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THE NATIONAL BANKRUPTCY REVIEW COMMISSION AND CONSUMER BANKRUPTCY: PROPOSALS IN SEARCH OF A RATIONALE

George J. Wallace [*]

The National Bankruptcy Review Commission's [1] Report was presented on October 20, 1997 to Congress, the President and the Chief Justice of the United States Supreme Court. [2] The consumer bankruptcy recommendations in the Report caused a certain amount of fanfare in Congress and the press, particularly in a hearing held by the Senate Judiciary Subcommittee on Administrative Oversight and the Courts at which each of the Commissioners briefly testified. [3] The Commissioners then went home.

The next day, Senators Charles E. Grassley of Iowa and Richard J. Durbin of Illinois, respectively the Chairman of the Subcommittee and its ranking minority member, introduced a bipartisan consumer bankruptcy reform bill, S. 1301, which adopted only four uncontroversial recommendations [4] of the 32 the Commission proposed, and otherwise took a quite different approach to consumer bankruptcy reform. [5] For example, Title I of the bill proposed "means testing" the availability of chapter 7, [6] a concept not discussed in detail in the Commission majority's Report, [7] although covered extensively in a separate statement of Commissioner Edith Hollan Jones joined by Commissioner James I. Shepard. [8] The House of Representatives did not even wait for the Commission to report. On September 18, 1997, Representatives Bill McCollum of Florida and Rick Boucher of Virginia introduced H.R. 2500, [9] which contains a means testing provision [10] and approximately 30 additional consumer bankruptcy reform provisions most of which have little relation to the recommendations in the Commission Report.

This failure of the Commission Report to have an immediate legislative impact was not because the contents of the Commission Report were so new. Its substance had been known in general outline for two months and a summary of the consumer proposals had been available in written form from the Commission for at least six weeks prior to the Commission Report date. [11]

Of course, it is possible that the consumer bankruptcy recommendations of the Commission's Report, like Phoenix, will rise again and eventually have a greater impact than initially on both Congress and the thinking of Americans about consumer bankruptcy. That remains to be seen. The important question is whether they deserve to be treated seriously, or instead consigned to the obscurity that they so rapidly attained upon their initial delivery.

This article concludes that the consumer recommendations fail to advance the political and philosophical debate beyond where it was when the Commission was created. If Congress hoped to substitute a more objective and useful inquiry into what could and should be done with consumer bankruptcy, its hopes were disappointed. Early on, the Commission was taken hostage by misfortune, and it never succeeded, despite the efforts of some Commissioners, in moving beyond the terms of the political debate that preceded it. [12]

It is unfortunate that it did not. The Commission offered an opportunity for a diverse group of informed and thoughtful participants to examine and restate why consumer bankruptcy should be available, what it does, and what it should and should not do in a more articulate way than the unclear but easy references that have dominated consumer bankruptcy policy discussions for some time, such as those justifying greater debtor benefits as enhancing the debtor's "fresh start". [13] That opportunity has been lost, at least for now.

I. What the Commission Did Not Do

Congress created the Commission to help it resolve ongoing policy and factual conflicts concerning bankruptcy. [14] Those involved in the negotiations leading up to the Bankruptcy Reform Act of 1994, which created the Commission, were aware that creditor and debtor interests each sought substantial changes to the Code, and those changes were strongly opposed by others. [15] At the same time, few Members of Congress had patience with the substantive and procedural details of each reform proposal. An independent Commission held out the promise that through study, policy analysis and factual research, a clearer articulation might develop of what each dispute was about. [16]

The consumer bankruptcy recommendations of the Commission fail to fulfill that promise in five respects.

First

, the Report lacks significant policy content. Surprisingly, it sidesteps an evaluation of how well the present consumer bankruptcy system is doing its job or a clear statement of what the policy objectives of the system should be, instead focusing upon justifying "recommendations" that seem to have little in common. The body of the Report, despite frequent reference to the historical justifications for bankruptcy and the undoubted hardships some debtors face, [17] fails to address meaningfully the policies that should guide Congress in deciding whether and to what extent the present consumer bankruptcy system should be revised to meet current societal needs in the twenty−first century. For example, the Report does not begin where common sense would suggest it should: Is the debtor assistance consumer bankruptcy provides adequate to help debtors? Does present consumer bankruptcy relief offer meaningful short term help, and over the long term return most debtors to being stable members of society who do not over borrow?

The Report also does not address two other policy issues of central importance: Does the ease with which a consumer debtor today can get a discharge encourage some debtors to use bankruptcy too easily when they could work their way out of their debt difficulties? If so, the personal responsibility of Americans, on which the consumer credit system relies, is being undercut. Second, is the willingness and commitment of ordinary Americans *voluntarily* to repay their consumer debts being eroded by increased public awareness that friends and neighbors are filing bankruptcy and easily relieving themselves from debt? Since these are the policy issues that must be considered before altering the scope and content of the Code's consumer bankruptcy provisions, the Report has no foundation for either its recommendations or its failure to recommend changes. It simply becomes the opinions−−informed or otherwise¾ of the majority of the Commission's members.

Second

, the Report fails to bring any significant new factual or statistical information to the debate about consumer bankruptcy policy. [18] For example, as I argue below, consumer bankruptcy is a social welfare benefit paid for by consumers who pay their consumer credit bills. The cutting edge monetary issue underlying bankruptcy policy today is how much bill payers should pay in increased credit costs or the reduced availability of consumer credit for the benefits bankrupt debtors receive. [19] Yet the Report does not begin to quantify how much those who pay their bills will pay in increased credit costs or reduced availability of credit in order to provide more generous welfare benefits to debtors in debt difficulty, a relevant question when expanding or contracting debtor relief is under consideration. Likewise, the Report does not give us any insight into how many people are really helped by bankruptcy each year.

Third

, the Report fails to address, in any reasoned way, the steady increase in the number of consumer bankruptcies per year, which accelerated to a rate of about 20% per year in 1996 and 1997. [20] The 1.33 million consumer bankruptcy filings expected for 1997 [21] will be up from under 300,000 in 1980 and sharply up from approximately 780,000 in 1994. [22] As the number of filings increase, the impact bankruptcies have on the cost of extending credit and therefore on bill paying consumers also increases, [23] magnifying the adverse effect of poorly constructed bankruptcy policies.

Fourth

, the Report barely addresses the decentralization of administration and the cumbersome procedure of the present consumer bankruptcy system and suggests little to improve the efficiency or reduce the cost of participation in the bankruptcy process. Yet it is obvious that todays' consumer bankruptcy process produces neither uniform results from one court to another, [24] nor provides an efficient social welfare system for debtors who get into debt trouble or the creditors who are affected. [25]

Fifth

, as a result of the failure of the Report to address the controversial issues of consumer bankruptcy as a matter of policy, the Commission produced a Report that contributes little to the debate.

