



AMERICAN  
BANKRUPTCY  
INSTITUTE

# 2019 Midwestern Bankruptcy Institute

## **ABI Consumer Commission Report**

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FRANK W. KOGER MEMORIAL LUNCHEON AND LECTURE

2019

The image shows a banner with the text "The ABI Commission on Consumer Bankruptcy" in white, bold, sans-serif font. The background of the banner is a blurred photograph of a courtroom, featuring a wooden bench and a pair of scales of justice on a table to the right.

**The ABI Commission  
on Consumer Bankruptcy**

An Introduction to the  
Final Report and Recommendations

ABI Midwestern Bankruptcy Institute  
Frank W. Koger Memorial Luncheon and Lecture  
October 3, 2019

Presented by:

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## Financial Support of the Commission

The Commission thanks


ABI Anthony H.N. Schelling  
Endowment Fund

Endowment for Education of the  
National Conference of Bankruptcy Judges

### Why Now?

- Over 40 years have passed since the Bankruptcy Code was adopted
- 14 years since the BAPCPA amendments
- In that time, there have been major changes in
  - the economy
  - technology
  - law practice
  - the regulatory environment

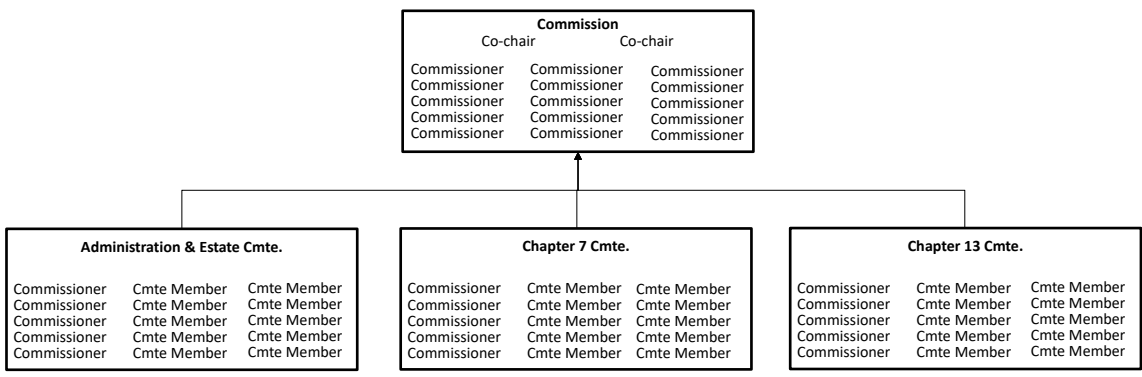
“The ABI Commission on Consumer Bankruptcy is charged with researching and recommending improvements to the consumer bankruptcy system that can be implemented within its existing structure.”



“These changes might include amendments to the Bankruptcy Code, changes to the Federal Rules of Bankruptcy Procedure, administrative rules or actions, recommendations on proper interpretations of existing law other best practices that judges, trustees and lawyers can implement.”

## Final Report

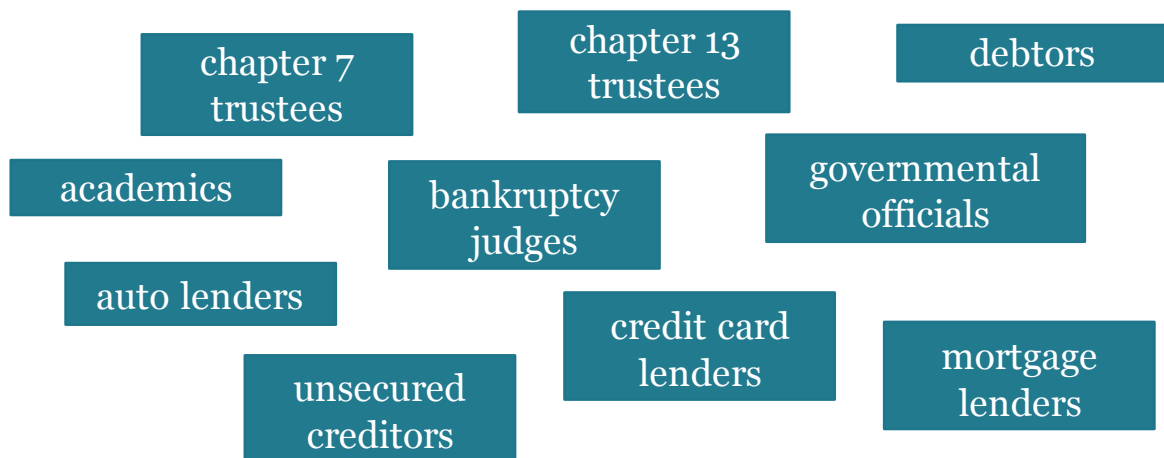
- Recommendations on 48 discrete issues with a discussion of the background and reasoning
- The Commission’s work was supported by three committees:
  - **Committee on Case Administration and the Estate**
  - **Committee on Chapter 7**
  - **Committee on Chapter 13**



