law professors and debtors' representatives. The author was part of a 10 member steering committee that facilitated the report.Back To Text

[11] The Commission's report was delivered to Congress on its due date, October 20, 1997. See Commission Report, supra note 2, at i (noting that Report was submitted on time and under budget).Back To Text

[12] H.R. 2500, 105th Cong. (1997). *See* Bill McAllister, *Reopening Chapter 7,* Wash. Post, Jan. 1, 1998, at A23 (discussing scope of credit industry’s lobbying campaigns); s*ee also* Christine Dugas, *Bankruptcy Reform Plan Stirs Debate*, U.S.A. Today, Oct. 20, 1997, at 1B (discussing introduced bill).Back To Text

[13] *See* H.R. 2500, 105th Cong., at §§ 101, 102. The means test in the bill would deny access to chapter 7 for many debtors without meaningful evaluation of whether their circumstances warrant a conclusion that they have an ability to repay their debts. In addition, large fixed payment obligations would be required of debtors forced into chapter 13 without consideration of whether those payments are actually affordable. The National Association of Consumer Bankruptcy Attorneys has prepared a thorough critique of this misguided bill, including discussion of the hardships it would cause for many debtors and the administrative headaches it would cause for trustees and the bankruptcy courts. (On file with the NACBA).Back To Text

[14] *See* id. For example, section 115 would allow creditors to bring substantial abuse motions under 11 U.S.C. § 707(b). The current system requires motions for dismissal based on substantial abuse to be raised by the Court or the United States trustee. That limitation serves as a necessary filter to prevent use of such motions for leverage against debtors. If creditors are allowed to bring such motions, the leverage created by forcing new litigation costs on debtors will undoubtedly be used to coerce reaffirmations, agreements to have debts determined to be nondischargeable, and to produce default judgments when the debtor cannot afford to pay an attorney to litigate. In addition, tens of thousands of new motions will clog the court calendars.

Other provisions of the bill would place enormous costs and burdens on debtors to solve problems asserted by creditors entirely without evidence, costs which would have the effect of making bankruptcy relief much less available or effective for those who need it. For example, debtors would be required to file several years of tax returns and eight weeks of pay stubs as well as other documents as a precondition for getting bankruptcy relief. *See* H.R. 2500, supra note 12, §§ 210, 211. There is no indication of why the trustees' investigation of these issues, which includes the right to require production of these documents when necessary, does not adequately meet the needs of the system. Not only do many debtors not have these documents in time to get them filed at the outset of the case—when they may need urgent relief −− but clerk's offices have insufficient filing space for the massive amount of additional papers which the proposal would require.Back To Text

[15] *See* Daniel L. Skoler, The Elderly and Bankruptcy Relief: Problems, Protections, and Realities, 6 Bankr. Dev. J. 121, 144 (1989) (stating private representation may be out of reach for many low−income clients, possibly causing a debtor to file chapter 13 plan installments if they cannot afford attorney fees). *Back To Text*

[16] *See* Ruth M. Gulas, *In re Glenn: The Court Establishes a Point on Chapter 13 Bankruptcy Process When the Homeowner’s Right to Cure His Defaulted Mortgage is* Terminated, 17 U. Tol. L. Rev. 653, 692 (1986) (stating that bottom line in most chapter 13 cases is to preserve and avoid foreclosure of family house) (citing Ken Kahan, Comment, *Home Foreclosures Under Chapter 13 of the Bankruptcy Reform Act,* 30 UCLA L. Rev. 637, 640 (1983)); *see also* In re Glenn, 760 F.2d 1428, 1432 (6th Cir. 1985) (stating chapter 13 rather than chapter 7 allowed this debtor to protect his principal residence from creditors).Back To Text

[17] *See* Ho, supra note 1, at A2; *see also* Letter from the National Consumer Bankruptcy Coalition to all members of Congress July 14, 1997.Back To Text

[18] *See Working Groups Drafts Tentative Revisions to Consumer Bankruptcy*, 6 no. 13 Cons. Bankr. News (1997) (stating that Commission has been criticized although working group has tried not to further the interests either debtor or creditor); *See also Consumer Bar to Commission: Don't Credit Creditor Views*, 30 no. 2 Bankr. Ct. Dec. (June 10, 1997) (warning that pro−creditor reforms would "encourage even more reckless lending"); *Life After Debt,* Cards International (1997) (discussing Commission, but also referring to a position paper stating that "observers" have perceived the proposals as "pro−creditor"). Back To Text

[19] *See* Conclusion, infra at p. 62.Back To Text

[20] The credit industry urged Congress to create the Commission. *See* Commission Report, *supra* note 2, at 49 nn.10, 12 and accompanying text. The Commission was expressly instructed not to "disturb the fundamental tenets of current bankruptcy law." H.R. Rep. No. 103−835 at 59, 103rd Cong. (1994). *See generally* Commission Report, *supra* note 2, at 50−51 nn.20−21 and accompanying text.Back To Text

[21] *See* Ho, supra note 1, at A2 (quoting statement of Phillip Corwin, a Washington lobbyist representing the American Bankers Association : "[w]e didn't think there was even a starting point for Congressional consideration.")Back To Text

[22] *See* Commission Report, *supra* note 2, at 105−07.Back To Text

[23] *See* Commission Report, *supra* note 2, at 106. However, no evidence suggests that significant numbers of debtors move from one jurisdiction to another and lie about their previous bankruptcy history in order to avoid the Code's refiling limitations. This would seem to be the minimal justification for requiring taxpayers to assume the substantial cost and expense of a national database.Back To Text

[24] *See* id. (stating creditors would have "increased monitoring capabilities to keep track of court dockets").Back To Text

[25] *See generally* National Consumer Law Center, Fair Credit Reporting Act (3d ed. 1994 and Supp.). *See* Karen Slater, *Your Money Matters*, Wall St. J., Apr. 26, 1985 (stating credit bureaus have information on consumer credit from local banks, merchants and other credit bureau customers; industry sells copies of files); *see also* David A. Szwak, *Fair Credit Reporting*, *Credit Cards and Fraud*, 990 PLI/Corp 647, 668 (1997) (stating FCRA requires credit bureaus to correctly report information from public records and credit reporting services); Ronald C. Claiborne, Credit Reports and the Fair Credit Reporting Act, 28 J. Marshall L. Rev. 365, 365 (1995) ("[t]here are more than 1,100 credit and mortgage reporting companies in the United States."). Back To Text

[26] One study found that almost half the of all consumer reports contain at least one error and many contain multiple errors. Twenty percent of those errors are serious enough to adversely impact an application for credit. *See Consumers Union, "What Are They Saying About Me? The Results of a Review of 161 Credit Reports From the Three Major Credit Bureaus,*" Consumer Reports, Apr. 29, 1991; *see also* Lewis, *Credit Reporting: Paying for Others' Mistakes*, Trial, Jan. 1992 (discussing study in which Consolidated Information Services found errors in 43 percent of 1500 credit reports).Back To Text

[27] *See* 15 U.S.C. § 1681i (West Supp. 1997).Back To Text

[28] *See* 15 U.S.C. § § 1681n, 1681o, 1681p. *See generally* National Consumer Law Center, Fair Credit Reporting Act (3d ed. 1994 and Supp.).Back To Text

[29] *See* id. § 1681b (West Supp. 1997). Congressional action to shore up the system was required as recently as 1996. *See* The Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104−208, 110 Stat. 3009 (1996).Back To Text

[30] *See generally* Mary A. Bernard, Comment, Houghton v. New Jersey Manufacturers Insurance Co.: *A narrow* Interpretation of the Scope of the Fair Credit Reporting Act Threatens Consumer Protection, 71 Minn. L. Rev. 1319 (1987) (propounding that FCRA was not without its flaws and illustrating author's hypothesis by a case in which judicial interpretation had negatively altered FCRA's consumer protections). *But see* Commission Report, supra note 2, at 105−07 (advocating national filing system). While dissenting on a substantial number of the Final Report's holdings, Commissioner Jones and Shepard primarily agree with the recommendation for a national filing system, but believe that the recommendation as finally articulated needs to be strengthened. *See* Hon. Edith H. Jones & Commissioner James I. Shepard, *Recommendations for Reform of Consumer Bankruptcy Law by Four Dissenting Commissioners, in* Commission Report, supra note 2, ch. 5, Individual Commissioner Views. For example, they suggest photographic identification should be attached to each petition, in addition to the past three years tax returns of the debtor. *See* id. at 13. Back To Text

[31] *See Consumer, Small Business Proposals Adopted By Commission in Detroit*, BNA Bankr. L. Daily, Jul. 16, 1997, at D3 (characterizing proposals as "balanced," believing debtors would benefit from recommended prohibition on reaffirmation agreements, while creditors would benefit from establishment of audit procedures and national filing system).Back To Text

[32] Aside from miscalculation, some underlying problems are present. Should the calculation be based on the total amount reported as owing under the schedules or on creditor filed claims? Should it be based on the percentage proposed under a successful plan or on the percentage actually received by creditors under the plan as implemented? How should nondischargeable debt and claims paid outside the debtor's plan be handled? *See generally* Frasier, *Caught in a* Cycle of Neglect: The Accuracy of Bankruptcy Statistics 101 Comm. L.J. 307 (1997).

Admittedly, these questions are relatively unimportant absent consequences to the consumer. However, if the database is a public record, there is no doubt that information will be used by potential creditors and perhaps government agencies and even potential employers. In those events, the consequences of error may be significant. *See generally* Raymond Nimmer & Patricia A. Krauthaus, *Computer Error and User Liability Risk*, 26 J. Jurimetrics 121 (1986) (analyzing potential practical problems in creating and relying upon a computer system). The authors analyze such practical problems as data−entry negligence, poor system designs and liability for defective system designs. *See* id.Back To Text

[33] *See* 11 U.S.C. §§ 349, 350 (1994); *see also* In re Statistical Tabulating Corp., 60 F.3d 1286, 1289 (7th Cir. 1995) (holding that despite dismissal, bankruptcy court retains jurisdiction to "reopen" case); In re Joslyn's Estate, 171 F.2d 159, 164 (7th Cir. 1949) (holding a bankruptcy court had properly reopened a proceeding).Back To Text

[34] *See* 11 U.S.C. § 727(d) (providing that "[o]n request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge. . ."); *see also* United States v. Cluck, 87 F.3d 138, 140 (5th Cir. 1996) (denying appeal to overturn a revocation on grounds of double jeopardy); *see also* In re Jeter, 73 F.3d 205, 206 (8th Cir. 1995) (affirming the bankruptcy court's revocation of debtor's chapter 7 discharge). Back To Text

[35] *See generally* Thompson v. San Antonio Retail Merchants Assoc., 682 F.2d 509 (1982). A private credit reporting agency used social security numbers as their primary identifying factor. The plaintiff was subsequently denied credit on account of a data−entry mistake with his social security number. The agency was found negligent and the plaintiff was awarded judgment. *See* id. *Cf.* Fed R. Bankr. P. 9024 (making Fed. R. Civ. P. 60(a) applicable to cases under the Bankruptcy Code, thereby allowing court to correct clerical errors upon its own initiative or upon motion of the parties). Back To Text

[36] *See* Fed. R. Bankr. P. 9022(a) (stating "[i]mmediately on the entry of a judgment or order of the clerks shall serve a notice of the entry . . . on the contesting parties and on other entities as the court directs").Back To Text

[37] *See* 18 U.S.C. § 152(4) (1994) (providing it is a crime when a person who "knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, in a personal capacity . . . ") Such a filing is a Class D felony. *See* 18 U.S.C. § 3559(a)(4).Back To Text

[38] *See generally* United States v. Warnick, 815 F.2d 1341, 1342 (10th Cir. 1987) (holding defendant guilty of republishing false security agreement and finding a separate offense for statute of limitations purposes).Back To Text

[39] *See* Commission Report, supra note 2, at 107; *see also* H.R. 2500, 105th Cong., § 202(f)(1)(B) (1997) (providing for establishment of random audit standards); S. 1301, 105th Cong. § 307 (1997). These bills would require one audit for every 50 cases in each judicial district. If present filing levels persist, this would mean that more than 20,000 audits would be required annually.Back To Text

[40] Fed. R. Bankr. P. 9011 (requiring signing and verification of papers).Back To Text

[41] *See* 11 U.S.C. § 727 (1994).Back To Text

[42] *See* id. § 523(a).Back To Text

[43] *See* Lawrence Ponoroff & F. Stephen Knippenberg, *The Implied Good Faith Filing Requirement: Sentinel of an* Evolving Bankruptcy Policy, 85 Nw. U. L. Rev. 919, 919−48 (1991) (reviewing evolution of good faith in bankruptcy); *see, e.g.*, Marsch v. Marsch (In re Marsch), 36 F.3d 825, 828 (9th Cir. 1994) (reviewing bankruptcy court's decision to dismiss case as bad faith filing); In re Love, 957 F.2d 1350, 1354−57 (7th. Cir. 1992) (discussing good faith standard of review); Society Nat'l Bank v. Barrett (In re Barrett), 964 F.2d 588, 591−92 (6th Cir. 1992) (stating that debtor's second chapter 13 filing, when he had insufficient income to support plan, was in bad faith; however, third chapter 13 case, which occurred after circumstances had changed, was not in bad faith).Back To Text