This is not to say that the consumer bankruptcy portions of the Commission Report make no contribution at all, or that the Commission was not hampered by a very small staff and lack of funds. For example, the Commission appears to have explored how a national docket and auditing could be implemented fairly carefully, [26] although without addressing the crucial issue of funding. The recommendations on consumer education and rehabilitation [27] give greater visibility to the lack of any significant commitment to these goals in the present bankruptcy system despite valiant efforts by some United States Trustee's offices, panel trustees and others to develop programs on a district by district basis. [28] The dialogue between the majority Report on the one hand and the minority statements by Commissioners Gose, Hartley, Jones and Shepard on the other outlines some of the conflicts in position that exist on consumer bankruptcy issues. [29] Yet all of this amounts to nothing more significant than a vehement exchange of opposing views, something with which Congress is quite familiar when dealing with consumer bankruptcy issues. The Commission did not significantly clarify the debate that preexisted its creation; it simply reiterated it.

II. What the Commission Did

The Commission's 32 consumer bankruptcy recommendations are a *potpourri* of different points of view, the most controversial of which were adopted by a narrow vote of 5 to 4. [30] Those who disagreed with the majority felt their differences strongly. Dissenting views took up more than 200 pages of the Commission's Report. [31]

The net effect of the changes proposed by the Commission majority would be to increase significantly the bankruptcy losses experienced by secured creditors, credit card issuers and those that make student loans, among others, with little offsetting gain. By extension, the effect of those losses would be to increase the price of credit to consumers who do pay their bills and encourage increased bankruptcy use by debtors with some ability to pay.

There follows a summary of the most significant of the Commission's consumer bankruptcy recommendations:

A. Secured Credit

The Commission majority recommended several provisions that would have the effect of making secured creditors' claims less collectible than they are today. The net effect of these changes would be to cause secured creditors and their paying customers to contribute more than they do now to giving relief to debtors in debt trouble. Purchase money first real estate secured creditors, however, are favored by one of the recommendations. [32] The offsetting gains to improved rehabilitation of bankrupt debtors remains unclear. As already discussed, the Report does little to justify the implicit redistribution in wealth it recommends.

B. Personal Property Security

1. Reaffirmations and "Ride Throughs"

Reaffirmations [33] and ride throughs [34] are undoubtedly important to both chapter 7 debtors and to their creditors. [35] Debtors use them to keep items of secured property that they wish to retain after filing, and the reaffirmation or ride through is therefore an important part of getting started again. Reportedly, debtors reaffirm or ride through in significant numbers. [36] Secured creditors apparently find that the debtor's continuation of payments as part of a reaffirmation or ride through results in favorable collection experience.

The Commission took several steps to discourage and even stop the use of Reaffirmations. [37]

First, it recommended that a stop be put to ride throughs. [38] In a chapter 7 case, the debtor owning personal property subject to a security interest could not retain that property unless he or she either (1) redeemed the property under section 722, or (2) agreed with the creditor to reaffirm the debt. [39] There could be no ride throughs. The debtor would be required within a short period of time after filing chapter 7 to either redeem, reaffirm, or relinquish the collateral to the creditor. [40] Voluntary repayment arrangements under Code section 524(f) would not be permitted if the creditor did anything *affirmative* to obtain the voluntary repayment. [41] These proposals would amount to an effective ban on ride throughs, particularly given in *In re Latanowich*, the "Sears Case" [42] and the settlement terms of the related criminal, class action and state attorney's general, and Federal Trade Commission enforcement actions that emanated from that case, [43] which have made creditors extremely careful about any acts that a court could construe as violating the post−discharge injunction.

Second, the current standards and procedures for obtaining a reaffirmation would also be radically restructured, abolishing the reaffirmation known today. [44] First, Reaffirmations would only be available if they were for no more than the fair market value of the property that secured the debt, *less* any attorneys' fees and collection costs. [45] The Commission would have fair market value determined by wholesale value. [46] In other words, a reaffirmation would have the equivalent economic effect of a chapter 13 cramdown. The articulated reason for this change is to force more people to use chapter 13's, although there is no certainty that would be the actual effect. [47]

Third, the procedure for validating a reaffirmation would require that *every* reaffirmation be presented to the court on motion and then approved by the court in order to result in a legally enforceable debt. [48] The motion would have to have attached to it, in addition to the reaffirmation agreement and any debtor attorney's certification, a copy of the contractual documents and perfection of lien information. The Commission Report attempts to propose a procedure by which the motion would be standardized, [49] but it is unlikely it would work routinely in practice. Procedurally, the paper work to file a reaffirmation would be as complicated as it was before the changes in 1994 substituted the debtor's attorney's certification for reaffirmation hearings. [50]

Neither the creditor nor the debtor could require that the court hold a hearing; [51] the court could grant or deny the motion on the papers without hearing, although the court could hold a hearing on any motion if it wanted to. On the other hand, the court would be *required* to hold a hearing on the reaffirmation unless the debtor's attorney had certified that the reaffirmation was in the debtor's best interest (as today) and the parties had agreed on valuation of the collateral. [52] In order for the reaffirmation agreement to become valid, the court would have to conclude, either on the motion papers or after hearing, that the agreement was in the best interests of the debtor and did not impose undue hardship. [53]

The effect of these changes on debtors and on secured lending would be severe. The limitation to wholesale value would cause a very significant increase in credit losses in markets, like secured vehicle credit, in which reportedly consumers reaffirm today in great numbers at or near full contract value. The automobile finance companies have indicated that literally billions of dollars of credit losses are in issue. [54] Even in markets in which Reaffirmations today tend to be for less than full contract, the procedural hurdles to a valid reaffirmation remain a very significant adverse change, increasing administrative costs of creditors and the court considerably.

The Commission Report argues that these changes to Reaffirmations and ride throughs would improve the bankruptcy system by forcing more debtors to use chapter 13, presumably to keep their automobile, and by producing more "equity" between secured and unsecured creditors, presumably by forcing more debtors into chapter 13 where they could "cramdown" the automobile loan to the wholesale value of the car as discussed below. [55] There is reason to doubt whether these recommendations would have the effects claimed. What is clear is that the changes would have major impact upon creditor collections and therefore the cost consumers pay for secured credit in general and automobile loans in particular. The ephemeral benefits the Commission claimed hardly outweigh the adverse impact the change would have both on the debtor's "fresh start" and on the cost of credit. More likely the Commission majority was swayed by the publicity surrounding the Sears Case and jumped to the conclusion that "something" needed to be done about Reaffirmations. What is now clear is that the Code already has more than sufficient sanctions in place to control improper creditor conduct in the context of Reaffirmations and ride throughs. [56] The post−discharge injunction combined with state and federal deceptive practices law resulted in Sears paying in class action settlements, penalties and enforcement actions more than $160 million dollars to settle the Sears Case. [57]

2. Cramdowns

In a chapter 13 case, personal property secured creditors would be subject to cramdown to "*wholesale value,"* undercutting *Associates Commercial Corp. v. Rash,* [58] which adopted a "replacement value" standard. [59] In addition, the Commission Report recommends that the interest rate on secured debt would be set artificially at something other than the market rate for that type of credit risk or the contract rate. [60] The Commission Report suggests that it should be at an unspecified spread over six month treasury bills. [61]

Given the choices the Commission had open to it on these topics, it clearly chose the ones least favorable to creditors and to consumers who pay their bills. Other choices the Commission could have made on valuation were retail value or some point between retail and wholesale value. Interest rates could likewise have been set at the contracted for rate or some point between that rate and the extremely low rate the Commission majority selected.