## Ideas for Areas of Sources

- The Commission received 131 written submissions that included ideas for areas of study
- The Commission and its committees held 6 public meetings in conjunction meetings of organizations of bankruptcy professionals
- The Commission and its committees conducted their own research

## Professional Experience of Commissioners and Committee Members



## ABI Commission Final Report Topic Categories

- Effectuating the Fresh Start
- Improving Creditor Certainty
- Facilitating Effective Access
- Making Chapter 13 Work
- Systems Issues

## Student Loans

- Code Amendments
- Best interpretation of Bankruptcy Code
- Recommendations for DOJ/Creditor process
- Payment in 13

## Student Loans - Dischargeability

- Should be dischargeable if
  - made by a nongovernmental entity (private loans),
  - incurred by a person other than the one receiving the education, or
  - first payable more than seven years before the bankruptcy.

## Student Loans - Interpreting *Brunner*

- Changes to interpretation of existing law - undue hardship
  - Debtor cannot currently pay
  - Will not be able to pay during loan term
  - Has not acted in faith
- By a preponderance of evidence
- Appellate review: determination of elements are a finding of fact

## Student Loans - Opposition Process

- DOJ procedures should mandate for government loans:
  - Creditors should not oppose discharge based on certain bright line rules based on poverty or disability guidelines
  - Avoiding unnecessary costs - accept proof informally and with good judgment

## Student Loans - Payment in 13

- New 11th priority
  - Further goal of paying government loans (surplus 7)
  - Allows for separate classification and payment
- 1322(a)(4) should except student loans from payment in full requirement
- All subject to the best interests of creditors test

## Credit Counseling & Financial Management Course

- Prepetition credit counseling should be eliminated
- The requirement of a financial management course for a chapter 7 discharge should be eliminated
- The requirement of a financial management course for a chapter 13 discharge should be retained, with further study of its effectiveness
- The Fair Credit Reporting Act should require the reporting of a debtor's successful completion of a financial management course

## Chapter 13 Debt Limits

- \$3,000,000
- No secured/unsecured distinction
- Adjusted per §104
- Clarification for married persons
  - Non-filing spouse's debts NOT to be aggregated with filing spouse
  - In a joint filing, both spouses have benefit of debt limit

## Attorney Competence & Lawyer Misconduct

- Well-established rules of professional conduct governing bankruptcy cases and disciplinary tools should be vigorously enforced.
- Local committees should form to investigate and resolve complaints against attorneys.
- Disciplinary orders should be published.
- Attorneys should receive enhanced fees for being board certified or demonstrated skill in the bankruptcy field, 11 U.S.C. § 330(a)(3)(F).

## Chapter 7 Attorney Fees

- Allow post-petition payment for pre-petition services
  - Limited delay of discharge to allow collection of attorney fees, and
  - Exception from discharge, with judicial oversight.
- Other measures to reduce the cost of chapter 7
  - Easy online data input forms
  - Increase pro-bono representation - government assistance
  - Reduce filing fee for low-income debtors
  - Allow video attendance at 341 meeting

## Presumptively Reasonable Chapter 13 Fees

- Courts should adopt presumptively reasonable fees through confirmation, with regular reviews of fee amount
- Adoption of “a la carte” fee structure for post-confirmation work
- Consider higher fee for certification

## Unbundling of Attorney Services

- Local Rules specifying services and addressing unbundling
- Rules consistent with professional responsibility

## Stand-in Counsel

- Adoption of governing rules including best practices specific to bankruptcy
- Amend rule 9010 to require notice of appearance with any limitation on representation
- Encourage video and telephonic hearings
- Negative notice procedures

## Chapter 7 Trustee Compensation

- \$120 per case not to come from an increase in filing fees
- Change % fee breakpoints to increase fees in asset cases

## Means Test Revisions & Interpretations

- The Commission recommends retaining the means test but with important amendments.
- These amendments are:
  - Reduced documentation below-median income debtors
  - Exclusion of public assistance, government retirement, and disability benefits from income
  - Removal of the presumption of abuse if the debtor shows special circumstances, even if the circumstances arose voluntarily; and
  - Allowance of certain statutory expense deductions only to the extent actually incurred and necessary for support