[44] Fed. R. Bankr. P. 2004 (providing for examinations of any entity). It is hard to see what an audit might uncover which goes beyond what can be learned by a party in interest in a standard 2004 deposition. Audits simply shift the cost of review to the taxpayer.Back To Text

[45] *See* 11 U.S.C. § 341 (1994); *see also* Fed. R. Bankr. P. 2003.Back To Text

[46] *See* 11 U.S.C. § 707(b).Back To Text

[47] *See* 18 U.S.C. §§ 151−157 (1994) (providing for crimes and criminal procedure in bankruptcy). Bankruptcy fraud is punishable by fine and imprisonment for up to five years. *See* id. § 157.Back To Text

[48] Taken together, these tools and processes for addressing fraud suggest something near an obsession with abusive behavior in the bankruptcy system. It is hard to see what audits would add beyond cost and expense.Back To Text

[49] *See* James Bovard, *The IRS Files*, Wall St. J., Apr. 11, 1997, at A14 (documenting zealous behavior of IRS agents and the havoc a personal audit can wreak). Eugene Carlson, *Talking Strategy: Businesses Needn't Feel Sting of IRS Employment Audit*, Wall St. J., Apr. 12, 1993, at B2 (stating fear of audits and their consequences cause business people to rigidly apply IRS guidelines).Back To Text

[50] *See* Fed. R. Bankr. P. 1007; 11 U.S.C. § 107(a) (1994). *See generally* 2 Collier on Bankruptcy ¶ 107.02, at 2 (Lawrence P. King et. al. eds., 15th ed. rev. 1997) (discussing public nature of bankruptcy records).Back To Text

[51] Perhaps this is a vestige of the 17th century English punishment for perjury in a bankruptcy examination which was to "stand upon the Pillory in some public place, by the space of Two Hours, and [to] have one of his ears nailed to the Pillory and cut off." *See* 1 Collier on BAnkruptcy, ¶ 7.LH[1][a] at 202 (Lawrence P. King et al. eds., 15th ed. rev. 1997) (quoting 1 Jac. 1, ch. 15, §4 (1604)). Back To Text

[52] Audits are likely to be largely duplicative of the investigation already undertaken by the trustee. The trustee has the existing power to make the necessary investigation and the experience to identify cases in which extra time and expense would be worthwhile.Back To Text

[53] Many taxpayers do not even have accountants.Back To Text

[54] If the debtor is dishonest to his or her attorney, cooking the books for an auditor will be a relatively small step. *But see* United States v. Brown, 943 F.2d 1246, 1250−51 (10th Cir. 1991) (charging debtor's attorney with conspiracy to defraud United States); United States v. Zimmerman, 943 F.2d 1204, 1209 (10th Cir. 1991) (prosecuting debtor's attorney for conspiracy with debtor to commit crime). *See also* United States v. Levine, 970 F.2d 681, 684 (10th Cir. 1992) (rejected defendants' contention that their actions were excused by bad attorney advice). Back To Text

[55] *See* Commission Report, supra note 2, at 108.Back To Text

[56] *See* id.Back To Text

[57] *See* id.Back To Text

[58] *Cf.* Susan Jensen−Conklin, *Financial Reporting by* Chapter 11 Debtors: An Introduction to Statement of Position 90−7, 66 Am. Bankr. L.J. 1, 2 (1992) (stating debtor's books and records may be flawed as result of his or her deteriorated financial condition, that records are often in shambles when debtors file, and that much of data will be historical and will not relate to future earnings potential). *Back To Text*

[59] *See* id. **Back To Text**

[60] *See* James E. Merritt et al., *Administrative Procedures − Audits − General Overview*, C690 ALI−ABA 1, 4 (1991) (noting that auditing process can be costly and time−consuming). *See generally* Proposals of the Consumer Bankruptcy Working Group of the National Bankruptcy Review Commission, 51 Consumer Fin. L.Q. Rep. 18, 20 (Winter 1997) (discussing random audit proposal).Back To Text

[61] Job loss frequently precipitates debt problems and bankruptcy. Consumers often file bankruptcy shortly after returning to work at lower paying jobs, at a time when they also have no available leave time. *See generally* James Medoff and Andrew Harless, The Indebted Society: Anatomy of an Ongoing Disaster, 206−07 (1996) (explaining that in last two decades, real wages of newly hired have fallen faster than those of longer tenured employees).Back To Text

[62] *Cf.* Henry J. Sommer, In Forma Pauperis In Bankruptcy: The Time Has Long Since Come, 2 Am. Bankr. Inst. L. Rev. 93, 109 (1994) (noting bankruptcy filing fees alone could present hardship or risk of loss of necessities).Back To Text

[63] Attorneys fees already often exceed $1,000. *See* Laura Mansnerus, *Declaring Bankruptcy: Not Easy and Not Cheap*, N.Y. Times, May 8, 1990, at A35 (noting that chapter 7 debtors have paid up to $1,500 and chapter 13 debtor's have paid up to $2,000 in legal fees). Back To Text

[64] *See* 11 U.S.C. § 1325(b)(1)(B) (1994) (requiring plan provide that disposable income be used to make payments under plan).Back To Text

[65] If a debtor uses disposable income otherwise available under 11 U.S.C. § 1325(b) to cover attorneys fees, unsecured creditors are, in effect, paying for the audit, thus reducing their receipts. The irony of this will undoubtedly be appreciated by those debtors who survive the audit process.Back To Text

[66] *See* Susan Block−Lieb, A Comparison of Pro Bono Representation Programs for Consumer Debtors, 2 Am. Bankr. Inst. L. Rev. 37, 39 (1994) ("payment of attorneys fees is . . . out of reach of many individuals in bankruptcy"). Back To Text

[67] If audits must become part of the bankruptcy process, perhaps a safe harbor for low−income debtors would make sense.Back To Text

[68] This is true even if the audit process is privatized. *See generally* H.R. 2500, 105th Cong. § 202(f)(1) (1997) (stating attorney general shall establish auditing procedures in accordance with generally accepted standards and performed by

independent certified public accountants and independently licensed public accountants). Private accountants are expensive. Moreover, audit records will need to be retained and reviewed. Personnel in the bankruptcy system will need to supervise private auditors and issues uncovered by the audits will need to be addressed. Not every issue uncovered by an audit will be proof of debtor misconduct. A judge and other bankruptcy personnel will have to decide whether the problem discovered in the audit is consequential and if so whether there are sanctions. The tax court and the attendant bureaucracy is largely a system designed for that purpose. The expense involved in bankruptcy audits is particularly troublesome given proposed statutory language requiring one audit for every 50 cases.
See infra note 65 and accompanying text. Back To Text

[69] *See* Hon. Stephen A. Stripp, An Analysis of the Role of the Bankruptcy Judge and the Use of Judicial Time, 23 Seton Hall L. Rev. 1329, 1330 n.2 (1993) (stating that judiciary is in funding crisis with insufficient funds to pay court−appointed lawyers, jurors and new judges) (citing *Judiciary Faces Broad Spending Reductions*, 25 Third Branch 1 (Admin. Off. U.S. Cts.) Jan. 1993, at 1, 3)). Back To Text

[70] *See, e.g.*, Thomas Herman, *IRS Staffers Tell of Wrongdoing by Fellow Aides*, Wall St. J., Sept. 26, 1997, at A4 (detailing Senate Finance Committee testimony of six IRS agents who described wrongdoing and taxpayer abuse); Michael Hirsh and Fred Goldberg, *Infernal Revenue Disservice*, Newsweek Oct. 13, 1997, at 32 (discussing taxpayer abuse and problems within IRS); Michael Hirsh, *Behind the IRS Curtain*, Newsweek, Oct. 6, 1997, at 28 (noting taxpayer abuse and senate investigation into IRS). Back To Text

[71] The argument that bankruptcy losses drive up the cost of credit so that all consumers are hurt by abusive bankruptcies is specious. There is no evidence by neutral evaluators that bankruptcy losses are affecting consumer interest rates. The evidence is that rates are kept artificially high since consumer choice has not generated effective competition. *See* James Medoff and Andrew Harless, The Indebted Society: Anatomy of an Ongoing Disaster 12−13 (1996) (noting that consumers incur debt regardless of the interest rate; thus, even as the federal funds rate fell, interest rates on credit cards remained high − "[t]his behavior seems to challenge several long−held beliefs about how the economy works and about how consumers make choices"). The bankruptcy system is being scapegoated by the credit industry. Most of the debts that are addressed in the bankruptcy system wouldn't have been paid back under any scenario. It is likely that some of the rest would cost creditors more to collect than they would recover in the collection process. Even if there is a slight increase in consumer interest rates due to the availability of bankruptcy (a connection which is unproven), that small interest rate premium functions as an insurance policy for every American. Every consumer is vulnerable to unexpected financial problems, and may need access to a system which provides for financial rehabilitation and a fresh start.

In this context, the extent to which bankruptcy losses are driven by abusive rather than legitimate cases is even less clear; although it does seem certain that the costs of audits to taxpayers will not be repaid with lower rates on consumer credit.Back To Text

[72] *See* In re 1095 Commonwealth Ave. Corp., 204 B.R. 284, 305−06 (Bankr. D. Mass. 1997) (stating bank/creditor fraudulently overstated its legal fees); McCormack v. Federal Home Loan Mortgage Corp (In re McCormack), 203 B.R. 521, 527 (sanctioning creditor for attempt to collect legal fees not due under plan); In re Campbell, 140 B.R. 35, 42 (Bankr. E.D.N.Y. 1992) (sanctioning mortgage company's attorney for fraudulent proof of claim and fraudulent affirmation). *Back To Text*

[73] *See* 11 U.S.C. § 1325(b) (1994). That evaluation is also sometimes called the "ability to pay" test. It provides, in essence, that a debtor must use all household income which is not being used for reasonable and necessary expenses to pay unsecured creditors. Thus, when payments to one creditor go down, payment obligations to other creditors generally go up. *See generally* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 12.3.3 (5th ed. 1996 and Supp. 1997) (discussing ability to pay test).

The exception would arise in one situation at either extreme. Obviously if a debtor is paying 100% of claims, there is a benefit to the debtor from reducing any claim. At the other extreme, if a consumer is not able to pay any unsecured claims, but is focusing all income on necessities and secured claims, that consumer benefits from reducing the secured claims up to the point that monthly income becomes available under the disposable income text.

The disposable income test is discussed at more length infra notes 234, 236−38 and accompanying text.Back To Text

[74] *See, e.g.*, Robert Berner, *Sears Debt−Collecting Policy Was Ruled Illegal Twice by a Bankruptcy Judge*, Wall St. J., April 25, 1997, at A8 (reporting that Boston bankruptcy judge ruled Sears method of debt collection illegal); Lisa Fickenscher, *Don't Come to Court Without a Solid Case, Judge Warns Card Issuers*, Am. Banker., Jan. 10, 1997, at 6 (discussing Florida judge's warning to credit card companies not to file "shoddy complaints"); Gerard Meuchner, *Lenders' Squeeze Tactics Assailed, Pressuring Bankrupt Clients Draws Regulators' Scrutiny*, Pittsburgh Post Gazettte, Sept. 11, 1997, at E1 (discussing how state and federal regulators are scrutinizing U.S. lenders who may be skirting law); Debra Sparks, *Got an AT&T Credit Card? Don't Go Bankrupt*, Bus. Week, Sept. 15, 1997, at 118 (discussing AT&T practices in aggressively pursuing fraud claims in bankruptcy).Back To Text

[75] *See* S. 1301, 105th Cong. (1997). In addition to a stronger provision addressing false claims, this Senate bill also would provide enhanced sanctions for discharge injunction violations, unsuccessful dischargeability actions, challenges to the chapter 7 discharge, and automatic stay violations. *See* id. § 201−204.Back To Text

[76] *See* id.Back To Text

[77] This is typically a one way right to shift fees. The creditor gets fees for enforcing the contract, while the consumer does not. *See* Satrap v. Pacific Gas & Elec. Co., 42 Cal. App. 4th 72 (1996) (discussing awarding attorneys fees).Back To Text

[78] *See* Commission Report, supra note 2, at 125, 130−32. Back To Text

[79] *See* id. at 125 (recommending $20,000 floor and $100,000 cap).Back To Text

[80] *See* Fla. Stat. Ann. Const. Art. 10 § 4 (West 1995); Kan. Stat. Ann. Const. Art. 15 § 9 (West 1996); *see also* Daniel L. Skoler, The Elderly and Bankruptcy Relief: Problems, Protections, and Realities, 6 Bankr. Dev. J. 121, 125 (1989) (comparing federal and state homestead exemptions); Henry B. Gonzalez, The Texas Homestead: The Last Bulwark of Liberty, 26 St. Mary's L. J. 339, 339−40 (1995) (discussing Texas homestead exemption). *See generally* David J. Morrow, *Key to a Cozier Bankruptcy: Location, Location, Location*, N.Y. Times, Jan. 7, 1998, at A1 (reviewing state homestead laws).Back To Text

[81] *See* Commission report, supra note 2, at 125; *see also* Wayne Johnson, The Embattled California Homestead Exemption, 21 Cal. Bankr. J. 305, 320 (1993); *see also* Hon. William Houston Brown, *Political and Ethical Considerations of Exemption Limitations: The "Opt−Out" as* Child of the First and Parent of the Second, 71 Am. Bankr. L.J. 149, 186 (1997).Back To Text