3. Security Interests in Household Goods

Purchase money security interests in household goods, tools of the trade, or health aids will be void unless a creditor files a motion in bankruptcy court and proves that the value of an item subject to security interest is worth more than $500 at the time of the hearing. [62]

The practical effect of this proposal on creditors taking security in items of this type would be enormous, even when the items were worth considerably more than $500, because a motion to determine value would be a necessary preliminary step to any enforcement during bankruptcy including a lift stay motion, and possibly afterwards. The additional expense and delay is obvious.

The advantage to consumer debtors justifying this recommendation is again unclear. [63] To be sure, debtors who filed for bankruptcy relief would be able to keep various items of household goods free of the security interest of creditors, but why is that an appropriate welfare benefit? The Commission Report fails to explain why bankrupt debtors need these items free from the obligation to pay for them (which they cannot keep under the present Code without making arrangements with their creditors) to start over again effectively. [64] It also fails to consider the effects the recommendation would have on consumers who pay their bills and who wanted secured credit to purchase these items. [65] They would presumably pay unsecured credit interest rates, not secured credit interest rates, because any security interest they gave would be void or voidable. On the whole, this recommendation also appears to be another poorly thought out overreaction to the Sears Case. In that case, Sears claimed a security interest in Mr. Latanowich's car battery and television, which he had purchased at Sears on a revolving credit card and not yet paid for fully. [66]

C. Home Mortgages

1. Multiple or Serial Filing

The Commission recommended that the so called "multiple filing problem" be addressed legislatively. [67] Serial filing of bankruptcy cases by the same debtor can be used by some debtors to delay foreclosure on real estate as long as possible. [68] By filing and obtaining the automatic stay, the debtor can stop a foreclosure sale. [69] When relief from stay is about to be granted, the debtor can dismiss the case, but remain poised to refile as soon as the foreclosure sale again becomes imminent. In states with complex foreclosure and sale procedures, this tactic, repeated as necessary, can delay foreclosure several years. A nationwide filing system would be maintained to keep track of all debtors who file, to back up the provisions on multiple filing. [70]

The Commission's proposal, on the other hand, while welcome for recommending legislative change on this topic, is not particularly effective. On the *third* bankruptcy case filing within six years by the same debtor, the automatic stay would not be imposed if the most recent filing was within 180 days unless the court, on motion and after notice and hearing, reimposed it. [71]

The Commission Report also recommends that *in rem* orders be authorized to deal with the situation when the debtor conveys out multiple interests in the property to separate individuals, [72] each of whom eventually file in a sequence designed to most disrupt foreclosure.

2. Cramdown of Subordinate Mortgages

In a chapter 13 case today, subordinate mortgage loans are exempt from cramdown, just as are first mortgage loans. [73] Under the Commission majority's recommendation, such loans could be crammed down to the appraised value of the property on the date the loan was made. [74] The justification given is that *some* subordinate lenders allegedly charge at interest rates little different from those charged for unsecured credit, although the Commission had no systematic evidence that was the case, and many home equity creditors charge at rates well under interest rates for equivalent unsecured credit. No consideration was given, apparently, to whether limiting cramdown in the manner proposed would harm those who now use subordinate loans successfully and to their advantage. The majority, based on scanty evidence, thought they saw *some* borrowers making unwise decisions to borrow secured by their home, and apparently decided it was best if the government discouraged the practice, without considering the effect on other borrowers who use such credit wisely to obtain credit at lower cost than available unsecured.

3. Ride throughs

Although the Commission recommends abolishing ride throughs when used with personal property security, they would be authorized for loans secured by the debtor's principal residence. [75] Although it is frequent practice for real estate creditors not to secure Reaffirmations, [76] this change would make it impossible for those who now do so to continue the practice. They would have no bargaining leverage if the debtor were current on the debt at the time the petition was filed because the debtor would be free to keep the house without agreeing to waive the discharge of the personal liability to pay for the house.

D. Unsecured Credit

1. No Reaffirmations

Unlike today, debtors who wanted to reaffirm debts with unsecured creditors could not do so, regardless of the reason why. [77] The adverse impact of this change upon debtors trying to reestablish credit after a chapter 7 and on credit card collection would undoubtedly be very significant, since the debtor would have no bargaining chip with his or her creditor to secure continued credit. Combined with the recommendation that voluntary repayments involving any "affirmative" act by a creditor would violate the post−discharge injunction, subjecting the creditor who accepted them to Sears Case type penalties, this recommendation is a virtual prohibition on a debtor voluntarily repaying a pre−filing creditor in order to reestablish post−filing credit. Again, the Commission Report specifies only unclear benefits to some chapter 7 debtors in an attempt to justify this change, [78] and it was probably motivated by general and unspecific hostility to Reaffirmations, another overreaction to the Sears Case.

2. Dischargeability of Credit Card Debt

Despite the requests of credit card lenders for more protection against debtor "loading up" (i.e., credit use) in the months just before bankruptcy, the Commission majority recommended that creditor protection be significantly reduced from present law. [79] Credit card debt would be automatically *dischargeable* if incurred more than thirty days before filing the bankruptcy case, even in a case of demonstrated "load up" before filing, except for debts incurred to pay taxes to the United States and debts with respect to which there was a materially false written statement with respect to the debtor's financial condition. [80] Since present law provides protection from discharge, in many instances, for credit incurred within ninety days of filing or without a reasonable belief in being able to repay the debt, [81] the Commission's recommendation would significantly cut back on controls against abusive credit use by those about to go bankrupt. To be sure, credit card debt incurred within the thirty days before filing would be nondischargeable, but that is of little comfort in cases in which debtors can just defer their filing for thirty days.

3. Dischargeability of Student Loans

The Commission recommended that all student loans be dischargeable, except for HEAL loans available for medical professional education. [82] A student would be able to borrow $100,000 or more in student loans, obtain a college or advanced degree, and then file chapter 7 and discharge all that debt before starting a job, which may pay extremely well. The Commission Report justified the proposal based on the hardships debtors face today when they are unable to repay student loans, and the assertion that permitting dischargeability will not increase default losses in the student loan program. [83] Many would strongly disagree with the latter, and concern about the potential for excessive losses in that program has long been the justification for making loans in that program non−dischargeable.

4. Proofs of Claim

Proofs of claim, which a bankruptcy court could conclude were "materially false," would subject a creditor to payment of the cost of correcting the claim, usually the debtor's attorney's fee in contesting the claim. [84] Knowingly false claims could result in sanctions set by the court. [85] However, the proof of claim process has always been thought to be a place where disputed amounts could be adjudicated or negotiated. Under the rule the Commission proposes, a creditor who, in good faith, submitted a proof of claim that was later successfully disputed would have to pay the debtor’s attorneys’ fees. The reverse would not be true. The creditor whose proof of claim was unsuccessfully contested would not receive attorneys’ fees. The proposal is obviously one−sided and unfair, and improperly discourages use of the bankruptcy court to adjudicate good faith dispute over claim amounts.

