AMERICAN BANKRUPTCY INSTITUTE

2018 Annual Spring Meeting

CONCURRENT SESSION

Consumer: ABI Commission Public Hearing – Parts I and II

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Former Regional U.S. Trustee; Roanoke, Va.

Karen Cordry
National Association of Attorneys General; Washington, D.C.

Dan Fisher
Education Credit Management Corp; Minneapolis

John G. Loughnane
Nutter McClennen & Fish, LLP; Boston

John D. McMickle
JDM Public Strategies; Washington, D.C.

Mary Ida Townson
Chapter 13 Trustee (N.D. Ga.); Atlanta

2018

MISSION

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 and other best practices that judges, trustees and lawyers can implement.

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Reporter: Robert M. Lawless

ABI Commission on Consumer Bankruptcy

Fact Sheet

- Created by the executive committee of ABI's Board of Directors in December 2016.
- Comprised of a 17-member expert panel who will examine the consumer bankruptcy system and issue a report with recommended improvements that can be implemented within the existing structure.
- The Commission is utilizing an open, information-gathering process that will allow interested parties across the consumer bankruptcy spectrum to provide input.
- Co-chaired by retired Bankruptcy Judges William Houston Brown and Elizabeth Perris. Combined, Brown and Perris have 50 years combined judicial experience.
- The Commission Reporter is Robert Lawless, the Max L. Rowe Professor of Law and co-director of the Program on Law, Behavior & Social Science at the University of Illinois College of Law.
- The Commission is supported by three committees: the Committee on Case Administration and the Estate, the Committee on Chapter 7, and the Committee on Chapter 13.
- Each committee is comprised of five commissioners and 10 other bankruptcy experts.
- For each committee, Members' Advisory Groups will be formed to receive input and provide perspectives from a wide variety of stakeholders. Any member of ABI can join a Members' Advisory Group.
- All interested individuals or groups will soon be able to submit comments, suggestions and information via the Commission's website (http://consumercommission.abi.org). The website will also contain committee meeting information and drafts of committee materials. Interested individuals also can email the Commission at ConsumerCommission@abiworld.org.
- The Commission will convene open meetings over the next two years to gather and review stakeholder input. Meeting details will be posted to the Commission website and via Twitter (@ConsumerBKComm).
- Committee recommendations that are approved by a two-thirds majority of the Commission will become part of the Commission's final report.
- The final report will be released at ABI's Winter Leadership Conference in December 2018 in Scottsdale, Ariz.

LIST OF TOPICS FOR ABI'S COMMISSION ON CONSUMER BANKRUPTCY

Please find the overall list of topics to be considered by the ABI Commission on Consumer Bankruptcy. The topics have been grouped within each of the three corresponding committees that support the Commission: the Committee on Case Administration and the Estate, the Committee on Chapter 7 and the Committee on Chapter 13. Each committee, comprised of five commissioners and 10 non-commission members, will take the lead in addressing the following topics:

Committee on Case Administration & the Estate

1. Student loans
2. Roles and responsibilities of attorneys
    a. Unbundling of services
    b. Payment of chapter 7 debtors' attorneys
    c. Use of no-look fees and other issues regarding the amount of attorney fees
    d. Use of appearance counsel for both debtors and creditors
    e. Payment of chapter 13 attorney fees in the plan
3. Roles and responsibilities of U.S. Trustee/Bankruptcy Administrator
    a. Supervision and appointment of chapter 7 and chapter 13 trustees
    b. Inconsistent application of statutes
    c. Section 341 practice
4. Systems issues
    a. New bankruptcy forms
    b. Number of bankruptcy judgeships; status of temporary judgeships
    c. CM/ECF modernization
5. Notice and service issues
    a. FRBP 7004(h)/Insured Depositary Institutions
    b. Notice lists
6. Prepetition repossession

a. Duty to return collateral
b. Postpetition fees and expenses for retained collateral
c. Postpetition sale of collateral

7. Exemptions

a. Trustee's sale of exempt property
b. Postpetition changes in value in estate assets
c. Addressing bad faith conduct under *Law v. Siegel* and *Schwab v. Reilly*
d. Relocation and application of state exemption law

Committee on Chapter 7

1. Prepetition credit counseling and postpetition financial management course

2. Chapter 7 trustees

a. Compensation of chapter 7 trustees
b. Hiring of trustee law firms
c. Chapter 7 trustee specialization

3. Dischargeability and discharge issues

a. "Return" in section 523(a)'s unnumbered paragraph
b. Remedies for discharge violations

4. Means test

a. Inconsistency between above- and below-median debtors
b. Application to converted cases
c. Arbitrary distinctions in application -- different types of debtors; debts vs. lack of debt

5. Property of the estate

a. Debtors' right of first refusal for proposed sale by trustee
b. Unliquidated estate property
c. Debtor disclosure of causes of action