[82] *See* In re Bandkau, 187 B.R. 373, 380 (Bankr. M.D. Fla. 1995) (finding debtor sold non−exempt assets to purchase new residence); In re Coplan, 156 B.R. 88, 92 (Bankr. M.D. Fla. 1993) (finding debtor attempted to shield assets from creditors by purchasing home); First Texas Sav. Ass'n v. Reed (In re Reed), 700 F.2d 986, 991 (5th Cir. 1983) (finding debtor sold non−exempt property to satisfy mortgages on his home). Absent the unlimited homestead exemption, some of these individuals will lose their incentive to file at all. Presumably, this will increase recoveries outside the bankruptcy process.Back To Text

[83] Potential costs of sale, including realtor's fees and transfer taxes, make the sale of a home with less than $20,000 in equity rare in any event.Back To Text

[84] *See* Commission Report, supra note 2, at 121 (discussing Recommendations 1.2.1). *See* Hon. William Houston Brown, *Political and Ethical Considerations of Exemption Limitations: The "Opt−Out" as* Child of the First and Parent of the Second, 71 Am. Bankr. L. J. 149, 187 (1997) (noting uniform set of federal exemptions is compatible with federal bankruptcy fresh start and discharge); Lawrence Ponoroff, Exemption Limitations: A Tale of Two Solutions, 71 Am. Bankr. L. J. 221, 247 (Spring 1997) (concluding uniform federal exemptions is only sensible response to increased chaos and inconsistency in case law).Back To Text

[85] *See* Commission Report, *supra* note 2, at 125 (each state's decisions about degree of protection available to its own citizens would be preserved since state exemptions would also remain available to all debtors).Back To Text

[86] *See* Ponoroff, supra note 84, at 243 (stating local differences in terms of exemptions needs would be accommodated under a uniform federal system); Brown, supra note 84, at 182 (stating many state exemption levels are lower than federal exemption levels).Back To Text

[87] *See* Commission Report, *supra* note 2, at 133 (stating "[w]ith respect to property of the estate not otherwise exempt by other provisions, a debtor should be permitted to retain up to $20,000 in value in any form. A debtor who claims no homestead exemption should be permitted to exempt an additional $15,000 of property in any form.").Back To Text

[88] *See* Forsberg v. Security State Bank, 15 F.2d 499, 502 (8th Cir. 1926) (finding debtor permissibly traded non−exempt property prior to filing of bankruptcy).Back To Text

[89] *See* Hon. Mary Davies Scott & Kimberly Forseth Woodyard, *When the Dust Settles: The Aftermath of Supreme Court Bankruptcy Cases: Issues and Ethical Considerations,* SB74 ALI−ABA 465, 521 (1997) (stating debtors may or may not know full range of exemptions available). Back To Text

[90] In very few cases, recoveries will decrease because debtors will no longer accidentally be trapped in the bankruptcy system with the wrong forms of property. There are very few asset cases, therefore this loss of an accidental recovery for creditors will probably affect a small number of cases and reduce receipts only marginally.

Another recommended change would create a uniform law for pensions. *See* Commission Report, *supra* note 2, at 139 (discussing Recommendations 1.2.5). This change would make pensions exemptible to the extent they are entitled to preferred tax treatment. This change would end unequal treatment of different types of pensions based on their standing under ERISA. See Patterson v. Shumate, 504 U.S. 753, 765 (1992) (discussing "applicable non−bankruptcy law"). It would eliminate a problem for some debtors who, to their misfortune, had pensions in vehicles which did not qualify for the anti−alienation protection of ERISA, including IRA's. *See* id. at 762. *See, e.g.*, In re Acosta, 182 B.R. 561, 567 (Bankr. N.D. Cal. 1994) (finding debtor's pension plan was not ERISA qualified, thereby not protected by subject to anti−alienation provisions, therefore part of bankruptcy estate). *See generally* 5 Collier on BAnkruptcy, ¶ 541.25 at 79−83 (Lawrence P. King et al. eds., 15th ed. rev. 1997) (discussing restrictions on transfer of spendthrift trusts).

This outcome is fair given that most wage earners have little control over the vehicle in which their retirement funds are kept. *See* Commission Report, *supra* note 2, at 141 (explaining that creditor recoveries will be enhanced in some cases, because exemptions will be limited to same extent that pension contributions are in Tax Code; high income debtors will be unable to use pensions to shield unlimited amounts of income from their creditors).Back To Text

[91] *See* Commission Report, *supra* note 2, at 135 n.266.Back To Text

[92] S*ee* Commission Report, *supra* note 2, at 125 (proposing section 522(m) be revised to reflect that all exemptions *except* for homestead exemption apply separately to each debtor in joint case).Back To Text

[93] *See* 11 U.S.C. § 522(m) (1994) (providing that all exemptions apply separately to debtors in a joint case).Back To Text

[94] Currently, a married couple choosing the federal exemptions qualify for a $30,000 total exemption in the family home. *See* id. § 522(d)(1). If the Commission proposals are adopted, these debtors would likely take the state exemptions, which may be as little as $20,000. If there were other reasons to take the federal exemptions over the available state law exemptions, the homestead exemption would be only $15,000. Given home values in the United States, this is very little cushion and, in many cases, the family home would be lost.

This potential reduction in the available homestead exemption would interact with Tax Code changes which have limited capital gains taxes on the sale of homes. *See* 26 U.S.C. § 121(a) (1994). This change may increase the number of homes sold in the bankruptcy process, since the trustee is likely to have reduced liabilities based on the sale.Back To Text

[95] Ironically, consolidation or joint administration of the cases might be possible under Fed. R. Civ. P. 1015.Back To Text

[96] There would be two filing fees and two attorneys fees. The system would have to administer two cases instead of one. In addition, it seems likely that creditors would argue that separate cases designed to enhance a married couple's exemptions constitute an attempt to hinder creditors by transferring property to separate trustees, thereby requiring denial of discharge under 11 U.S.C. § 727(a)(2). Debtors would have to pay to defend such objections to discharge. It might be cheaper for them to get divorced so that the issue would not arise.Back To Text

[97] *See* Grogan v. Garner, 498 U.S. 279, 286 (1991) (noting purpose of Code is to give debtors "new opportunity in life . . . unhampered by the pressure and discouragement of pre−existing debt"); Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (finding Bankruptcy Act holds out promise to debtor of fresh start); *see also* Williams v. U.S. Fidelity Guar. Co., 236 U.S. 549, 554−55 (1915) (stating primary purpose of Bankruptcy Act is to relieve honest debtor from prior indebtedness and "permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes"). Congress was concerned that once a debtor completes a case, he or she should obtain the benefit of a "fresh start." *See, e.g.*, H.R. Rep. No. 95−595, at 117 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6078 (stating fresh start is the "essence of modern bankruptcy law"); H.R. Rep. No. 95−595 at 125, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6086 (noting "purpose of straight bankruptcy . . . is to obtain a fresh start"); H.R. Rep. No. 95−595, at 118, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6078 (stating chapter 13 designed to ensure "the debtor is given adequate exemptions and other protections to ensure that bankruptcy will provide a fresh start"); H.R. Rep. No. 95−595, at 118, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6078−79 (finding whether debtor uses chapter 7 or 13, "bankruptcy relief should be effective, and should provide the debtor with a fresh start."). A thoughtful analysis of the social importance of the fresh start and debtor rehabilitation is found in Karen Gross, Failure and Forgiveness 91−103 (1997). Back To Text

[98] *See* Reitz v. Butler, 322 F. Supp. 1029, 1031 (N.D. Ga. 1971) (purpose of state exemption statutes was to allow family of debtor to keep at least some items of his possessions so that "family might have the barest essentials for human existence"). Back To Text

[99] Having failed to obtain a Commission which would recommend a major overhaul and reduction in the Bankruptcy Code's long−standing approach to exemptions, the credit industry is now putting forward a legislative proposal for yet another Commission specifically to address exemption policy. H.R. 2500, 105th Cong., § 113 (1997). It appears that the proposal is designed to create a Commission stacked in favor of more conservative appointees. Perhaps the industry just wants to keep having commissions until one of them agrees with its positions. Back To Text

[100] *See* Bruce Mohl, *Sears Admits Missteps in Collecting on Debts Allegedly Pressured Bankrupt Customers*, Boston Globe, Apr. 10, 1997 at A1 (discussing how Sears pressured bankrupt customers into paying bills or face repossession); Gerard Meuchner, *Lenders' Squeeze Tactics Assailed Pressuring Bankrupt Clients Draws Regulators' Scrutiny*, Pittsburgh Post−Gazettte, Sept. 11, 1997 at E1 (discussing federal and state regulators looking at lenders that skirt law to squeeze payments from bankrupt customers).Back To Text

[101] *See, e.g.*, Republic Bank of Cal. v. Getzoff (In re Getzoff), 180 B.R. 572, 574 (B.A.P. 9th Cir. 1995) (stating reaffirmation agreements not favored because of danger of coercion by creditors); In re Latanowich, 207 B.R. 326, 336 (Bankr. D. Mass. 1997) (finding creditor wrongfully billed and accepted payment from debtor, after discharge without proper reaffirmation agreement); In re Izzo, 197 B.R. 11, 12 (Bankr. D. R.I. 1996) (requiring debtor's attorney to explain why signing affidavit on behalf of debtor was proper, when debtor could not maintain payments); In re Hovestadt, 193 B.R. 382, 387 (Bankr. D. Mass 1996) (striking reaffirmation agreement where debtor's attorney had not advised debtor of right to redeem property for liquidation value); In re Noble, 182 B.R. 854, 856 (Bankr. W.D. Wash. 1995) (stating "[t]he reaffirmation rules are intended to protect debtors from compromising their fresh start . . . ") In addition to failing to meet Code requirements for valid reaffirmation, creditors have aggressively pursued debtors with solicitations to reaffirm, often without the knowledge of the debtor's attorney. Back To Text

[102] *See* In re Bruzzese, 214 B.R. 444 (Bankr. E.D.N.Y. 1997); *see also Federated Refunds $4.3 Million to Bankrupt Customers*, 31 No. 1 Bankr. Ct. Dec., Aug. 5, 1997, at 1 (discussing case involving Federated Department Stores, Inc.) Back To Text

[103] Debra Sparks, *Got an AT&T Credit Card? Don't Go Bankrupt*, Bus. Week, Sept. 15, 1997 at 118 (describing example of aggressive approach taken by AT&T Universal Card Services in alleging fraudulent acts by debtor in filing bankruptcy); *see also* Lisa Fickenscher, *Banks Heavy−Handed in Attacks on Bankruptcy Claims, Critics Say*, Am. Banker, Jan. 10, 1997 at 1 (criticizing some credit card lenders for going one step too far and "challenging at every turn consumers' attempts to discharge their debt.").Back To Text

[104] H.R. Rep. No. 95−595, at 124 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6085. Back To Text

[105] *Cf.* Bruzzese, 214 B.R. 444, 451 (Bankr. E.D.N.Y. 1997) (annulling reaffirmation agreement because it was not in the best interest of debtor, debtor was not fully informed about the true economic consequences of agreement, and it imposed an undue hardship upon debtor).Back To Text

[106] *Cf.* In re Gibson, 16 B.R. 257, 265 (Bankr. D. Kan. 1981) (describing customary procedure of creditors lending money to consumers by taking a security interest in all of debtor's belongings and obtaining waiver of debtor's exemptions, without debtor being aware of what form he had signed).Back To Text

[107] *Cf.* C.I.T. Fin. Serv. v. Posta (In re Posta), 866 F.2d 364, 368 (10th Cir. 1989) (evidence that debtors were inexperienced in business matters and had never read the security agreement was sufficient to defeat case based on conversion of collateral). Back To Text

[108] *See generally Abusive Creditor Reaffirmation Procedures Require Strong Response* 15 NCLC REPORTS, *Bankruptcy and Foreclosures* Ed. 17 (March/April 1997).Back To Text

[109] *See* supra note 42.Back To Text

[110] *See* In re Iappini, 192 B.R. 8, 9−10 (Bankr. D. Mass. 1995) (disapproving Sears reaffirmation agreements that are not accompanied by affidavits and that refer to settling section 523 actions when no dischargeability complaints have been filed); *see also* AT&T Universal Card Serv. v. Bermingham (In re Bermingham), 201 B.R. 808, 812−13 (Bankr. W.D. Mo. 1996) (creditors maneuvered settlement agreement from debtor based on allegation of fraud). *See also* Commission Report, supra note 2, at 191−192.Back To Text

[111] *See* 11 U.S.C. § 523(d) (permitting an award of attorneys fees only if creditor's action is not "substantially justified"). *See generally Obtaining Attorneys Fees in Dischargeability Cases*, 15 NCLC REPORTS, Bankruptcy and Foreclosures Ed. 21 (May/June 1997). Fees for the debtor's attorney under this provision are hardly guaranteed, even if there is protracted and expensive litigation. *See, e.g.*, AT&T Universal Card Services v. Akdogan (In re Akdogan), 204 B.R. 90, 98 (Bankr. E.D.N.Y. 1997). *Cf.* Vasseli v. Wells Fargo Bank (In re Vasseli), 5 F.3d 351, 353 (5th Cir. 1993) (no fees available for successfully defending creditor's appeal in nondischargeability proceeding). A judge who finds against the creditor frequently wants to split the baby and does so by denying an award of fees. A creditor can also file a bad faith case and, if the case does not result in a settlement or a default, offer to drop the case in exchange for a waiver of fees. As a practical matter it is difficult to counsel a client to refuse such a settlement based upon an uncertain award of fees.Back To Text