5. Settlement of Code Section 727 Objections

The Commission recommended that there be significant impediments to settlement of cases in which a creditor objects to the dischargeability of a debt based upon a ground in section 727. [86] The articulated reason for the impediments is to prevent section 727 actions being used as a lever to obtain other concessions such as reaffirmation agreements, even though the Commission majority would abolish such agreements with respect to unsecured credit as already discussed. [87] Any consideration for a dismissal of an objection to discharge must benefit the estate as a whole, not a single creditor, or else the settlement cannot be approved by the court. [88]

The proposal is obviously one that will make out−of−court settlement of cases more difficult and increase the likelihood of trials, making it harder for both debtors and creditors to complete bankruptcy proceedings efficiently. Since the settlement must benefit the estate as a whole, the debtor apparently cannot settle by agreeing with the creditor’s assertion of non−dischargeability of debt. Once again, an overbroad remedy is proposed by the Commission to deal with a narrow problem. Revised Bankruptcy Rule 9011 should go far to deal with any creditors who improperly assert nondischargeability claims.

6. Exemptions

The Commission would remove reliance on state law for any exemption except the homestead exemption. [89] The homestead exemption would be determined by state law initially, but have a new minimum federal floor of $20,000 and a federal maximum of $100,000 for bankruptcy purposes. [90] Exemptions would apply separately to each debtor in a joint case except the homestead exemption. [91] If the debtor did not claim a homestead exemption, the debtor could claim $15,000 lump sum exemption in any property instead. [92] Nonhomestead exemptions would be like those now in the Code, but increased to permit a $20,000 lump sum exemption for property of any kind. [93] In addition, certain special property, like retirement benefits, would be exempt. [94]

The effect of this proposal is to raise significantly the minimum personal property and homestead bankruptcy exemption from where it is today in about one half the states. In those states, debtors would not have to go into chapter 13 to protect equity in non−exempt property, which would probably reduce chapter 13 use. But, more importantly, the Commission failed to approach, in any reasoned manner, how much property a debtor really needed to be successfully rehabilitated. Once again, increasing debtor social welfare benefits was recommended without serious concern for the consequences.

7. Minimum Payments in chapter 13 Cases

To address the difficulties that have arisen applying the "disposable income" test of the size of the debtor's payments in chapter 13 cases, [95] the Commission proposed that any chapter 13 debtor would have to make a minimum payment in a flat percentage amount of the debtor's gross income, [96] which the Commission did not specify. The percentage would increase as the debtor's gross income increased. [97]

Other than the recognition that consumers should be required to make significant payments in chapter 13 under a clear and easily administered standard, this proposal adds little because it does not specify what the percentage of gross income would be. It is clear that the Commission avoided the hard decisions on this issue.

E. Honesty of the System

Audits of the information debtors provide on their petitions, particularly with regard to assets, exemptions and income and expenses, would be conducted by trustees. No method of funding the additional cost is discussed. [98] In addition, the Commission strongly supported increased accuracy of the information which debtors provide the court and creditors in the petition and schedules. [99]

F. Debtor Education and Credit Rehabilitation

1. Opportunity to Participate in Financial Education Program

The Commission recommended that each debtor should have an opportunity to participate in a financial education program voluntarily. [100] However, the Commission Report does not discuss how such a program would be structured or funded, the difficult questions.

2. Credit Rehabilitation

Trustees are encouraged by the Commission Report to establish credit rehabilitation programs to provide access to cheaper credit than might otherwise be available for those in repayment plans. [101] Again, the Commission Report does not recommend how to structure or fund such a program, and so avoids the fundamental issue.

3. Favorable Reporting on Credit Reports of Those Who Use Repayment Plans

Credit reporting agencies would have to report debtor filings in chapter 13 differently from those in chapter 7. [102] The Commission Report does not specify how the credit report now used would be different for chapter 7 as opposed to chapter 13 filers. Debtors who completed voluntary debtor education programs would have that fact reported in their credit report. [103]

Debtors in a bankruptcy world, that was arranged to the satisfaction of the Commission majority would have an opportunity to pay significantly less to their creditors, particularly their secured creditors, than they do now. The debtor's ability to keep a car purchased on credit and to secure reduced payments in chapter 7 might be decreased or increased significantly depending on whether lenders preferred to have a debtor in chapter 7 or chapter 13. [104] In most states, debtors in either chapter 7 or 13 could also keep more exempt property than today. Because bankruptcy would be made more attractive for debtors, the incentives to use bankruptcy would be increased, a somewhat strange step in the face of rapidly increasing bankruptcy filings in good economic times.

On the whole, it is fair to ask what would be accomplished if these recommendations were made law? Would consumers, who use consumer credit, be encouraged to use credit responsibly and carefully by the consumer bankruptcy system revised as the Commission recommends? Clearly not. Would social welfare be improved? The Commission made no compelling case that it would. *In the absence of compelling evidence that in order to rehabilitate debtors effectively, they must be able, for example, to cramdown a car loan or reaffirm the debt at an amount no greater than its present fair market value, it is hard to see why other bill paying consumers should ultimately pay for enhanced benefits available to bankrupt debtors. The Commission Report fails to present a credible case that it has proposed a sensible balance between the needs of debtors in trouble and the interests of the consumers who pay their bills and ultimately must pay for the relief those debtors obtain.*

III. What the Commission Could Have Done

If the Commission had asked, and tried to answer, three basic questions, the Commission Report would be both more credible and more useful. Because bankruptcy is an old statutory framework, there is a tendency not to ask these questions and to assume that there are satisfactory answers. But when a statutory scheme is evaluated and radical changes proposed, as the Commission has done, basic principles must be explored if the resulting analysis is to rest on a firm foundation. The Commission lost the opportunity to examine those principles and to develop that foundation.

A. How effective is consumer bankruptcy as a social welfare program? Is the remedy it provides adequate?

Chapters 7 and 13 taken together offer a social welfare benefit for those who become overburdened with debt. [105] The benefit is delivered in the form of the stay, the discharge, retention of exempt property and the possibility of restructuring secured and priority debt in chapter 13 [106] . Since 95% of the chapter 7 cases filed are no asset cases in which creditors receive nothing, it is clear that the only policy justification for a large proportion of consumer bankruptcy cases is the social welfare benefit delivered to those in need. [107]

Does the stay, forgiveness of unsecured debt, the ability to retain exempt property and the opportunity to restructure secured and priority debt adequately address the needs of the debtors involved? There are signs that in certain cases it does not. For example, although it is difficult to get accurate information, the fact that ten percent of filers are reported to be repeat users of consumer bankruptcy suggests that for some the remedy is ineffective to cure their problems and return them to a consumption society in which credit is a commonplace.