6. Surrender

a. Creditor indifference toward return of collateral, refusal to accept surrendered collateral
b. Debtor's duty to cooperate?
c. Relationship to automatic stay

7. Redemption

a. Time limit on redemption
b. Oversight of redemption lenders

8. Reaffirmation

a. Leases & reaffirmation
b. Lender notices & reaffirmation

Committee on Chapter 13

1. Chapter 13 eligibility

a. Debt limits
b. Section 109(g) refiling

2. FRBP 3002.1 issues

3. Home-owner issues

a. Underwater liens
b. Loan modifications in bankruptcy
c. HOA fees

4. Chapter 13 plans

a. Emergency fund
b. Secured claim matters: proof of claim vs. plan
c. Direct mortgage claim payment by debtor in chapter 13 plans
d. Conduit plans
e. Interest rates in the plan
f. National plan form

   g. Strict compliance with the 60-month rule

5. Credit reporting and bankruptcy

6. Local legal culture and chapter 13

   a. Role of local legal culture in chapter choice
   b. Racial disparities in the use of chapter 13

7. Section 1306, scope of estate property in unclosed cases

Persons submitting written statements or making public statements at Commission meetings are welcome to address any of the Commission's overall topics. Experts/interested stakeholders within a given topic area are encouraged to provide their input to the corresponding Committee that will be addressing that topic. Written statements can be submitted via e-mail at ConsumerCommission@abiworld.org.

To make an oral statement at a Commission or Committee meeting, be sure to check the Commission's website for scheduling and submission guidance.

AMERICAN BANKRUPTCY INSTITUTE
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Feature

BY HON. WILLIAM H. BROWN, HON. ELIZABETH L. PERRIS AND PROF. ROBERT M. LAWLESS

ABI Announces Commission on Consumer Bankruptcy

Hon. William H. Brown (ret.)
U.S. Bankruptcy Court (W.D. Tenn.)

Hon. Elizabeth L. Perris (ret.)
U.S. Bankruptcy Court (D. Ore.)

Prof. Robert M. Lawless
University of Illinois College of Law

Editor's Note: *For more information on the Commission, visit consumercommission.abi.org.*

In our years as bankruptcy lawyers, judges and students of bankruptcy law, we like to think that we have learned a few things. Most of those lessons are not bankruptcy-specific: Times change, and what was once sparkly and new becomes outdated.

We remember 1979, when the cutting-edge technology for consumers was a Tandy TRS-80 Micro Computer available from RadioShack. The Dow closed the year at 873 points, and the Fed's discount rate was 13.8 percent. We also remember 2005, when the best-selling cellphone was a Nokia 1110 that had a black-and-white display with a backlight! The Dow had climbed to 10,348 points. The Fed's discount rate was 3.8 percent, and soundly invested retirement portfolios still included fixed-income assets that offered decent interest rates.

Bankruptcy lawyers, of course, remember 1979 and 2005 as the years when the Bankruptcy Reform Act and the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) took effect. Just like all that was once sparkly and new, the Bankruptcy Code is pushing 40 years old. Even the major changes wrought by BAPCPA are 12 years old. The world has changed a lot in that time, both technologically and in the financial markets. Consequently, the legal foundations of the consumer bankruptcy system are creaking.

The ABI Commission's Charge and Key Players

ABI has stepped up to take a leadership role in improving the consumer bankruptcy system. In December 2016, the executive committee of the ABI Board of Directors created the ABI Commission on Consumer Bankruptcy. The Commission will begin its work in April. There are ways for all ABI members to be involved. ABI President-Elect Hon. **Eugene R. Wedoff** (ret.) has charged the Commission with

> 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, new administrative rules or actions, recommendations on proper interpretations of existing law, and other best practices that judges, trustees, and lawyers can implement.

The Commission will certainly take on tough issues that might require statutory amendments. However, one focus will be on identifying practically workable reforms, such as changes that can be implemented by national or local rules committees, in the U.S. Trustee's Office, in the standing orders or decisions of local courts, and in the offices of bankruptcy trustees and attorneys. The Commission also will emphasize consensus and compromise among different stakeholders in the system. The Commission intends to release a final report containing its recommendations at ABI's Winter Leadership Conference in December 2018 in Scottsdale, Ariz.

This article's authors are the co-chairs and reporter for this new Commission. Judges Brown and Perris are retired bankruptcy judges with 49 years of combined experience in the bankruptcy courts of Tennessee and Oregon and will supervise the Commission's overall activities as co-chairs. Prof. Lawless has been teaching and writing about bankruptcy law for 24 years. As reporter, he will assist in operations and draft the Commission's final report.

President-Elect Wedoff worked with us to assemble an impressive roster of commissioners.