[112] *See* S. 1301, 105th Cong., § 202 (1997) which addresses this concern, in part, by making an award of fees and costs mandatory in the event the debtor prevails in dischargeability litigation. Additional sanctions are available when the creditor's position is not substantially justified. This would be a far superior mechanism to prevent improper creditor uses of litigation than current section 523(d).Back To Text

[113] *See* Commission Report, supra note 2, at 145 (proposing section "524(c) be amended to provide that a reaffirmation agreement is permitted, with court approval, only if the amount of the debt that the debtor seeks to reaffirm does not exceed the allowed secured claim . . .")Back To Text

[114] *See* Commission Report, supra note 2, at 145.Back To Text

[115] *See* id. Back To Text

[116] *See* id. at 151.Back To Text

[117] *See* id.Back To Text

[118] *See id.* at 152.Back To Text

[119] *See* Commission Report, *supra* note 2, at 169.Back To Text

[120] To work as intended, the dollar amount of the limitation is probably inadequate. Creditors have no incentive to actually pursue personal property repossessions unless their recovery exceeds their costs. Since replevin actions are required in virtually any state to repossess property within the family home, there is no potential that creditors could obtain a net recovery, except in isolated cases, on property worth less than $1,000. In addition, in order to protect against the effect of inflation, any dollar amount adopted should be periodically adjusted consistent with 11 U.S.C. § 104(b)(1).Back To Text

[121] *See* Commission Report, supra note 3, at 171 (noting when financing costs are added on, it becomes clear that "any intrinsic value which such commodities may have will never come close to offsetting the credit liability secured thereby") (quoting *Hearings Before Subcomm. on Civil and Constitutional Rights of the House Committee on the Judiciary, 94th Cong.* (1975−76) (statement of David H. Williams, Attorney, Division of Special Projects, Bureau of Consumer Protection, FTC). Back To Text

[122] To the extent such a creditor receives payment preference as a secured creditor, recoveries to other unsecured creditors are affected.Back To Text

[123] Congress should also allow "ride through" of secured debts consistent with Capital Communications v. Boodrow (In re Boodrow), 126 F.3d 43, 53 (2d Cir. 1997) as an alternative course open to debtors. This option allows debtors to keep the collateral associated with a secured claim, by making current payments under the contract without reaffirmation. By doing so, debtors can avoid potential liability on a deficiency in the event of a later default. Absent the availability of a "ride through" option, consumers are forced to reaffirm in order to keep collateral for which they are paying in full. *Compare* In re Belanger, 962 F.2d 345, 346−49 (4th Cir. 1992) (allowing retention of property without reaffirmation or redemption) *and* Lowry Federal Credit Union v. West, 882 F.2d 1543, 1546 (10th Cir. 1989); *with* Taylor v. AgE Federal Credit Union (In re Taylor), 3 F.3d 1512, 1516−17 (11th Cir. 1993) (providing that retention of property without reaffirmation or redemption is tantamount to *de facto* reaffirmation with no debtor recourse); In re Edwards, 901 F.2d 1383, 1386−87 (7th Cir. 1990); general Motors Acceptance v. Bell (In re Bell), 700 F.2d 1053, 1056−57 (6th Cir. 1983). Another case holds that a debtor in default must reaffirm in order to retain collateral. Johnson v. Sun Finance Co. (In re Johnson), 89 F.3d 249, 251−252 (5th Cir. 1996). *Johnson* leaves open whether a debtor who is current on payments must reaffirm.Back To Text

[124] Some of the other Commission recommendations in this area are more limited. They are intended to clarify the law and to make it more uniform across jurisdictions and should not be controversial. These include clarification on the preclusive effects of non−bankruptcy judgments related to dischargeability, *see* id. at 217, vicarious liability of debtors on non−dischargeability cases, *see* id. at 223, notice and extensions of time for creditors to bring objections to discharge, *see* id. at 227, and settlement and dismissal of objections to discharge, *see* id. at 228.

It is unclear whether the recommendation on extensions of time to file objections to discharge is intended to apply when the creditor has actual notice. Close examination of the recommendation is necessary in order to prevent unnecessary disputes about whether notice has been received. *See* Commission Report, supra note 2, at 227−28 (discussing procedure for authorizing extensions under Code). Many debtors cannot afford to litigate that issue. Nothing should be done which creates incentives for creditors to assert lack of formal notice when actual notice has been received.Back To Text

[125] *See* id. at 207.Back To Text

[126] *See* id. at 190 (discussing benefits of bright−line test for credit card debts).Back To Text

[127] *See* id. at 180.Back To Text

[128] *See* id.Back To Text

[129] *See* 11 U.S.C. § 523(a)(2)(C) (1994) (creating presumption of nondischargeability of consumer debts for luxury goods or services incurred within 60 days of order for relief aggregating more than $1000 under open end credit plan obtained within 60 days of order for relief).Back To Text

[130] *See* 11 U.S.C. § 523(a)(2)(A) (1994) (debt incurred "false pretenses, a false representation, or actual fraud").Back To Text

[131] *See* Commission Report, supra note 2, at 194 (explaining how section 523(a)(2)(C) would be repealed and section 523(a)(2)(A) would be inapplicable if bright−line rule is adopted).Back To Text

[132] *See* id. at 191−192 (noting that bright−line rule would create uniform test for non−dischargeability throughout districts and eliminate unnecessary costs of litigation).Back To Text

[133] *See* id. at 195 (asserting that honest debtors would be at less risk of prejudicial treatment).Back To Text

[134] *See* supra note 15 and accompanying text.Back To Text

[135] *See* MBNA America v. Parkhurst (In re Parkhurst), 202 B.R. 816, 820 (Bankr. N.D.N.Y. 1996) (discussing increase of bankruptcy filings as result of credit card debts). *See also* Lawrence M. Ausubel, Credit Card Defaults, Credit Card Profits, and Bankruptcy, 71 Am. Bankr. L.J. 249 (1997) (discussing relationship between credit card debts and increase in bankruptcy filings). Back To Text

[136] *See* Ausubel, supra note 135, at 256−57 (showing statistical relationship between increase in bankruptcies and credit card debt); Jagdeep S. Bhandari & Lawrence A. Weiss, The Increasing Bankruptcy Filing Rate: An Historical Analysis, 67 Am. Bankr. L.J. 1, 1 (1993) (providing that there was positive relationship between debt outstanding and bankruptcy rate); *see also Statement Before the Subcommittee on Administrative Oversight and the Court, Committee on the Judiciary, United States Senate*, (statement of Kim Kowalewski, Chief, *Financial and General Macroeconomic Analysis Unit*) (Apr. 11, 1997) (documenting the historic correlation between consumer debt and bankruptcy filing rates); Commission Report, supra note 2, at 84−86.Back To Text

[137] *See* Laurie Hays, *Credit Cards*: *Banks' Marketing Blitz Yields Rash of Defaults,* Wall St. J., Sept. 25, 1996, at B1. The five largest card issuers alone sent out more than 220 million solicitations in the third quarter of 1996 − and that was *a 15% drop* from 1995. *See* Jeff Bailey, *Credit−Card Mail Solicitations Fell in Quarter Third Period Mailings Off 15% in Steepest Decline of Current Expansion,* Wall St. J., January 17, 1997, at B7A. MBNA, one of the largest issuers, claims 30 million credit card solicitations each month in 1997 together with 6 million phone solicitations. *See* Saul Hansell, *MBNA Continues to Build on Its Foundation of Plastic*, N.Y. Times , Oct. 22, 1997, at D2; Samuel R. Cothran, Jr., Note, Dischargeability of Consumer Credit Card Debt After Anastas v. American Savings Bank (In re Anastas), 48 S.C. L. Rev. 915, 926 (1997) (stating that 2.7 billion credit card solicitations were mailed in 1996). *See generally* Stephen S. Frank, *This Family Deserves Much Credit Though Why Isn't Exactly Clear*, Wall St. J., Jan. 7, 1998 (family charted offers of more than 4.9 million dollars in credit offers in 1997). Back To Text

[138] *See* Ausubel, supra note 135, at 267 (noting that credit card companies allow cardholders to take cash advances at casinos); *see also* Ford Elsaesser, Legislative Update, 15 Am. Bankr. Inst. J. 6 (Oct. 1996) (stating that credit cards are used to pay almost everything from electric bills to gambling debts); Vincent D. Rougeau, Rediscovering Usury: An Argument for Legal Controls on Credit Card Interest Rates, 67 U. Colo. L. Rev. 1, 7 n.19 (1996) (noting necessity of credit cards in almost all possible transactions). Back To Text

[139] In constant dollars, median family credit card debt increased from $1,100 to $1,500 between 1992 and 1995. *See Family Finances in the United States: Recent Evidence from the Survey of Consumer Finances,* 1/1/97 Fed. Reserve Bull. 1, 21 at Table 14, Vol. 83, No. 1. Another study reports that the average household credit card debt increased by 173% between 1983 and 1992. *See* Peter S. Yoo, Charging Up a Mountain of Debt: Accounting for the Growth of Credit Card Debt, 3/13/97 Fed. Reserve Bank St. Louis Rev., 3, n.2, Vol. 79, No. 2. Consumer debt has grown more than 700% since 1977 without commensurate growth in real income. *See* Commission Report, supra note 2, at 84 n.127.Back To Text

[140] *See* Chevy Chase Bank, FSB v. Briese (In re Briese), 196 B.R. 440, 443 n.2 (Bankr. W.D. Wis. 1996) (stating that credit card business has become increasingly profitable); *see* Rougeau, supra note 138, at 2 (stating that increase in credit card market has caused noticeable transfer of wealth from consumer to credit card companies).Back To Text

[141] *See* James Medoff & Andrew Harless, The Indebted Society: Anatomy of an Ongoing Crisis 12−13 (1996); Ausubel, supra note 135, at 261 (noting that credit card interest rates have generally remained around eighteen percent).Back To Text

[142] *See* Ausubel, supra note 135, at 259−260. Ausubel notes that the pretax return on assets for banks between 1983 and 1993 averaged under one percent while the return on credit card lending for that same period was over 4.5%. According to Ausubel, the latter figure represents approximately a 75% annual return on equity. *See* id. *See also* Hays, supra note 137, at B2, "([b]y borrowing money at 4% to 5% and loaning it to card holders at 17%, [banks] are expected to earn 12.5 billion in credit−card profits alone this year, a 3.3% return before taxes." *See also* Major Lescault, Soaring Credit Card Debt, Delinquencies, and Bankruptcies Underscore the Need for Preventive Law Programs, 1997 Army Law 16, 17 (Mar. 1997) (noting that credit card lending is almost twice as profitable as any other form of banking business).Back To Text

[143] *See* Ausubel, supra note 135. In addition, an increase in credit card profitability is likely to lead to an increase in defaults. *See* id at 264.Back To Text

[144] *See* Federal Reserve Bulletin, supra note 139, at 21 Table 14. Overall, without consideration of income, the rate is one family in nine. Undoubtedly, these are the families who are most at risk of a bad turn of events resulting in the need for bankruptcy.Back To Text

[145] For many credit granters, a large balance due with payments maintained for several months automatically triggers a unilateral increase in the credit limit. *See* Barnett Bank of Pinellas Country v. Tinney (In re Tinney), 188 B.R. 1015, 1020 (Bankr. M.D. Fla. 1995) (asserting that "availability of credit for difficult financial times is one very good reason to establish credit"); *See also* First USA Bank v. Hunter (In re Hunter), 210 B.R. 212, 214 (Bankr. M.D. Fla. 1997) (stating plaintiff alleged use of credit cards because unavailability of cash). Back To Text

[146] *See* GM Card v. Cox (In re Cox), 182 B.R. 626, 634 (Bankr. D. Mass. 1995) (discussing problems of treating use of credit cards as a representation of ability to repay); First Deposit Nat'l Bank v. Parlsey (In re Parsley), 158 B.R. 664, 668 (Bankr. N.D. Ohio 1993) (discussing factors considered in proving debtor's intent to deceive); *see also* AT&T Universal Card Servs. v. Alvi (In re Alvi), 191 B.R. 724, (Bankr. N.D. Ill. 1996) (discussing use of credit cards as representation); *see generally* Commission Report, *supra* note 2, at 184 (noting that some courts have declined to equate credit card charge with intent or ability to repay).Back To Text

[147] *See* Tinney, 188 B.R. at 1020 (noting reason for establishing credit when people are experiencing financial difficulties). *See also* Manufacturers Hanover Trust Co. v. Cordova (In re Cordova), 153 B.R. 352, 356 (Bankr M.D. Fla. 1993) (noting availability of credit for difficult financial times is good reason to establish credit); Sears Roebuck and Co. v. Faulk (In re Faulk), 69 B.R. 743, 754 (Bankr. N.D. Ind. 1986) (providing that test for nondischargeability should not be whether card was used in difficult financial times).Back To Text

[148] *See* 11 U.S.C. § 523 (a)(2)(C) (1994). Consumer debts owed to a single creditor totaling more than $1,000 for "luxury goods or services" or cash advances aggregating more than $1,000 obtained within 60 days of the bankruptcy are presumed to be nondischargeable. *See generally* Norwest Financial Consumer Discount Co. v. Koch (In re Koch),