The Commission never seriously explored the extent to which the lack of effectiveness of the remedy is a serious problem, [108] so it remains a nagging concern. Chronic gamblers, for example, may well seek bankruptcy relief, but the discharge obtained does not address their addiction. It may not even help them on the way to rehabilitation, since it frees them of debt and allows them to return to the gaming tables. There are also the accounts, frequently enough heard, of debtors who obtain a discharge and quickly find themselves again in debt difficulty. They go through the bankruptcy social welfare program, but are promptly in trouble again. This is not to say that many others may learn from their experiences and avoid debt again. But the fact that the remedies are entirely based on money and property

¾ discharge of debt, retention of exempt property¾ leaves the question whether the simple discharge of debt available as a matter of right and without judicial or administrative supervision is an appropriate and effective way to address the problems of those who become overburdened.

B. Are the remedies of consumer bankruptcy too easily available?

For those individuals with good income, large amounts of unsecured nonpriority debt, and low assets, the easy and complete chapter 7 discharge of unsecured debt undercuts personal responsibility because they have some ability to repay their debt and because they get a windfall of their post−filing income free of the responsibility both to repay their unsecured debts and, in many cases, a part of their secured debts. Should the chapter 7 discharge therefore be restricted to those without the ability to pay? The issue is unavoidably presented by the present structure of consumer bankruptcy, and deserved to be fully explored by the Commission. It did not do so.

Should those who repeatedly seek bankruptcy relief be excluded from repeat use for several years or be required to use a different form of relief the second time, perhaps a form in which there would be an evaluation of why the debtor went into bankruptcy a second time? Should there be the possibility of mandatory education and a payment plan to teach the skills necessary to manage financially?

While aspects of this issue were raised in the Commission's exploration of whether there should be an educational component to bankruptcy relief or restrictions on multiple filings, it was addressed only in passing.

C. How much effect on the price and/or availability of credit does expansion of consumer bankruptcy remedies cause?

It is difficult to dispute that the consumer who pays his or her consumer credit bills ultimately pays for consumer bankruptcy. Consumer credit is a closed pricing system in which collection losses initially borne by creditors are eventually passed on to consumers who pay their bills. At the cutting edge of bankruptcy policy is the question of how much consumers pay today for the present bankruptcy system, and how much they *should* pay tomorrow.

What Congress needed was a careful assessment of the increase in consumer credit cost or reduction in availability of credit which falls on those who pay their bills caused either by continued increase of bankruptcy filings at the present rate or by expansion of consumer bankruptcy remedies. Americans have historically been generous in helping those truly in need. But when doubts are being expressed about whether consumer debtors really need all the relief given them, a careful analysis of the cost of the social welfare program bankruptcy provides would advance the debate considerably.

Conclusion

If the Commission's Report had addressed the three policy questions posed above head on, and presented reasonable and balanced information about whether the remedy bankruptcy offers is effective for most debtors, the Commission Report would have laid the groundwork both to support sensible and credible recommendations and to further the policy debate which now must be taken over by Congress. As it is, the Commission Report seems instead to be a jumble of proposals, the most radical of which appear to have been adopted less as the result of an overall viewpoint than as a visceral reaction to current events such as the Sears Case or to allegations of specific debtor misconduct such as repeat filing of bankruptcy petitions to thwart foreclosure.

If the Commission Report had explored whether the availability of bankruptcy and its increasing use affects the behavior of bill paying Americans on the margin, and whether that effect is to undercut the personal responsibility and willingness to undergo hardship to repay debt that has been the basis for our consumer credit economy heretofore, the Commission Report would have advanced policy discussion of consumer bankruptcy materially. If the Commission Report had explored whether increased bankruptcy remedies, including the ones the Commission eventually recommended, would affect the price and/or availability of credit, particularly credit for the most marginal borrowers, it would be possible to weigh the benefits to debtors of expanded remedies against the attendant cost to rest of us who pay the bills.

But the Commission did not take any of these challenges seriously. It is unfortunate that it did not because it produced a hollow and apparently misguided Commission Report as a result. Its early obscurity deserves to be its final epitaph.

FOOTNOTES:

[*] Member, Eckert Seamans Cherin & Mellott, L.L.C., Washington, D.C. The views expressed in this article are solely those of the author.Back To Text

[1] The National Bankruptcy Review Commission [hereinafter, "NBRC" or "Commission"] was created by the Bankruptcy Reform Act of 1994, P.L. 103−394, § 601 ff. (1994) at the very close of the 103d Congress. There were nine members, three appointed by the President, including the Chairman; one each by the President pro tempore of the Senate and the Senate minority leader; one each by the Speaker of the House of Representatives and the House minority leader, and two members by the Chief Justice of the Supreme Court. The Commission's duties included investigating and studying issues and problems relating to bankruptcy, to evaluate proposals, to solicit "divergent views of all parties" and to report. *See* Nat'l Bankr. Rev. Comm'n, Bankruptcy: The Next Twenty Years, Final Report 53−57, 47−48 (1997) [hereinafter Commission Report]. Back To Text

[2] *See id.* at 47, 74.Back To Text

[3] *See generally* Dean Foust and Debra Sparks, *Bankruptcy Reform: Everybody's Mad − And That's Fine*, Bus. Wk., Nov. 3, 1997, at 154 (discussing debate on consumer bankruptcy issues); Christine Dugas, *Bankruptcy Reform Plan Stirs Debate*, USA Today, Oct. 20, 1997, at 1B (addressing debate created by recommendations).Back To Text

[4] *See* S. 1301, 105th Cong. (1997).Back To Text

[5] *See* S. 1301, 105th Cong. (1997). Four of the Grassley−Durbin bill's provisions have similarities with NBRC Report proposals, although they are not equivalent in their details. The source of these bill provisions, however, was not the Commission Report but rather proposals advanced by various interest groups both before the Commission and Congress.Back To Text

[6] *See* S. 1301, 105th Cong. § 102 (1997) (calling for section 707 to be amended to read "707. Dismissal of a case or conversion under Chapter 13").Back To Text

[7] *See* Commission Report, *supra* note 1, at 89−90 (mentioning "means testing" as alternative approach to addressing increase in bankruptcy filings; however, not developed in specific detail).Back To Text

[8] *See* Hon. Edith H. Jones and James I. Shepard, *Additional Dissent to Recommendations for Reform of Consumer Bankruptcy Law in* Commission Report, *supra* note 1, ch. 5, Individual Commissioner Views 10−27 [hereinafter *Dissent*]. Back To Text

[9] *See* H.R. 2500, 105th Cong. (1997).Back To Text

[10] *See id.* Section 101 (discussing needs based bankruptcy).Back To Text

[11] *See generally* Commission Report, *supra* note 1, at 69−74 (noting American Bankruptcy Institute periodically reported Commission's consumer bankruptcy recommendations via journal and internet).Back To Text

[12] Former Congressman Michael Lynn Synar, the Commission's original Chairman, diagnosed with cancer, resigned approximately six months after being formally appointed in June, 1995. *See* Commission Report, *supra* note 1, at 53−54. The Commission then proceeded briefly under the direction of the Vice Chairman, Hon. Robert E. Ginsberg, until a permanent Chairman, Brady C. Williamson, was appointed. *See id.* at 55. Undoubtedly, this disruption set back the Commission's work. Under the enabling legislation creating the Commission, Democratic office holders appointed five members, a majority of the Commission. In one of those ironic twists which occur at times in politics, in the final votes on consumer issues, two of the Democratic and two of the Republican appointees joined with members of the other party. The final result was that the most controversial consumer recommendations were adopted by a narrow five to four majority. *See id.* at 94−95. Back To Text