The Commission will be comprised of 15 experts from all over the nation with experience in all different parts of the consumer bankruptcy system and in representing diverse stakeholders. Commissioners include **Michael T. Bates** of JPMorgan Chase Bank, NA (Lewisville, Texas), ABI Vice President-Publications **Alane A. Becket** of Becket & Lee, LLP (Malvern, Pa.), **Edward C. Boltz** of The Law Offices of John T. Orcutt, PC (Durham, N.C.), **Rudy J. Cerone** of McGlinchey Stafford, PLLC (New Orleans), Bankruptcy Judge **Randall L. Dunn** (ret.) (Portland, Ore.), Chapter 13 Trustee **Henry E. Hildebrand, III** (Nashville, Tenn.), **Ariane Holtschlag** of The Law Office of William J. Factor, Ltd. (Chicago), **David W. Houston, III** of Mitchell, McNutt & Sams (Aberdeen, Miss.), **Richardo I. Kilpatrick** of Kilpatrick & Associates, PC (Auburn Hills, Mich.), Prof. **Bruce A. Markell** of the Northwestern University School of Law (Chicago), **Ronald R. Peterson** of Jenner & Block LLP (Chicago), Prof. **Katherine M. Porter** of the University of California at Irvine School of Law (Irvine, Calif.), **John Rao** of the National Consumer Law Center (Boston), **Wendell J. Sherk** (St. Louis) and **Tara Twomey** of the National Consumer Bankruptcy Rights Center (Carmel, Calif.).

The Commission will also include nonvoting *ex officio* members in ABI, including ABI Executive Director **Samuel J. Gerdano**, Judge Wedoff, ABI Vice President-Development **Edward T. Gavin** of Gavin/Solmonese LLC (Wilmington, Del.), **Clifford J. White III**, director of the Executive Office for U.S. Trustees, and a representative of the Internal Revenue Service.

Hon. William Houston Brown retired in 2006 as a U.S. Bankruptcy Judge for the Western District of Tennessee. Hon. Elizabeth Perris was a U.S. Bankruptcy Judge for the District of Oregon from 1984-2015. Robert Lawless is the Max L. Rowe Professor of Law and co-director of the Program on Law, Behavior and Social Science at the University of Illinois College of Law.

Commission Structure and Procedures

The Commission workhorses will be three committees: the Committee on Chapter 7, the Committee on Chapter 13, and the Committee on Case Administration and the Estate. Judge Wedoff again worked with us to identify the committee members. Each committee has a total of 15 persons, five commissioners and 10 other bankruptcy professionals, again chosen for their breadth of professional experience and geographic diversity. Three former bankruptcy judges will chair the committees: **Randall Dunn** will chair the Committee on Chapter 7, **David Houston** will chair the Committee on Chapter 13, and Prof. **Bruce Markell** will chair the Committee on Case Administration and the Estate. Under the leadership of these committee chairs, the committees already have started their organizational work.

The committees will identify the issues that the Commission will consider. In this sense, the committees will set the agenda for the Commission. To prevent overlap, the co-chairs and reporter will coordinate the work of the three committees such that each issue will be taken up by only one committee. The committee actions will be forwarded to the Commission for its review, debate and consideration. Committee recommendations that are approved by a two-thirds majority of the Commission will become part of the Commission's report.

The process was designed with the goal of reaching middle-ground solutions about which many stakeholders can agree. The Commission and its committees should act as checks on each other. The hope is that the resulting dialogue will encourage compromise and responsible professional discourse even on issues where differing views may be strongly held.

Get Involved

The Commission process also has been designed to be very open and communicative. As this article goes to press, ABI is developing a website that will house all of the Commission's materials and will be available to the public. Anyone will be able to submit written comments to the Commission through the website. You can email the Commission at consumercommission@abiworld.org.

ABI members also will be able to sign up for the Members' Advisory Groups for each Committee. Participants in the Members' Advisory Groups will be continually informed about developments in the committee and in the Commission generally, will get notices as to new documents that have become available on the Commission's website, and receive notice of open meetings for the committees and the Commission. The Members' Advisory Groups will be particularly encouraged to attend and participate at the open meetings. Look for announcements at the Commission's website about how to sign up for the Members' Advisory Groups.

The first open meeting of the ABI Consumer Bankruptcy Reform Commission will take place at the National Association of Consumer Bankruptcy Attorneys (NACBA) Annual Meeting on May 4-7 in Orlando, Fla. The Commission is working with other organizations to hold meetings at events where bankruptcy professionals gather. Look for announcements at the ABI website (abi.org) for further details about these events.