83 B.R. 898, 899 (Bankr. E.D. Pa. 1988) (concerning video cassette recorder, television, and radio); ITT Fin. Services, Inc. v. Claar (In re Claar), 72 B.R. 319, 321−22 (Bankr. M.D. Fla. 1987) (regarding lifetime membership to PTL religious theme park); J.C. Penney Co., Inc. v. Herran (In re Herran), 66 B.R. 323, 323 (Bankr. S.D. Fla. 1986) (concerning $1,021 worth of giftware, cosmetics, fragrances and clothing); Commercial Credit Corp v. Hussey (In re Hussey), 59 B.R. 573, 573 (Bankr. M.D. Ala. 1986) (involving three−wheeled vehicle).Back To Text

149 S*ee* Dan M. Kahan, Social Influence, Social Meaning, and Deterrence, 83 Va. L. Rev. 349, 379 (1997) (noting that high percentage of those who break law do get caught).Back To Text

150 *See* Commission Report, supra note 2, at 195 (discussing that Commission's proposal for dischargeability of credit card debt will still penalize some honest debtors although it is not intended to do so).Back To Text

151 *Cf.* Alvin C. Harrell, *The Consumer Issues Agenda of the National Bankruptcy Review Commission*, 51 Consumer. Fin. L.Q. 9, 11 (1997) (explaining that because credit lenders compensate themselves in advance, bankruptcy benefits consumers with no cost to society). *Compare* Ann Haberfelde, *A Reexamination of the Non−Dischargeability of Criminal Restitutive Obligations in* Chapter 13 Bankruptcies, 43 Hastings L.J. 1517, 1535 (1992) (noting that bankruptcy discharge allows debtor to feel forgiven by society); *and* M. Bernard Aidinoff et al., Report and Recommendations on Taxpayer Compliance, 41 Tax Law. 329, 351 (1988) (noting that tax cheats feel alienated from society), *with* Richard S. Gruner, Beyond Fines: Innovative Corporate Sentences Under Federal Sentencing Guidelines, 71 Wash. U. L.Q. 261, 280 (1993) (explaining that forced restitution payments in criminal cases will compel criminals to restore victims to condition that would have prevailed had offense not occurred). Back To Text

152 Given competition and significant profit margins, it is surprising that rates have not changed consistent with the lenders' cost of funds. *See* Ausubel, supra note 135, at 261. *See also* Cochran, *supra* note 137, at 928, (suggesting there is not empirical evidence to prove that credit card interest rates have increased as result of bankruptcy filings resulting form credit card debt). How likely is it then, that rates will change if an additional small number of bankruptcy abuses are caught?Back To Text

153 *See* Teresa A. Sullivan et al., As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America, at 219−221 (1989) [hereinafter Sullivan].Back To Text

154 *Cf.* H.R. 2500, 105th Cong., 1st Sess., § 107 (Sept. 18, 1997). The bill would go much farther than the Commission Report by creating a presumption of nondischargeability for any consumer debt incurred within 90 days before filing. Obviously, even more wholly innocent debtors would be caught by this provision, than by the Commission proposal. And, unlike the Commission proposal, H.R. 2500 would not eliminate use of § 523(a)(2)(A) for debts outside the period of the presumption.Back To Text

155 *See* Susan Block−Lieb, A Comparison of Pro Bono Representation Programs for Consumer Debtors, 2 Am. Bankr. Inst. L. Rev. 37, 40 (1994) (finding statistics from Administrative Office of United States Courts indicate that the number of bankruptcy cases filed pro se in U.S. has continued to rise in past few years); *see also* Mary M. Testerman, Bankruptcy Paralegal Regulation and the Bankruptcy Reform Act of 1994: Legitimate Legal Assistance Options for the Pro Se Bankruptcy Debtor, 23 Cal. Bankr. J. 37, 37 (1996) (observing consumers filed approximately 643,538 chapter 7 bankruptcy petitions in the U.S. in 1992, of which 82,000 were pro se). Back To Text

156 *See* Klein and Spade, Self Representation in the Bankruptcy Court: The Massachusetts Experience 12−13 (National Consumer Law Center, 1995); *see* Testerman, supra note 155, at 37−38 (providing that pro se debtors often receive improper advice).Back To Text

157 *See* Susan Block−Lieb, *Fishing in Muddy Waters: Clarifying the Common Pool Analogy as Applied to the Standard for Commencement of a* Bankruptcy Case, 42 Am. U. L. Rev. 337, 400 (1993) (discussing current limitations that federal law places on portion of individual's wages that can be garnished); *see also* 15 U.S.C. § 1673 (1994) (providing limits on wage garnishments). *Back To Text*

[158] *See* Brendan Stephens, *Panel Urges Major Reforms in Bankruptcy Law*, Chi. Daily L. Bull, Oct. 28, 1997, at 5 (1997) (discussing bright−line test for discharging credit card debt). *Back To Text*

[159] *See* 11 U.S.C. § 523(a)(2) (1994).Back To Text

[160] *See* id.Back To Text

[161] *See* Commission Report, supra note 2, at 207 (noting that Commission recommends to Congress that provision making such loans nondischargeable be overturned).Back To Text

[162] *See* Richard Chacon, *Debt Burden Soaring for US Students, High Tuitions Fewer grants Cited; graduates Delay Other Life Choices*, Boston Globe, (Oct. 23, 1997) at A1 (discussing student loan debt burden). According to the Nellie Mae study on which the article is based, an average student's debt increased from $8,200 in 1991 to $18,800 in 1997.Back To Text

[163] *See* David Keim and John Lang, *Banking on a B.A.; Paying for College? Expect a Degree of Risk*, The Knoxville News−Sentinel, Oct. 12, 1997, at A1 (discussing problems associated with massive student loan debts).Back To Text

[164] *See* H.R. Rep. No. 595, 95th Cong., 133 (1977) (discussing student loan fraud); 4 Collier On Bankruptcy, ¶ 523.14[1], at 96 (Lawrence P. King et. al. eds., 15th ed. rev. 1997). *See generally* Fossey, *Certainty of Hopelessness: Are Courts Too Harsh Toward Bankrupt Student Loan Debtors*, 126 J. of Law and Ed. 29 (1997).Back To Text

[165] There is a particular problem for debtors who attend trade schools which do not meaningfully enhance their earning capacity. Due to poor regulation of the student loan program, for−profit trade schools have been rife with fraud and abuse. Since the debt for attending school is owed to the student loan creditor, rather than to the school itself, defrauded students have been left holding the bag. *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 5.9 (3d. ed. 1991 and Supp. 1996) (discussing student loan fraud and educational assistance program issues); *see also* Brad Carlson, *Bankruptcies Continue to Climb,* Idaho Bus. Rev. June 9, 1997 at n.32 (finding credit card debt, tax problems, business failures, divorce, and medical problems continue to be main causes of bankruptcy); Edmund Sanders, *Chapter 7, 13 Filings on Rise, Orange County May Break its 1996 Record,* The Orange County Cal. Reg., May 31, 1997, C01 (discussing the causes of the increase in bankruptcy filings).Back To Text

[166] *See generally* Patricia Somers, Ph.D. & James M. Hollis, Student Loan Discharge Through Bankruptcy, 4 Am. Bankr. Inst. L. Rev. 457, 461 (1996) [hereinafter Somers] (noting that because of perceived abuse of discharge provision in chapter 13, Student Loan Default Prevention Initiative Act of 1990 was passed, removing student loans from superdischarge of chapter 13).Back To Text

[167] These courts have concluded that separate classification which allows payments to student loan creditors in an amount greater than other unsecured creditors discriminates unfairly and is thus prohibited by 11 U.S.C. § 1322(b)(1). *See* Groves v. LaBarge (In re Groves), 39 F.3d 212, 216 (8th Cir. 1994); McDonald v. Sperna (In re Sperna), 173 B.R. 654, 658 (B.A.P. 9th Cir. 1994); Eck v. Willis (In re Willis), 197 B.R. 912, 915 (N.D. Okla. 1996); *Compare., e.g.,* In re Freshley, 69 B.R. 96, 98 (Bankr. N.D. Ga. 1987) (holding that more favorable treatment of unsecured claim for student loan did not unfairly discriminate because of special treatment accorded educational loans in Bankruptcy Code). Some courts have allowed current payments to be made to student loan creditors during a bankruptcy case as they come due. *See* In re Benner, 156 B.R. 631, 634 (Bankr. D. Minn. 1993) (stating payment in full, outside chapter 13 plan, of debtor’s student loan did not unfairly discriminate); *compare* In re Coonce, 213 B.R. 344, 349 (Bankr. S.D. Ill. 1997) (finding debtors could not separately classify their student loan debt as long−term debt).Back To Text

[168] *See* Leeper v. Pennsylvania Higher Educ. Assistance Agency (PHEAA), 49 F.3d 98, 103 (3d Cir. 1995) (holding that interest accrues post−petition on non−dischargeable student loan during Chapter 13 case); In re Sullivan, 195 B.R. 649, 651−53 (Bankr. W.D. Tex. 1996) (same); Ridder v. Great Lakes Higher Educ. Corp. (In re Ridder), 171 B.R. 345, 346−47 (Bankr. W.D. Wis. 1994) (stating that post−petition interest on non−dischargeable student loan may be collected after bankruptcy concludes).Back To Text

[169] *See* 11 U.S.C. §1325(b) (1994) (requiring that debtor use all available income during chapter 13 plan to pay unsecured creditors).Back To Text

[170] Crushing post−discharge student loan debt can thoroughly undermine the fresh start. *See, e.g.*, Seth J. Gerson, Note, *Separate Classification of Student Loans in* Chapter 13, 73 Wash. U. L.Q. 269, 285−86 (1995) (considering impact of debtor's significant amount of unpaid, non−dischargeable student loan debt that would remain after bankruptcy); Thad Collins, Note, *Forging Middle Ground: Revision of Student Loan Debts in Bankruptcy as an* Impetus to Amend 11 U.S.C. § 523(a)(8), 75 Iowa L. Rev. 733, 748 (1990) (finding that strict interpretation of "undue hardship" results in many debtors who are in precarious financial situations often continue to be saddled with significant student loan debts after bankruptcy).Back To Text

[171] Perhaps current law should be replaced with a narrowly drafted provision barring discharge of student loan debts by debtors with high incomes or those engaged in potentially lucrative careers.Back To Text

[172] Other creditors would benefit from a decision to make student loan debts dischargeable. In some circumstances, resources being committed to student loans would be shared among all creditors.Back To Text

[173] For example, the Commission's proposal for *in rem* orders concerning relief from stay, would appear to apply in all chapters. *See* Commission Report, supra note 2, at 281.Back To Text

[174] *See* Personal Bankruptcy Consumer Credit Crisis, Before the Senate Committee on the Judiciary, 1997 WL 10569496 (1997) (statement of Ian Domowitz) (noting that chapter 13 plans have failure rate of about two−thirds); Marianne B. Culhane, *Home Improvement?* Home Mortgages and the Bankruptcy Reform Act of 1994, 29 Creighton L. Rev. 467, 488 (1996) (warning that chapter 13's high failure "rate should raise flag of caution", since two−thirds never complete plan to qualify for discharge); Teresa A. Sullivan et al., Rejoinder: Limiting Access to Bankruptcy Discharge, 1984 Wis. L. Rev. 1087, 1098 (asserting that "[d]ebtors in bankruptcy already have spotty payment records, and those debtors voluntarily in chapter 13 have high failure rates").Back To Text

[175] *See* Oliver B. Pollak, "*Be Just Before You're Generous:" Tithing and Charitable Contributions in* Bankruptcy, 29 Creighton L. Rev. 527, 580 (1996) (noting that chapter 13 debtor must be dedicated to plan); Robert M. Thompson, Comment, Consumer Bankruptcy: Substantial Abuse and Section 707 of the Bankruptcy Code, 55 Mo. L. Rev. 247, 248 (1990) (observing that there must be commitment in chapter 13 plan to pay back some of debtor's future earnings); C. William Schlosser, Jr., *Chapter 13 Bankruptcy as an* Alternative to Chapter 7, 18 Colo. Law. 2089, 2089 (1989) (examining chapter 13 debtor's serious financial commitment).Back To Text

[176] S*ee* 11 U.S.C. § 1325(b) (1994). Section 1325(b)(1)(B) states that if the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless it provides that all of the debtor's projected disposable income be received within a three−year period.Back To Text

[177] Debtor's prisons would do little to enhance creditor recoveries since it is hard to earn wages from prison and imprisonment would have enormous social costs. *See generally* Andrew J. Duncan, From Dismemberment to Discharge: The Origins of Modern American Bankruptcy Law, 100 Com. L.J. 191, 214 (1995) (discussing ill social effects of English debtor prisons in eighteenth century); Nick Jackson, Internal Exile: A Proposal for a Federal System 1990 Det. C.L. Rev. 1085, 1107 (discussing futility of placing debtors in prison to pay off debts).Back To Text