[13] The references are unclear because they obscure the need to evaluate each proposed increased "fresh start" benefit based on whether debtors need it to make return to society as stable individuals likely, and the costs to bill paying consumers and others of increasing those debtor benefits, including increased credit costs.Back To Text

[14] *See generally* Commission Report, *supra* note 1, at 50−51 (stating Commission was to "*review, improve and update the Code [while] not disturb[ing] the fundamental tenets of current law*") (quoting H.R. Rep. No. 103−835, at 59 (1994)).Back To Text

[15] *See id.* at 89 (stating "[t]he Commission received a series of submissions from the credit industry advocating the general proposition that the bankruptcy system should be dramatically changed to require debtor−by−debtor scrutiny before permitting debtors to file for chapter 7").Back To Text

[16] Interview with Jeffry Tassey, Senior Vice President of American Financial Services Association, in Washington, D.C. (December 20, 1997) (notes on file with author). In 1994, Mr. Tassey was involved on behalf of the American Financial Services Association in the legislative activity which resulted in the creation of the Commission.Back To Text

[17] *See, e.g.*, Commission Report, *supra* note 1, at 78, 179, 208.Back To Text

[18] It is not that the majority Report fails to discuss available empirical information. On the contrary, it does refer to several empirical studies. But it ignores or summarily rejects information that is inconsistent with the recommendations, and often relies heavily upon episodic reports of debtor hardship, ignoring offsetting episodic reports of creditor injury or debtor benefits from the same practice. In sum, the Report's use of empirical evidence and information in general is not fair and balanced, limiting its credibility. The Report should be seen for what it is: All out advocacy for a particular philosophical point of view, which favors more of the benefits the majority thought would be good for debtors without systematic consideration for the cost to other debtors or the society as a whole of providing those benefits. In other words, the Report is opinion, not fact.Back To Text

[19] *See* Commission Report, *supra* note 1, at 85. Back To Text

[20] *See id.* at 82 (mentioning, briefly, that "[b]ankruptcy filings jumped 11% during 1995 and another 27% during 1996"); Interview with Stuart Feldstein, President of SMR Research Corporation, in Washington, D.C. (January 5, 1998) (filings for 1997 expected to be in range of 1.33 million) (notes on file with author). Back To Text

[21] Interview with Stuart Feldstein, President of SMR Research Corporation, in Washington, D.C. (January 5, 1998).Back To Text

[22] *See* U.S. Bankruptcy Filings 1980−1996, (visited Jan. 9, 1998) <http://www.abiworld.org/stats /1980annual.html>. The Report asserts that certain of its recommendations will reduce the attractiveness of chapter 7 to consumers, and so slow or stop the increase in consumer bankruptcy filings. *See* Commission Report, *supra* note 1, at 159−60. The Commission Report identifies as recommendations having this effect changes in how much property the discharged debtor can keep free of creditor claims, cut backs in the availability of Reaffirmations and "ride throughs", limits on repeat filings, and requirements for national filing records and audits of individual petitions. *See id.* at 96−103. That assertion cannot, however, be taken seriously because it is at least equally likely that those changes would increase bankruptcy use in general and chapter 7 use in particular. For example, the Commission's exemption proposal increases bankruptcy exemptions significantly in a number of populous states, allowing the chapter 7 debtor to keep considerably more property than now. *See id.* at 129. That would seem to increase bankruptcy's attractiveness in those states. The Commission Report also asserts that its recommended restrictions on the availability of reaffirmation would force more chapter 7 debtors to give up their cars and major appliances subject to secured debt, and so make chapter 7 less attractive. *See id.* at 160. It seems equally likely, however, that chapter 7 debtors would have *increased* leverage with those secured creditors who prefer to leave the car with the debtor rather than repossess and resell. If so, chapter 7 is more attractive than now, since it would provide a complete discharge of unsecured debt *and* the possibility of keeping property subject to security interest and paying a reduced monthly payment based on the wholesale value of the car rather than the full contract price. Back To Text

[23] *See supra* note 19 and accompanying text.Back To Text

[24] *See generally* Dan J. Schulman, The Constitution, Interest Groups, and the Requirements of Uniformity: The United States Trustee and the Bankruptcy Administrator Program, 74 Neb. L. Rev. 91, 105 (1995) (discussing leading Supreme Court cases relating to uniformity in bankruptcy).Back To Text

[25] *See generally* Robert Kofrasmussen, An Essay on Optimal Bankruptcy Rules and Social Justice, 1994 U. Ill. L. Rev. 1, 4 (advocating economic approach to bankruptcy to promote more efficient social system).Back To Text

[26] *See* Commission Report, supra note 1, at 105−07.Back To Text

[27] *See* id. at 114−16 (discussing recommendations on consumer education).Back To Text

[28] *See* id. at 115 n.201 (stating Consumer Bankruptcy Working Group held session on debtor education in December 1996, where several chapter 13 trustees spoke about their debt education programs).Back To Text

[29] *See* id. at 114−16; s*ee also* Dissent, supra note 8, at 22−23.Back To Text

[30] *See* Commission Report, supra note 1, at 95. The Commissioners in the majority were Chairman Brady C. Williamson, a well−known Democratic politician and commercial bankruptcy practitioner, Jay Alix, an accountant with a substantial commercial workout consulting practice, Hon. M. Caldwell Butler, a former Republican Congressman from Virginia and private practitioner, Babette A. Ceccotti, a private attorney with a firm known for its representation of labor union interests, and Judge Robert E. Ginsburg, a United States Bankruptcy Judge sitting in the District of Illinois. *See* id. at 55−57. Back To Text

[31] *See* id. at 56−57. The dissenters were John A. Gose, a private practitioner appointed by former Democratic Representative and Speaker of the House of Representatives Thomas Foley, Jeffrey J. Hartley, a bankruptcy practitioner and former staffer to Democratic Senator Howard Heflin, Hon. Edith Hollan Jones, a Circuit Court Judge on the fifth Circuit and well known for her ability to articulate conservative views, and James I. Shepard, a tax consultant and bankruptcy practitioner.Back To Text

[32] *See* Commission Report, supra note 1, at 145−46, 236 (providing recommendation 1.3.1 and its discussion)Back To Text

[33] A reaffirmation is a waiver of the discharge of a particular debt and recreates the debtor's personal legal responsibility for it. A reaffirmation must be done according to certain procedural and substantive standards set by the Code. See 11 U.S.C. §§ 524(c), (d) (1994) (providing procedural steps for reaffirmation agreement to become legally enforceable). In the context of secured debt, the *in rem* creditor’s interest in the property survives bankruptcy discharge, but the personal liability, absent reaffirmation, does not.Back To Text