## Reserve Fund in Chapter 13

- Chapter 13 debtors should be allowed and encouraged to maintain a reasonable reserve fund
  - to be held by the trustee
  - for unanticipated expenses of the debtor
- The reserve fund should be limited to one month of scheduled expenses
- The debtor would access the reserve fund after notice and an opportunity for interested parties to object
- The debtor should be allowed to replenish the reserve fund

## Definition of Surrender

- Interpretation: A debtor should
  - Relinquish the property
  - Not impede trustee or creditor from taking it
  - Must make property available
- Surrender does not require physical delivery
- Debtor may still assert non-bankruptcy defenses
- Recommendation is not an endorsement of force-vesting
- Clarify inconsistent deadlines in 521

## Statement of Intention - Deadlines & Consequences

- 521(a)(2)(A): Statement of Intention for secured estate property: 30 days after petition date
- 521(a)(2)(B): Perform intention within 30 days after 341
- 521(a)(6): Not retain property secured by purchase money security interest longer than 45 days after 341 without a reaffirmation or redemption
- 362(h): Automatic stay does not apply to property if debtor does not file a statement of intention or perform intentions.

## Statement of Intention: Recommendations

- 30 days from petition date to file Statement of Intention
- Conforming filing within 60 days of first date set for 341
  - Reaffirmation agreement
  - Motion to authorize redemption
- Property remains property of the estate but stay lifts
- Amend Rule 6008: Motion to redeem within 30 days of 341; payment 14 days after order

## Business Debtor Reporting

- Amend 2015 to require new official form for chapter 13 business debtors
- Quarterly reports
- Court may excuse or change requirements

## Underwater Mortgages

- Debtor may satisfy a claim subject to a mortgage by conveying property to lienholder or selling free and clear of liens:
  - Use of Rule 6004 procedure: notice of sale
  - Plan must give mortgage holder 60 days from confirmation to respond to plan provision
  - Holder accepts deed in lieu or if rejects transfer, Debtor serves motion to sell under § 363(f)

## Application of Means Test in Converted Cases

- Means test should apply
- Applied as of original petition date

## Racial Justice

- Recognize empirical evidence of racial disparity in filing Chapter 13 and obtaining discharge
- Encourage equal access to justice by all professionals
- Encourage education and training
- Collection of race and ethnicity information

## Mental Health issues in Bankruptcy

- Acknowledge and address the known link between debt and mental health issues
- Recommendations:
  - Encourage disclosure while protecting privacy
  - Education and evaluation services /pro bono and reduced fee services to court
  - ABI programming

## Rule 3002.1 Changes

- Changes to payment change notices
- Notices of final cure, with mandatory response
- Add mid-case status review



## Other Chapter 13 Recommendations

- No automatic dismissal for reasonable extension past 60 months
- Preventing conflicts between proof of claim and plan
- Rule 1306 amendment

## Conduit payments

- Would be required unless:
  - Trustee commission would be an undue burden on debtors in the district
  - Trustee commission would be an undue burden on the debtor in the case
  - A non-filing co-debtor is making payments
- Bifurcated commission rates should be permitted

## Remedies for Discharge Violations

- Allow a private right of action
- Parties may ask court for a determination whether an action violates the discharge injunction
  - Expedited
  - Debtor or creditor may apply by motion

## Repeat Filers - 109(g)

- Amend 109(g): order of dismissal (first case) may include a restriction on a new filing - after notice and hearing - made by any party in interest:
  - Willful failure of debtor to abide by court orders or propose a plan in good faith
  - Willful and substantial default
  - Repetitive dismissed bankruptcies
  - Willful failure to appear
  - Any abuse of Title 11 other than 707(b)
  - Prohibition on refiling for (in most cases) 180 days

## Repeat filers - 349

- Dismissal of a case
  - Does not bar discharge in a subsequent case of dischargeable debts except as expressly provided for by the Code
  - Does not prejudice the Debtor with regard to refiling except as set forth in 109(g)

## Repeat filers - 362

- 362(c)(3) should be repealed

## Exemption Recommendations

- Exemption changes for debtors who have moved
- Denial of exemption for fraudulent concealment—limiting *Law v. Siegel*
- Increases in wildcard and homestead

## Standardization of Credit Reporting

- Problems: Proper reporting of discharged debt
  - Mortgage servicers not reporting during a case
  - Incorrect reporting after notice of final cure
  - Lack of standardization after dismissal
  - “Ride-through” reported as delinquent
  - Reporting of co-obligors
- ABI forum bringing experts together to develop best practices

## Next Steps

- The Report needs to come to the attention of legislators, judges, regulators, and other policymakers
- All can support these efforts
- ABI’s Endowment and NACTT can assist in efforts to study issues



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