[178] *See* Report of the Commission on the Bankruptcy Laws of the United States, Part I at 159 (1973); H.R. Rep. No. 95−595, at 120−21 (1977), *reprinted in* 1978 U.S.C.C.A.N., 5963, 6080−81; Commission Report, supra note 2, at 89−91; s*ee also* Karen Gross, Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments, 135 U. Pa. L. Rev. 59, 119 (1986) (stating Congress wanted to encourage voluntary repayment by debtor to creditors through chapter 13); Sullivan, supra note 169, at 199−229 (1989) (asking question "Can these debtors pay?" and concluding that they cannot). A follow up study is reported in Teresa A. Sullivan et al., Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981−1991, 68 Am. Bankr. L.J. 121, 135−37 (1994) (financial comparison of debtors past and present). *But see* Charles Jordan Tabb, The History of the Bankruptcy Laws in the United States, 3 Am. Bankr. Inst. L. Rev. 5, 36 (concluding that Congress

has indirectly attempted to force some debtors out of chapter 7 and into 13, by allowing courts to dismiss chapter 7 cases where there is "substantial abuse" under section 707).Back To Text

[179] This is the approach which was taken in the current version of the Code. H.R. Rep. No. 95−595 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6080−81. The broader discharge available in chapter 13 cases also acts as an incentive to use that chapter. *Compare* 11 U.S.C. § 1328(a) (listing debts not discharged by firm confirmation) *with* 11 U.S.C. § 523(a) (listing exceptions to discharge).Back To Text

[180] *See* Hon. Laura Taylor Swain, *Individual Debt Adjustment Bankruptcy − Chapter 13*, 755 PLI/Comm 155, 159 (1997) (noting that "in return for willingness of chapter 13 debtor to undergo discipline of repayment plan for three to five years, broader discharge is available under chapter 13 than in chapter 7").Back To Text

[181] *See* 11 U.S.C. § 1322(d) (providing for plans of three years in most cases).Back To Text

[182] *See* infra notes 190 and accompanying text.Back To Text

[183] *See* 11 U.S.C. § 1322(b)(3) and (5) (1994); *see also* Mason−McDuffie Mortgage Corp. v. Peters (In re Peters), 101 F.3d 618, 619 (9th Cir. 1996) (noting that section 1322(b)(5) states that plan may "provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any . . . secured claim on which the last payment is due after the date on which the final payment under the plan is due"); Grubbs v. Houston First Am. Sav. Ass'n, 718 F.2d 694, 697 (5th Cir. 1983) (finding "[s]ection 1322(b)(5) is an explicit, but limited, exception to Section 1322(b)(2) which prevents modification of most home mortgage claims).Back To Text

[184] *See* 11 U.S.C. § 1322(b)(2); *see also* In re Wetherbee, 164 B.R. 212, 215 (Bankr. D. N.H. 1994) (stating that section 1322(b)(2) allows for modification of secured claims other than claim secured only by debtor's principal residence).Back To Text

[185] *See* 11 U.S.C. § 1325(a)(5).Back To Text

[186] *See* 11 U.S.C. § 506(d); Dewsnup v. Timm, 502 U.S. 410, 417 (1992) (holding that "§ 506(d) does not allow debtors to 'strip down' lien in chapter 7 cases); Nobelman v. American Sav. Bank, 508 U.S. 324, 328−29 (1993) (holding that section 1322(b)(2) prohibits chapter 13 debtor from relying on section 506(a) to reduce undersecured homestead mortgage to present fair value of mortgage residence).Back To Text

[187] The arrears usually include all foreclosure fees and costs since most secured credit agreements allow the lender to pass these fees on to the borrower. Thus a debtor who is four months behind on a mortgage requiring payments of $1,000 per month is likely to have generated arrears of more than $5,000 including fees and costs.Back To Text

[188] *See* Rake v. Wade, 508 U.S. 464, 472 (1993) (concluding that holder of mortgage is entitled to postpetition and prepetition interest on arrearages pursuant to sections 506(b) and 1325(a)(5)). For mortgages entered after September 22, 1994, interest on arrears will be required only if the underlying agreement and applicable non−bankruptcy law require it. *See* 11 U.S.C. § 1322(e) (1994). Pub. L. No. 103−394, §702(b)(2)(D) makes this provision applicable from the date of the enactment of the 1994 Bankruptcy Reform Act only.Back To Text

[189] In most jurisdictions, this is an additional ten percent premium. *See* 28 U.S.C. § 586(e); *see also* In re Savage, 67 B.R. 700, 704−08 (Bankr. D. R.I. 1986) (concluding court has no authority to determine reasonableness of all fees including trustee compensation); Westpfahl v. Clark (In re Westpfahl), 168 B.R. 337, 367 (Bankr. C.D. Ill. 1994) (finding proper computation of trustee's fee is to multiply by 1.1, when total amount is not fixed, so that total amount received should be amount to be paid to creditor plus 10% thereof as fee).Back To Text

[190] A family is likely to have other unusually high expenses in the period of time immediately after resolving a financial problem. These include potential costs of addressing needs typically deferred during an economic crisis including home maintenance, non−emergency medical and dental care, clothing for children, and replacement of worn out appliances. A debtor using the bankruptcy process also has an obligation to pay the filing fee ($160), utility

deposits under 11 U.S.C. § 366 and, in most cases, a retainer to cover attorney fees. *See generally* Mansnerus, supra note 63, at 1A; s*ee also Mortgage Foreclosures, Hearings Before the Subcomm. on Fin. Insts. Supervisions Regulations and Insurance of the House Comm. on Banking Finance and Urban Affairs*, 98th Cong., 1st Sess. 276 (1983) (statement of John J. Sheehan, Dir. of Legis., United Steelworkers of America) (explaining that homeowners facing loss of home are more likely to confront family problems as well as physical or mental illness).

In addition, there is every reason to believe that a history of recent financial problems is the best predictor of likely future problems. *See* Commission Report, supra note 2, at 234 (noting half of all debtors who initially file chapter 13 are dismissed with no resolution of their financial problems and no discharge).Back To Text

[191] Only 32% of chapter 13 cases are successfully completed today. *See* Commission Report, supra note 2, at 90. *See also* infra note 218.Back To Text

[192] *See* Commission Report, supra note 2, at 236; Bruce A. Markell, Clueless on Classification: Toward Removing Artificial Limits on Chapter 11 Claim Classification, 11 Bankr. Dev. J. 1, 20 (1994−1995) (explaining that "bankruptcy law equalizes the status of unsecured claims and non−recourse deficiency claims").Back To Text

[193] 508 U.S. 324, 330−31 (1993) (affirming bankruptcy court's denial of debtor's attempt to bifurcate claim into secured and unsecured claims).Back To Text

[194] *See* 11 U.S.C. § 1322(b)(2) (1994). *See also* Commission Report, supra note 2, at 237−38 (discussing basis for recommendation on stripdown).Back To Text

[195] *See, e.g.*, Wilson v. Commonwealth Mortgage Co., 895 F.2d 123, 128−29 (3rd Cir. 1990) (stating Code does not preclude modification of "unsecured" portion of undersecured claim); Bellamy v. Fed. Home Loan Mortgage Corp. (In re Bellamy), 962 F.2d 176, 180 (2d Cir. 1992) (stating bifurcation does not result in improper "modification" of claim which was secured solely by interest in debtor's principal residence). Back To Text

[196] *See* Commission Report, supra note 2, at 238−39 (stating that consumers are taking out more home equity loans, partially because they are easier to obtain).Back To Text

[197] *See* id. (noting that tax advantages have provided incentives to finance through home equity loans).Back To Text

[198] *See generally* Julia Patterson Forrester, Mortgaging the American Dream: A Critical Evaluation of the Federal Government's Promotion of Home Equity Financing, 69 Tul. L. Rev. 373, 379 (1994) (discussing recent growth of home equity financing, which results in greater risk of homeowner default). These same consumer goals could largely be addressed with nearly universally available unsecured credit in the form of credit cards.Back To Text

[199] *See* Forrester, supra note 198, at 382 (discussing lenders sustaining less risk in home equity loans than homeowners).Back To Text

[200] *See* Commission Report, *supra* note 2, at 240 n.619 and accompanying text. *See generally* Michael Hudson, Merchants of Misery: How Corporate America Profits from Poverty 72−85 (1996).Back To Text

[201] *See* Forrester, supra note 198, at 429 (discussing placing home equity lenders in better position than other secured creditors).Back To Text

[202] *See* id. at 452 (suggesting special treatment should not be extended to home equity loans in bankruptcy). Back To Text

[203] *See* id. at 452−55.Back To Text

[204] *See* Commission Report, *supra* note 2, at 236.Back To Text

[205] *See* supra notes 201−02 and accompanying text..*Back To Text*

[206] *See* Veryl Victoria Miles, *The Bifurcation of Undersecured Residential Mortgages Under §1322(b)(2) of the* Bankruptcy Code: The Final Resolution, 67 Am. Bankr. L.J. 207, 261 (1993) (noting creditors often require debtor secure debt with property even when property is so encumbered that no equity exists at time of loan).Back To Text

[207] The appraisal cases of just one judge over a five year period suggest the degree to which appraisal outcomes differ based on who requests them. *See generally* Parham v. R.C.R. Servs., (In re Parham), No. 91−10176S 1991 WL 186889, at *1 (Bankr. E.D. Pa. Sept. 20, 1991) (illustrating controversy between 'dueling appraisers'); Lampkins v. Commonwealth Mortgage Corp. of Am. (In re Lampkins), No. 90−12972S 1991 WL 71777 at *2 (Bankr. E.D. Pa. May 2, 1991) (mediating between appraisals); Wiley v. Federal Nat'l Mortgage Assoc. (In re Wiley) No. 91−14211S, 1991 WL 38965 at *1 (Bankr. E.D. Pa. Mar. 21, 1991) (demonstrating another discrepancy in appraisals by "dueling appraisers" submitted by adversarial parties); Starkey−Handy v. Metmor Fin., Inc. (In re Starkey−Handy), No. 90−0984S 1991 WL 34216 at *2 (Bankr. E.D. Pa. Mar. 11, 1991); Wolk v. Golden Realty Credit Corp. (In re 222 Liberty Travel Assocs.), 105 B.R. 798, 799 (Bankr. E.D. Pa. 1989); Derkotch v. Commonwealth Mortgage Corp. of Am. (In re Derkotch), No. 88−11726S 1988 WL 125700 at *2 (Bankr. E.D. Pa. Nov. 22, 1988) (comparing different appraisals from mortgagee and mortgagor); Cole v. Sovran Mortgage Corp. (In re Cole), 81 B.R. 326, 327 (Bankr. E.D. Pa. 1988) (stipulating to documents submitted for basis of appraisal); Crompton v. Boulevard Mortgage Co. (In re Crompton), 68 B.R. 831, 833 (Bankr. E.D. Pa. 1987) (comparing appraisals submitted by adversarial parties); Baxter Dunaway, 3 The Law of Distressed Real Estate § 27D.07(1) (1997) (listing unresolved problems with appraisals).Back To Text

[208] *See* Janet A. Flaccus, *Have Eight Circuits Shorted?* Good Faith and Chapter 11 Bankruptcy Petitions, 67 Am. Bankr. L.J. 401, 443 (1993) (illustrating appraisal differences from time of loan to time of bankruptcy). *Back To Text*

[209] *See* supra text accompanying note 179.Back To Text

[210] *See* ABI Report, supra note 10, at 18−19. The recommendation reached by the ABI panel would also protect most refinancings of purchase money mortgages.Back To Text

[211] *See* 11 U.S.C. § 1322(b)(2) (1994); *see also* Nobelman v. American Sav. Bank, 508 U.S. 324, 332 (1993) (finding section 1322(b)(2) prohibits bifurcation of secured claim where principal lenders claim is secured only by lien on debtor's principal residence). Back To Text

[212] The Commission has proposed that a creditor's secured claim in real property should be determined by the property's fair market value minus hypothetical costs of sale. *See* Commission Report, supra note 2, at 243. It is unclear how this standard would apply to undersecured junior mortgages which the Commission recommends be evaluated as of the time the mortgage was made. *See* id. at 236. Would hypothetical costs be deducted? If so, today's costs or the costs which would have applied if the property had been liquidated as of the date the mortgage was made?Back To Text

[213] *See* David Gray Carlson, *Car Wars: Valuation Standards in* Chapter 13 Bankruptcy Cases, 13 Bankr. Dev. J. 1, 2 (1996) (noting forced sales "are notoriously poor in producing cash proceeds"). The replacement value standard enunciated by the Supreme Court in Associates Commercial Corp. v. Rash, 117 S.Ct. 1879 (1997) has been criticized by both creditor and debtor advocates for raising more questions than it answers. *See* Robert F. Mitsch and Carleton B. Crutchfield, *The Rash Decision: A Question of Value in* Context, 16 Am. Bankr. Inst. J. 18, 18 (Aug. 1997) (creditor's perspective); Gary Klein, *Opinion Raises More Questions Than it Answers,* 16 Am. Bankr. J. 18 (Aug. 1997) (debtor's perspective). *See also* In re McElroy, 210 B.R. 833, 836−37 (Bankr. D. Or. 1997) (determining fair market value of automobile in question is less than "Blue Book" wholesale value).Back To Text

[214] *See generally* National Consumer Law Center, Repossessions and Foreclosures §11.4 (3d ed. 1995 and Supp.).Back To Text

[215] Donald J. Rapson, Symposium: Consumer Protection and the Uniform Commercial Code: Efficient Treatment of Deficiency Claims: Gilmore Would Have Repented, 75 Wash. U. L.Q. 491, 493 (1997) (arguing for fair valuation because abuses occur when secured creditor bids low at auction and then tries to enforce deficiency claim). Back To Text

[216] Given the disposable income test under current law, 11 U.S.C. § 1325(b), lower valuation standards benefit other unsecured creditors rather than the debtor in most cases. Any amount by which payment on the secured claim is reduced, increases the debtor's obligation to unsecured creditors − including the unsecured portion of claims after stripdown. *See* supra note 68. The exception arises in cases in which the difference in valuation standards is determinative of whether the debtor can afford a chapter 13 repayment plan at all. Most often debtors with such a small amount of disposable income are among those in the most dire circumstances with the greatest need for relief.