[34] A ride through is an arrangement in which the debtor voluntarily continues to make contractual secured loan payments and keeps the collateral, although the debtor does not reaffirm the debt. Three circuits have endorsed ride throughs over creditor objection, generally on the theory that creditors, for a variety of reasons, have no right to repossess the car until there is a default cognizable in bankruptcy. Capital Comm.unications Fed. Credit Union v. Boodrow, 126 F.3d 43, 48 (2nd Cir. 1997); Home Owners Funding Corp. v. Belanger (In re Belanger), 962 F.2d 345, 347 (4th Cir. 1992); Lowry Fed. Credit Union v. West, 882 F.2d 1543, 1546 (10th Cir. 1989). From another perspective, ride throughs are voluntary repayment arrangements under 11 U.S.C. § 524(f). Ride throughs are clearly disadvantageous to the creditor compared to a reaffirmation since the debtor can abandon the collateral at any time for any reason and cease payments. The debtor has no personal liability on the debt, only the secured property is charged with the security interest.Back To Text

[35] *See generally*, 4 Collier On Bankruptcy ¶ 524.04 (Lawrence P. King et al. eds. 15th ed. rev. 1997) (discussing reaffirmation agreements).Back To Text

[36] *See* Margaret Howard, *A Theory of Discharge in* Consumer Bankruptcy, 48 Ohio St. L.J. 1047, 1074−75 (1987) (discussing benefits of reaffirmation and ride through as reason for use by debtors).Back To Text

[37] *See* Commission Report, supra note 1, at 145−65 (discussing recommendation regarding reaffirmation agreements and ride throughs).Back To Text

[38] *See* id. at 165 (discussing recommendation for "No Ride Through").Back To Text

[39] *See* 11 U.S.C. § 521(2) (1994) (providing debtor’s duties regarding stating debtor’s intentions, but not explicitly requiring return of collateral).Back To Text

[40] *See* id. § (2)(A),(B) (allowing thirty days to file statement of intention and providing 45 days to perform statement of intention).Back To Text

[41] Commission Report, supra note 1, at 165 (providing that "creditors are free to keep payments that the debtor willingly remits").Back To Text

[42] In re Latanowich, 207 B.R. 326, 333 (Bankr. D. Mass. 1997) (discussing civil and criminal proceedings in case). The case concluded that Sears' practices in obtaining reaffirmation agreements which it did not file with the court violated the discharge injunction.Back To Text

[43] *See* id. at 327 (indicating that Sears, debtor, U.S. Trustee, U.S. Attorney, State Attorney general were involved); Bruce Mohl, *Sears May Pay 265 Million for Credit−Debt Tactics*, The Boston Globe, June 6, 1997, at A1 (discussing Sears potential liability for several claims).Back To Text

[44] *See* Commission Report, supra note 1, at 145−46 (discussing recommendations for reaffirmation agreements).Back To Text

[45] *See* id. at 145−61.Back To Text

[46] *See* id. at 243−58 (discussing Commission's recommendation regarding value of collateral).*Back To Text*

[47] *See* id. at 149−50 (concluding that current practices do not promote chapter 13 filing).Back To Text

[48] *See id.* at 160−61 (allowing for courts to hold hearings at their discretion).Back To Text

[49] *See* Commission Report, *supra* note 1, at 160−61 (describing recommendation direction on procedure and information for motions).Back To Text

[50] *See id.* at 161 (noting that recommendation would not cause significant change in practice regarding critical paperwork).Back To Text

[51] *See id.* at 160 (stating " hearings would not be required in all cases").Back To Text

[52] *See* id. (allowing for courts to hold hearings at their discretion).Back To Text

[53] *See id.* at 161 (adding that bankruptcy bench and bankruptcy bar are responsible for success and integrity of bankruptcy). Back To Text

[54] *See* Jan Elston, Statement on Behalf of Chrysler Credit Corporation, Ford Motor Credit Corporation, General Motors Acceptance Corporation and the American Financial Services Association Concerning Reaffirmations in Chapter 7 Bankruptcy, Submitted to the NBRC Nov. 8, 1996 (copy on file with author).Back To Text

[55] *See* Commission Report, *supra* note 1, at 158, 160 (discussing how recommendation will increase chapter 13 filings and that many previous Reaffirmations were for car loans).Back To Text

[56] *See generally*, 10 Collier, supra note 35, ¶ 9011 (discussing types, initiation, and imposition of sanctions).Back To Text

[57] *See* Bruce Mohl, *Sears May Pay $265 Million for Card−Debt Tactics*, The Boston Globe, June 6, 1997 at A1 (noting that Sears' potential losses for breaking bankruptcy laws). There are those who over the years have opposed Reaffirmations because some chapter 7 debtors may reaffirm more debt than they can afford to pay, despite the safeguards of 11 U.S.C. §§ 524(c), (d), which requires attorney supervision of such agreements if the debtor is represented and court supervision if the debtor represents him or herself. The Commission did not collect information on the causes and/or significance of this problem, and it remains unclear whether when a case of post−discharge debt difficulty occurs, it is more than an infrequent aberration. The point is that the Commission's recommendation would seriously increase secured creditor costs without clear policy justification for doing so.Back To Text

[58] 117 S. Ct. 1879 (1997). The Supreme Court held that the standard of valuation in a cramdown was "replacement value."Back To Text

[59] *See* Commission Report, supra note 1, at 243−63 (valuing property by wholesale price as bright line standard).Back To Text

[60] *See id.* at 258 (recommending fixed criteria for interest rates).Back To Text

[61] *See id.* at 261 (recommending six month treasury bill rate as starting point).Back To Text

[62] *See id.* at 169−78 (recommending valuation for household goods).Back To Text

[63] Section 522(f) already voids any non−purchase money security interest in exempt household goods to make sure that debtors who borrow other than to buy new goods will not be threatened by repossession of their cherished or most necessary household furnishings. But that rationale does not carry over to their purchases of new goods which they haven't yet paid for when they file bankruptcy. *See* 11 U.S.C. § 523(f) (1994) (protecting debtor's exemptions discharge and fresh start by permitting avoidance of liens on exempt property).Back To Text

[64] *See* Commission Report, supra note 1, at 169−74 (discussing recommendation for security interests in household goods). The Commission Report argues that creditors abuse security interests in small ticket items to gain negotiating leverage, relying on episodic report rather than systematic evidence. There are also reports heard from time to time that some consumer debtors, wanting to keep an item of household goods, have agreed to reaffirm or have voluntarily resumed payments. Again, the Commission failed to gather systematic evidence on how widespread this practice is, or on the welfare impact on debtors.Back To Text

[65] *See* id*; see also* supra note 24 and accompanying text.Back To Text

[66] *See* In re Lantanowich, 207 B.R. 326, 329 (Bankr. D. Mass. 1997) (discussing Sears' claimed security interest in merchandise in Latanowich's account balance).Back To Text

[67] *See* Commission Report, supra note 1, 273−81 (recommending natural filing and discussion).Back To Text

[68] *See generally* Lex A. Coleman, *Individual Consumer "Chapter 20" Cases after* Johnson: An Introduction to Non−Business Serial Filings Under Chapter 7 and Chapter 13 of the Bankruptcy Code, 9 Bankr. Dev. J. 357, 363−75 (1992) (discussing serial filings and their incentives, protection, and added dischargeability).Back To Text

[69] *See* id. at 357 (providing that debtors can extend or reimpose automatic stay) (citing In re Mellard, 117 B.R. 716, 717 (Bankr. M.D. Fla. 1990)); In re Fuller, 111 B.R. 660, 661−62 (Bankr. S.D. Ohio 1989); In re Russo, 94 B.R. 127, 127−28 (Bankr. N.D. Ill. 1988).Back To Text

[70] See Commission Report, supra note 1, at 105−08. *See generally*, Michael D. Webb, Electronic Access to Court Records: What's Available Now and What's Coming , 6 Am. Bankr. Inst. J. at 12 (July 1995). Public Access to Court Electronic Records (PACER) has just activated a system that, in effect, establishes an ability to search the name of a debtor who has filed for bankruptcy relief in any other jurisdiction.Back To Text

[71] The 180 day period is probably too short to be effective in states with lengthy foreclosure procedures because the debtor can keep the foreclosure going longer than that period, and then refile. The Commission's recommendation would add little to already available relief under present Code section 109(g), which permits dismissal of a case, on motion, if refiled within 180 days of a dismissal of a previous case which the debtor requested and section 109(g) already provides somewhat similar relief, and it has been ineffective. *See* 11 U.S.C. § 109(g) (1994). Back To Text

[72] *See* Commission Report, supra note 1, at 282−87 (recommending and discussing changes for *in rem* orders).Back To Text

[73] *See* 11 U.S.C. § 1322(b)(2) (1994). Of course, some courts have interpreted section 1322(b)(2) narrowly to deny protection from cramdown in certain instances. Back To Text

[74] *See* Commission Report, supra note 1, at 236−43 (discussing mortgages and recommending amendments to section 1322(b)(2)).Back To Text

[75] *See* id. at 236−43 (providing exception for security interest in real or personal property that is debtor's principle residence).Back To Text

[76] *See generally,* Jean Braucher, Lawyers and Consumer Bankruptcy: One Code, Many Cultures, 67 Am. Bankr. L.J. 501, 528 (1993) (discussing secured real estate creditors' reaffirmation practices).Back To Text

[77] *See* Commission Report, supra note 1, at 145−46 (stating "11 U.S.C. § 524(c) should be amended to provide that a reaffirmation agreement is permitted").Back To Text

[78] *See* id. at 152−60.Back To Text

[79] *See* id. at 182 (recommending that all credit card debt incurred within thirty days of debtor's filing bankruptcy petition be non−dischargeable, in order to prevent debtors from loading up). Back To Text

[80] *See* id. at 180−96 (discussing dischargeability of credit card debt). Back To Text

[81] *See* 11 U.S.C. §§ 523(a)(2)(A), (C).Back To Text

[82] *See* Commission Report, supra note 1, at 207−17 (proposing "section 523(a)(8) should be repealed" allowing certain student loans to be discharged except for HEAL loans).Back To Text

[83] *See* id. at 215. The Commission Report relies upon a study that concluded excessive student loans were not discharged in chapter 13 while it was possible to do so before the law changed in 1990. Even if those study results are accepted at face value, chapter 13 imposes a repayment plan on the debtor, discouraging the debtor with steady income from filing a chapter 13 plan unless really in need. Making student loans dischargeable would make chapter 7 discharge available, and the collection experience on student loans in chapter 13 would not seem to reliably predict results in chapter 7.Back To Text

[84] *See* id. at 110.Back To Text

[85] *See* id. at 110−12. Back To Text

[86] *See* id. at 228 (proposing three new limitations on settlement of cases where creditor has raised objection to dischargeability under section 727).Back To Text

[87] *See* supra note 39 and accompanying text.Back To Text

[88] *See* Commission Report, supra note 1, at 117−44.Back To Text

[89] *See* id. at 126 (stating "the Commission's Proposal recommends that state law would determine the amount of the homestead exemption within a permissible range").Back To Text

[90] *See* id. at 125 (proposing new maximum and minimum allowance for homestead exemption).Back To Text

[91] *See* id. Back To Text

[92] *See* id. at 133 (noting "debtor who claims no homestead exemption should be permitted to exempt additional $15,000 amount of property").Back To Text

[93] *See* Commission Report, supra note 1, at 137 (discussing examples of proposed change).Back To Text

[94] *See* id. at 139−42.Back To Text

[95] *See* 11 U.S.C. § 1325(b)(1)(B) (1994).Back To Text

[96] *See* Commission Report, supra note 1, at 262.Back To Text

[97] *See* id. at 263−73 (discussing examples of how percentage correlates to debtor's gross income).Back To Text

[98] *See* id. at 107−10 (noting Commission's "heightened requirements").Back To Text

[99] *See* id. at 112−13. Although it is arguably clear that Fed. R. Bankr. P. 9011, as effective December 1, 1997, already so requires, the Commission urges the Rules Committee to clarify that the Rule extends the obligation of reasonable inquiry and accurate statements to the schedules, statement of affairs and amendments to either.Back To Text

[100] *See* id. at 114−16.Back To Text

[101] *See* Commission Report, supra note 1, at 293−94.Back To Text

[102] *See* id. at 292−93 (recommending that "debtors who choose Chapter 13 repayment plans and make payments have their bankruptcy filings reported differently from those who do not"). Back To Text

[103] *See* id.Back To Text

[104] If the creditor preferred the debtor to be in chapter 13, the creditor would refuse to agree to a reaffirmation under the Code as the Commission majority would have it revised. The debtor then would either relinquish the car to the creditor or convert to chapter 13. If the creditor preferred the debtor stay in chapter 7, the creditor could agree to a reaffirmation at fair market value.Back To Text

[105] *See* Commission Report, supra note 1, at 233. Chapter 13 allows a person to pay their secured and unsecured creditors from future income, while at the same time retaining their assets. 8 Collier, supra note 35, ¶ 1300.01 et seq.Back To Text

[106] 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 (1993) (noting "under chapter 13 of the code, the debtor is able to propose a plan of readjustment or reorganization of his debt, in full or partially, from future income, and is also able to retain any valued pre−petition property while retaining any exempt assets"). The protection of chapter 7 and chapter 13 offers a social welfare benefit to people who get themselves in debt.Back To Text

[107] Interview with Stuart Feldstein, President of SMR Research Corp., Washington, D.C. (Jan. 5, 1998) (notes on file with author).Back To Text

[108] As previously discussed in notes 33 and 34, the Commission did argue for restrictions on reaffirmation in part because of reports that some consumers use bankruptcy and then reaffirm a significant proportion of their debts. During the Commission hearings, various observers reported cases in which individuals would obtain the discharge but be in debt difficulty shortly thereafter. Usually these stories were used as arguments why creditors were generally "abusing" the system. Creditors "allowed" debtors to assume more than they could pay. However, a more thoughtful approach is to ask how many debtors only need a simple discharge to learn how to manage debt, and how many need something more or different. Back To Text