The question becomes more important if the Commission's recommendation that obligations to unsecured creditors become fixed by a means other than the disposable income test is adopted. *See* id. at 262 (Recommendation 1.5.4). In that event, the greater the secured claim, the greater the debtor's total obligations in bankruptcy. *See* infra note 221−241 and accompanying text.Back To Text

[217] *See* Commission Report, supra note 2 and accompanying text.Back To Text

[218] *See* Commission Report, supra note 2, at 90, 234; Henry E. Hildebrand, III, *Administering Chapter 13—At What Price?*, 13 Am. Bankr. Inst. J. 16, 16 (Aug. 1994) (noting "trustees estimated that the completion rate of chapter 13 cases averaged 32.89 percent").Back To Text

[219] *See* Jean Braucher, Lawyers and Consumer Bankruptcy: One Code, Many Cultures, 67 Am. Bankr. L.J. 501, 503 n.2 (1993) (noting "the primary reason that debtors choose chapter 13 is to keep collateral when they are in arrears on a secured debt"). When it takes longer to address the default on a secured claim, the cure is more expensive, because more interest is due. This reduces the amount available to pay unsecured claims.Back To Text

[220] This recommendation takes on increased importance if the Commission proposal limiting refiling is enacted. *See* Commission Report, supra note 2, at 273; s*ee also* infra notes 251−58 and accompanying text.Back To Text

[221] *See* Commission Report, supra note 2, at 262. The amount would be adjusted upward in some cases to meet the requirement in 11 U.S.C. §1325(a)(4) (1994) that unsecured creditors receive in chapter 13 the present value of the amount they would have received if the debtor had filed under chapter 7.Back To Text

[222] Creditors have pressed forward the most aggressive possible test for unsecured debt repayment in chapter 13. H.R. 2500, 105th Cong. § 102 (1997). Among its various problems, the proposal creates a definition of "monthly net income" which fails to account for secured and priority debts. This would leave no room in the budget to pay these debts or to cure delinquencies on these debts −− thus making chapter 13 wholly unworkable.

Net income available to pay unsecured creditors is determined in H.R. 2500 by taking the current monthly total income and subtracting only certain expense allowances used by the Internal Revenue Service in making tax payment agreements. However, when the IRS uses these tables they also allow for deductions for items such as child care, transportation, homeowners' utilities, health care, taxes, court ordered payments, life insurance and other necessary expenses which cannot be easily standardized from family to family. H.R. 2500 does not allow deduction for these essential expenses. Nor does it allow flexibility for parochial school, church dues or tithing, support of elderly parents and other common items considered vital by many families. Id.Back To Text

[223] *See* 8 Collier on Bankruptcy ¶ 1325.07, at 41 (Lawrence P. King et al. eds., 15th ed. rev. 1997) (stating most important criterion for confirmation of chapter 13 plan is section 1325(a)(6)'s requirement that court determine if debtor will be able to make all payments).Back To Text

[224] *See* In re Festner, 54 B.R. 532, 533 (Bankr. E.D.N.C. 1985) (determining that debtor's disposable income is $260 and after paying her obligations on secured claims, attorney's fees, and administration costs, balance is to be paid to

unsecured creditors).Back To Text

[225] The process of forming the budget is a very useful exercise in itself, which teaches many debtors to be better consumers. This ancillary benefit of the disposable income test would also be lost if the Commission's recommendation is enacted.Back To Text

[226] *See* In re Jones, 55 B.R. 462, 467 (Bankr. D. Minn. 1985) (stating it was not "reasonably necessary" for debtor to include $500 per month for college tuition, and $500 per month for secondary school tuition as part of monthly expenditures when calculating disposable income).Back To Text

[227] *See* 11 U.S.C. § 1325(b)(1) (1994) (trustee or holder of allowed unsecured claim may object); *see also* Festner, 54 B.R. at 532 (deciding creditor's objections concerning debtor's calculation of disposable income).Back To Text

[228] Of course, the $64,000 question is how the schedule of obligations would be established. Obviously, as the problems increase, the debtor's obligation under the schedule increases. Presumably, the amount of such an obligation would be negotiated in the political process by a schedule written into the Code. It is hard to see how such an approach could be more finely tuned than a system which resolves each debtor's current financial obligation based on that debtor's circumstances.Back To Text

[229] *See* Commission Report, supra note 2, at 262 ("trustee or any unsecured creditor should be authorized to file an objection any to plan that deviated from the guidelines"). The court would determine whether the deviation was appropriate. Id.Back To Text

[230] *See generally* sullivan, supra note 153, at 219−24.Back To Text

[231] *See* Symposium, American Bankruptcy Institute Roundtable−−Consumer Bankruptcy Issues Facing the Commission, 15 Am. Bankr. Inst. J., 30, 32 (Aug. 1996) (citing example of woman who budgeted only $75 per month for food and noting slim chance of plan completion).Back To Text

[232] There is a real possibility that this change would decrease the total revenues of the chapter 13 system. If a debtor could afford a case involving $5,000 in payments to unsecured creditors, but has a fixed obligation of $6,000 under the schedule, that debtor would be unable to file and their $5,000 in potential payments would not be captured in the chapter 13 process.Back To Text

[233] *See* Commission Report, supra note 2, at 270.Back To Text

[234] *See* id. at 264−65 (stating private school tuition was not reasonably necessary expense) (citing In re Jones, 55 B.R. 462, 467 (Bankr. D. Minn. 1985); In re Gonzales, 157 B.R. 604, 609 (Bankr. E.D. Mich. 1993) (finding educational expenses for masters program to be discretionary and therefore not reasonably necessary); *see also* Robert G. Drummond, Disposable Income Requirements Under Chapter 13 of the Bankruptcy Code, 57 Mont. L. Rev. 423, 441−58 (1996) (discussing major areas of controversy with respect to disposable income requirement).Back To Text

[235] *See* Commission Report, supra note 2, at 264 n.322 (noting current congressional proposals on tithing). As a practical matter, the current system is largely self regulating. Debtor's counsel knows what will and won't be challenged in a particular jurisdiction and naturally recommends avoiding litigation costs by establishing budgets which are acceptable in the local legal culture.Back To Text

[236] *See* 11 U.S.C. § 341 (1994) (requiring trustee to convene and preside over mandatory meeting of creditors). Based on experience, it is more common for debtors to squeeze in the other direction. A debtor may set up a somewhat unreasonable budget by minimizing expenses in order to show that a plan which addresses the home mortgage and the car loan is feasible. *See* 11 U.S.C. § 1325(a)(6) (requiring that debtor's plan be feasible).

The argument that debtors deliberately manipulate the system is not born out by review of the litigated cases. Of the hundreds of thousands of debtors who have used chapter 13 since 1984 when the disposable income test was enacted, only a handful of disputes concerning generally inflated budgets have been resolved in the courts. The cases tend to involve a relatively narrow range of issues, including tithing, private school and recreation expenses. *See, e.g.*, In re Navarro, 83 B.R. 348, 356−57 (Bankr. E.D. Pa. 1988) (concluding $100 per month for religious education is not excessive); In re Bien, 95 B.R. 281, 283 (Bankr. D. Conn. 1989) (finding tithe was reasonably necessary); In re Green, 73 B.R. 893, 896 (Bankr. W.D. Mich. 1987) (confirming plan with budget including tithe); In re Rogers, 65 B.R. 1018, 1021−22 (Bankr. E.D. Mich. 1986) (denying confirmation of plan keeping car with $17,000 lien for transportation); In re Hedges, 68 B.R. 18, 21 (Bankr. E.D. Va. 1986) (denying confirmation of plan that included continued payment for recreational boat). In short, the disputes are few in number and not especially hard to resolve. If Congressional guidance is provided on a few issues, such as tithing and private school tuition, then judicial resources spent on this issue would be essentially nil. *See* H.R. 2604, 105th Cong. (1997) (introducing bill to allow debtors to tithe during their chapter 13 cases).Back To Text

[237] Interestingly, the chapter 13 trustees have not objected to the existing disposable income test. Similarly, the majority of the participants in the ABI Consumer Bankruptcy Reform Forum "indicated a desire to continue the status quo with no changes [concerning disposable income], indicating that the system as it exists allows for those local and geographical variances that are necessary when dealing with budgets in Chapter 13's." *See* ABI Report, supra note 10, at 16.Back To Text

[238] The amount of time Judges spend on these issues would increase rather than decrease if the Commission's proposal is enacted. The number of cases and the evidence required to address exceptions from the standards would require far greater resources than are now being spent on the disposable income test.

If this proposal has supporters outside the Commission, they have the burden of establishing that there are a large number of disputed issues under existing law or by gathering data which shows that debtors are inflating their budgets based on unreasonable lifestyles. No such data exists to the best of the author's knowledge.Back To Text

[239] *See* Commission Report, supra note 2, at 267−68 (observing that "[s]ome courts throughout the country will not confirm plans that provide less than a certain percentage of repayment to unsecured creditors"). *See also* Braucher, supra note 219, at 532 (stating that some chapter 13 trustees and judges effectively deter zero−percent plans and keep most chapter 13 plans above floor percent that is known to local practitioners); 8 Collier On Bankruptcy, ¶ 1325.08, at 45 (Lawrence P. King et al. eds., 15th ed. rev. 1997) (discussing different court interpretations of good faith requirement of section 1325(a)(3)). *But see* In re Navarro, 83 B.R. at 356−57 (refusing to impose court's values on debtor's basic choice about appropriate maintenance and support).Back To Text

[240] An amendment to section 1325 to the effect that "a court has no authority to order payments to holders of allowed unsecured claims which exceed the amounts required under subsections 1325(a)(4) or 1325(b), whichever is greater" would probably do the trick.Back To Text

[241] *See also* Margaret Howard, *A Theory of Discharge in* Consumer Bankruptcy, 48 Ohio St. L.J. 1047, 1080−81 (1987) (noting that courts have dealt with chapter 13 abuses by using good faith requirement of section 1325(a)(3) and finding that it contains payment standard and requires that something be paid to unsecured creditors).Back To Text

[242] *See* Commission Report, supra note 2, at 273.Back To Text

[243] *See* id.Back To Text

[244] *See id.* at 275 (stating that "[c]onversion [from chapter 13 to chapter 7] would occur only after an opportunity for notice and hearing, and a debtor's case could not be converted if the debtor was barred from receiving a Chapter 7 on account of a prior Chapter 7 case.").Back To Text

[245] *See* 11 U.S.C. § 1307(a) (1994) (stating debtor may convert at any time and that any waiver of this right is unenforceable); s*ee also* In re McFadden, 37 B.R. 520, 521 (Bankr. M.D. Pa. 1984) (noting once debtor files notice of conversion, conversion is automatic); H.R. Rep. No. 95−598 at 428 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6383 (stating section 1307(a) gives debtor absolute right of conversion at any time).Back To Text

[246] *See* Commission Report, supra note 2, at 275 (observing that under current system debtor needs to know enough about bankruptcy system to request conversion from chapter 13 to chapter 7, and many do not); s*ee also* id. at 275 (noting only 14% of chapter 13 cases were converted to chapter 7).Back To Text

[247] Instead, its value may be paid to unsecured creditors from the debtor's income. *See* 11 U.S.C. § 1325(a)(4) (1994) (requiring that liquidation value be paid in order to confirm chapter 13 plan). The choice to use chapter 13 for this reason is especially common when the property involved is a home or personal property with significant sentimental value.Back To Text

[248] Among other things, a chapter 7 discharge would preclude obtaining another discharge for a period of six years. *See* 11 U.S.C. § 727(a)(8). In many cases, the circumstances of chapter 13 plan failure presage a new period of financial problems and attendant debts. Refiling several months later so that additional debts can be addressed is preferable to completing the existing case sooner.Back To Text

[249] *See* Commission Report, supra note 2, at 277 (stating that "debtors may see their plans dismissed, and they may file again later to make another attempt to repay when their circumstances improve") Courts are suspicious of refiling without any change in circumstances. *See, e.g.,* In re Hilton, 122 B.R. 138, 139 (Bankr. M.D. Fla. 1990) (finding filing successive chapter 13 without change in circumstances was abuse of chapter 13 process warranting denial of case for bad faith).Back To Text

[250] That impact increases to the extent refiling is precluded based on a discharge in a prior case. *See* H.R. 2500, 105th Cong. § 121 (1997). That bill would extend the time in which a debtor could not obtain a second bankruptcy discharge from six to ten years. No evidence has been developed or presented that there is an abusive use of bankruptcy by debtors in the 6 to 10 year period after their initial bankruptcy filings. Back To Text

[251] *See* Commission Report, supra note 2, at 276 (reviewing formal and informal surveys conducted to determine extent in which debtors enter bankruptcy system multiple times). Back To Text

[252] *See* Commission Report, supra note 2, at 276.Back To Text

[253] *See* Commission Report, supra note 2, at 277 (observing some cases may be dismissed and necessitate refiling when courts use dismissal as disciplinary tool).Back To Text

[254] *See, e.g,* Brengettcy v. National Mortgage Co. (In re Brengettcy), 1996 WL 46911, at *2,*3 (Bankr. W.D. Tenn. 1996) (finding debtor’s job promotion and increase in pay sufficient change in circumstances to permit refiling).Back To Text

[255] The steering committee for the ABI Consumer Bankruptcy Reform Forum endorsed a similar proposal. *See* ABI Report, *supra* note 10, at 10−11. These proposals would essentially expand the existing approach. *See* 11 U.S.C. § 109(g) (1994). That provision is designed to and does already catch many of the potentially abusive refilings. Back To Text

[256] *See* Commission Report, supra note 2, at 273.Back To Text

[257] The cost of pursuing this motion is likely to be high so that some poorer debtors will be kept out of the system based on this provision even though they have legitimate cases. *Compare* H.R. 2500, 105th Cong. § 109 (1997) and S. 1301, 105th Cong. § 303 (1997) which would require an expensive debtor motion in almost every instance of refiling within one year. Debtors who cannot afford to litigate for a stay would be barred from refiling under these provisions whether their case was abusive or not.Back To Text

[258] Similarly, the proposal concerning *in rem* orders responds to creditor concerns which are not shared by debtors. *See* Commission Report, supra note 2, at 281−82. This proposal addresses fractional share schemes, a bankruptcy abuse in which debtors transfer interests in their properties to others who file bankruptcy solely for the purpose of invoking the automatic stay as to that property. It is essential for the remedy to this problem to reflect that some

transfers, such as transfers required by divorce decrees, are not inappropriate and should have no impact on subsequent bankruptcies. The Commission's recommendation addresses this concern. The proposals on this issue that have been introduced in Congress are much too broad. They fail to protect many legitimate property transfers. *See* H.R. 2500, 105th Cong. at § 109 (1997); S. 1301, 105th Cong. at § 303 (1997). Further, the procedure governing *in rem* orders needs careful thought with respect to notice, filing, potential for relief from the order, and other technical issues related to due process and fairness. An example of some of the potential problems inherent in an *ad hoc* procedural setting can be found in In re Fernandez, 212 B.R. 361, 369−71 (Bankr. C.D. Cal. 1997).Back To Text

[259] The student loan proposal would also benefit some consumers. The only other significant potential benefit to consumers is in the proposal concerning valuation. However, that proposal is likely to run to the benefit of unsecured creditors to a much larger extent than it will benefit consumers.Back To Text

[260] The availability of a partial discharge of taxes in the bankruptcy system operates as an incentive for taxpayers with large arrears to get back into the tax system and work out a plan to pay as much as possible. Back To Text

[261] Modifications of mortgages otherwise protected by section 1322(b)(2) involving capitalization of arrears and re−amortization of the resulting balances could be allowed by consent of the parties. Such modifications, because they typically extend the loan term or reduce the interest rate, result in lower monthly payments on the mortgage, rather than higher monthly payments as required by a "cure" plan under current chapter 13.

All parties to a bankruptcy case benefit from a consensual modification which lowers the household's monthly mortgage payments, because the mortgage is restored to current status and more disposable income is available for other creditors. To create an incentive for voluntary modifications, a secured creditor might, for example, be presumptively entitled to relief from stay upon a rebuttable showing that the debtor is more than 60 days behind on payments under the mortgage as modified.Back To Text

[262] Many debtors have monthly mortgage payments of $1,000 or more. The trustee's commission on these payments can be a substantial additional expense for debtors where it is required. *See* Foster v. Heitkamp (In re Foster), 670 F.2d 478, 485 (5th Cir. 1982). *See generally* 8 Collier On Bankruptcy ¶ 1302.05, at 31 (Lawrence P. King et al. eds., 15th ed. rev. 1997) (discussing payment of percentage fee on payments directly to creditor and not through trustee).Back To Text

[263] The availability of such a fund would greatly enhance the success of chapter 13 cases because debtors would have savings available in the event of new short−term financial problems. A mechanism would be required for oversight of such funds so that debtors could access them only in the event of true hardship. Perhaps debtors could be given some incentive to generate such funds and to maintain them, by allowing a portion of unused amounts to be returned to the debtor at the close of the case.

Any diminution of receipts to unsecured creditors based on maintenance of the savings fund would likely be offset by increases derived from payments under plans that would otherwise have failed. Professor Jeffrey W. Morris of the University of Dayton Law School originally conceptualized and proposed this idea.Back To Text

[264] *See* 11 U.S.C. § 525(c)(1) (1994) (stating that governmental unit cannot discriminate against debtor under Bankruptcy Act). Protections against discrimination in lending decisions by federally related lenders following a designated waiting period would be a significant incentive for consumers to propose and complete a chapter 13 plan.Back To Text

[265] 508 U.S. 464, 471−75 (1993) (allowing claims in bankruptcy to provide for compound interest, even though such interest is illegal under the laws of many states). *See* Kathleen Keest, *The Cost of Credit: Regulation and Legal Challenges*, *in* National Consumer Law Center § 4.6 at 125 (1995) (legal restrictions on compound interest) .Back To Text

[266] Some courts have held that the stay terminates at the time of confirmation. *Compare* Chicago v. Fisher (In re Fisher), 203 B.R. 958, 964 (Bankr. N.D. Ill. 1997) (vesting property of estate in debtor at confirmation deprives that

property of stay protection afforded to property of estate), *and* Bernstein v. Nagel (In re Bernstein), 20 B.R. 595, 598 (Bankr. M.D. Fla. 1982) (ceasing protection of automatic stay after confirmation of chapter 13 plan), *with* Security Bank of Marshalltown v. Neiman, 1 F.3d 687, 691 (8th Cir. 1993) (continuing protection of the stay estate after confirmation of chapter 13 plan). Post−confirmation execution on the debtor's property can seriously undermine performance of the plan.Back To Text

[267] *See* Laurie Hays, *Credit Cards: Banks Marketing Blitz Yields Rash of Defaults*, Wall St. J., Sept. 25, 1996, at B1 (noting problems with credit card enticements); *see also* Ausubel, supra note 135, at 250 (1997) (stating that extranormal profitability of credit card lending has been major factor contributing to currently high levels of delinquencies); *see also* Samuel A. Rea, *Arm−Breaking, Consumer Credit and Personal Bankruptcy*, 22 Econ. Inquiry, 188, 192 (1984) (noting that creditors were in better position than borrower to determine predictability of borrowers to repay their debts). Back To Text

[268] *See, e.g.*, Vern Countryman, *Improvident Credit Extension: A New Legal Concept Aborning*?, 27 Me. L. Rev. 1, 20−22 (1975) (proposing bankruptcy legislation intended to deter improvident extensions of credit by disallowing claim of creditor who improvidently extended credit); Ronald L. Hersbergen, *The Improvident Extension of Credit as an* Unconscionable Contract, 23 Drake L. Rev. 225, 296−97 (1974) (proposing that bankruptcy courts should disallow credit claims arising from unconscionable transactions, including improvident extensions of credit).Back To Text

[269] Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299, 313 (1978). *See* Smiley v. Citibank, N.A., 517 U.S. 735, 741 (1996) (finding that National Bank Act allows national banks to charge customers fees at rates permitted by laws of their home states even in states where such fees are prohibited).Back To Text

[270] *See* Greenwood Trust Co. v. Massachusetts, 776 F. Supp. 21, 46−7 (D. Mass. 1991) (holding that Massachusetts could use own laws prohibiting imposition of late charges), rev'd, 971 F.2d 818 (1st Cir. 1992). *See generally* Keest, supra note 265, at ch. 2 (addressing state regulation of interest rates).Back To Text

[271] *See, e.g.*, Richard P. Eckman, *The Delaware Consumer Credit Bank Act and "Exporting"* Interest Under Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980, 39 Bus. Law. 1264, 1267−1270 (1984) (noting that Delaware seized upon opportunity to deregulate interest rates and other bankruptcy functions in order to attract banks and credit card companies that operate solely on "export" basis). Back To Text

[272] Minimum payments on many credit cards will not amortize the loan. If the principal is not paid, interest quickly accrues. For many consumers this can spiral out of control.

If minimum payment terms are offered that won't amortize the debt in two years consumers should be told, in clear and conspicuous language, what they need to pay, if they make no further charges, in order to pay off the loan over a two year period.Back To Text

[273] Low initial rates are designed to encourage consumer use of credit in the first months after credit is granted. Many consumers do not understand what the permanent rate will be or the impact of the rate change on a large unpaid balance. Back To Text

[274] Some lenders raise rates arbitrarily after consumer balances reach a certain level. Interest rate changes should be tied to an actual change in the interest rate environment so that consumers are not caught unaware.Back To Text

[275] When a lender extends a consumer's credit limit unilaterally, in some cases after a consumer is already struggling with the existing balance, the message is that the lender believes that the consumer can afford to take on more credit. Consumers would not be hurt by having to ask for more credit, rather than having it offered unilaterally. Such a request should trigger at least minimal underwriting requirements.Back To Text

[276] *See* supra note 102 and accompanying text.Back To Text

[277] Consumers receive checks from several major lenders in the mail for as much as $5,000. Not everyone understands that cashing these checks can lead to acceptance of high rate credit terms. In addition, pre−approved credit through cashed checks eliminates the cooling off period which more common credit application processes provide.Back To Text

[278] With credit card cash advance machines prevalent in casinos, is it surprising that some gamblers get overextended on credit and file bankruptcy based on those credit card debts?Back To Text

[279] Offering credit aggressively to college students who cannot afford to pay off their debts until they join the work force some years later is prevalent because interest mounts until the debt is paid off. Again, is it surprising that some college students can't manage their debts or don't find work quickly enough after college in order to pay down accrued obligations? By lending aggressively to college students, at a time in life when money is scarce, our society runs the risk of saddling people early in life with an unmanageable problem that will later preclude more important uses of credit such as purchase of a home and car.Back To Text

[280] Television commercials suggest that consumers use credit for everything from expensive restaurant dinners to a vacation on the Riviera with Nastasia Kinski. Credit card bills are stuffed with advertisements for additional items which can be purchased on credit. Back To Text

[281] *See* Credit Card Protection Act of 1997, H.R. 1975, 105th Cong., 1st Sess. (1997).Back To Text

[282] The Commission has sensibly recommended systemic financial education for all debtors during the bankruptcy process. *See* Commission Report, *supra* note 2, at 114. In addition to teaching budgeting skills, it is essential that any educational program offered to debtors teach the costs and risks associated with credit, how to shop for the cheapest possible loan products, and most importantly, raise awareness concerning consumer legal rights available when lenders step over the line.Back To Text

[283] *See* United States v. Kras, 409 U.S. 434, 447 (1973) (holding that due process and equal protection clauses do not require court to waive bankruptcy court fee for indigents); *see also* Henry J. Sommer, *In Forma Pauperis in* Bankruptcy: The Time Has Long Since Come, 2 Am. Bankr. Inst. L. Rev. 93 (1994) (noting that bankruptcy courts are only federal courts where individuals cannot proceed in forma pauperis).Back To Text

[284] Fees are now $160 per case for chapter 13 and $175 per case for chapter 7. At the time of the Supreme Court decision in *Kras* fees were only $45 per case. The increases have substantially outstripped inflation. Attorneys fees can also add substantially to the cost of filing a case. *See* Laura Mansnerus, *Declaring Bankruptcy: Not Easy and Not Cheap*, N.Y. Times, May 8, 1993, at 35.Back To Text

[285] *See, e.g.,* Sommer, supra note 283, at 93 (1994); *see also* Jason DeParle, *Poor Finding Going Broke is Too Costly*, N.Y. Times, Dec. 11, 1991, at A24 (noting recession caused many debtors to lose possessions and ruin credit history because could not afford filing fees); Sullivan, supra note 169, at 2.Back To Text

[286] *See* Report of the Commission on Bankruptcy Law of the United States, H.R. Doc. No. 137, 93rd Cong., pt.1, (1973), *reprinted in* App. Collier on Bankruptcy at 254 (Lawrence P. King et al. eds., 15th ed. 1997) (recommending that indigent debtors be authorized to file in forma pauperis petitions in bankruptcy without payment of filing fees). Back To Text

[287] H.R. Rep. No. 103−2519, pt.1, at § 111(d)(3) (1993), *reprinted in* 1993 U.S.C.C.A.N. 1153, 1165 (describing waiver of fee in selected districts). The pilot districts, which permitted chapter 7 cases to be filed by indigents without any fees during the program were the Southern District of Illinois, the District of Montana, the Eastern District of New York, the Eastern District of Pennsylvania, the Western District of Tennessee, and the District of Utah. Compare In re Shannon, 180 B.R. 189, 191 (Bankr. W.D. Tenn. 1995) (finding debtor's agreement to pay attorney $100 does not waive qualification for fee waiver), *and* In re Koren, 176 B.R. 740, 746 (Bankr. E.D. Pa. 1995) (allowing debtor to obtain IFP relief even though debtors paid attorney), *with* In re Takeshorse, 177 B.R. 99, 100 (Bankr. D. Mont. 1994) (denying fee waiver to debtor who paid $450 attorney's fee). Back To Text