The Road Ahead

There are undoubtedly many diverse views about how the bankruptcy system can be made to work better. In crafting the Commission's structure, we paid special attention to ABI's mission as a nonpartisan, multidisciplinary organization dedicated to research on matters related to insolvency. We hope the Commission will offer not only a forum for vigorous and respectful debate about these views, but also a process by which to reach consensus wherever possible. The result would be recommendations that will make the system work better for debtors, creditors and the professionals who work within it. abi

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Legislative Update

ABI Consumer Commission Holds Hearing at NACBA Annual Meeting

Editor's Note: *The following are excerpts from public statements presented to the ABI Commission on Consumer Bankruptcy at a hearing held during the annual meeting of the National Association of Consumer Bankruptcy Attorneys (NACBA) on May 6 in Orlando, Fla. The Commission's Chapter 13 Committee will conduct a public hearing on July 15 in Seattle as part of the National Association of Chapter 13 Trustee's annual meeting. A full schedule of the Commission's meetings can be found on the Commission's website at ConsumerCommission.abi.org.*

Statement of Bradford W. Botes (Birmingham, Ala.)

I have practiced consumer bankruptcy law for more than 30 years. My firm has had offices in Alabama, Mississippi, Tennessee, Florida, North Carolina and Texas. I was one of NACBA's first 50 members, served on its board of directors and acted as its first full-time executive director.


Bradford W. Botes

Based upon my experience, it is my opinion that the BAPCPA requirements requiring credit counseling prior to bankruptcy and financial management post-filing and prior to discharge have become exactly what we had predicted they would: a waste of a debtor's time and resources with little, if any, benefit to debtors or the bankruptcy system as a whole. An entirely new bureaucratic industry has in fact been created, which slows down the administration of cases and has created new unnecessary costs. In my opinion, the Commission should recommend that these requirements be eliminated post-haste.

Statement of Cathleen Moran (Mountain View, Calif.)

I've practiced bankruptcy law in the Silicon Valley of the Northern District of California for 37 years. I've been a bankruptcy specialist, certified by the California State Bar Board of Legal Specialization for 21 years. I've divided my comments into two general categories: the specific and the systemic. Both need change if bankruptcy is going to realize its potential to enable individuals to lead financially stronger lives.

I'm sure you'll hear from others much about student loan discharge and the need for a better balance between the interests of student loan lenders and guarantors and the interests of borrowers. Short of changing the test for the discharge of student loans, there are two lesser changes that would aid borrowers in dealing with their loans.


Cathleen Moran

One, recognize student loans as long-term debt on which payments can properly be maintained throughout the life of a chapter 13 plan. Allow separate classification of student loans in the plan. Alternatively, permit debtors to continue to service student loans directly. Where I practice, neither are presently permitted. Instead, we effectively require debtors to default on their student loans and incur significant collection costs in addition to the oft-crippling loans themselves.

As to chapter 13, no credible financial counselor would craft a budget for a client that had them spending every penny they take in. Yet that's how our chapter 13 calculation of monthly disposable income works. The means test makes no allowance for routine replacement of household goods and the repair of appliances, much less an unexpected or catastrophic event. Without an approved mechanism for an emergency fund, a bump in the financial road leads to plan defaults, the need for plan modification, additional attorneys' fees or dismissal. Even when a family can get through five years without some unplanned expense, the system has missed an opportunity to build a savings habit. Three or five years of practice at saving would be more powerful in the future lives of debtors than a one-hour financial management class.

The bankruptcy system contributes to our national attitude that retirement will take care of itself. That's an exercise in wishful thinking. Saving for retirement should be a rea-

sonable and necessary living expense. To conduct ourselves as though it isn't is to perpetuate the hope that old age will take care of itself, magically. Our current system allows only retirement savings where contributions are mandatory; yet fewer and fewer individuals have the kind of employment that requires retirement savings. Early plan payoff chapter 13, as it operates, is divorced from financial common sense when it resists early payoff of chapter 13 plans. Whether by reason of improving finances or an unexpected windfall, or the willingness to reach into exempt assets to fund plan payoff, too many chapter 13 trustees oppose early payoff. What creditor would reject payment of $100 now in favor of 10 future payments of $10?

Chapter 13's approach to early payoff is an expression of the ACP as a sentence of financial incarceration to be served. With a system that exposes any improvement in circumstances to capture for the benefit of creditors, it becomes harder for counsel to pitch the advantages of chapter 13 over alternatives. Chapter 20 looks better. Debt settlement, which fixes the payment schedule at the outset, look better. The risks of chapter 13 are becoming disproportionate to the benefits of the shrunken chapter 13 discharge. Conditioning access increases costs disproportionately.

The misbegotten idea that consumers have been flocking to bankruptcy in an irresponsible attempt to avoid paying their debts has led to the enormous increase in the cost of bankruptcy representation. The means test, the need for supporting documents and the threat of having to defend your need for bankruptcy against a taxpayer-funded lawyer from the Office of the U.S. Trustee with a prosecutorial mentality makes bankruptcy difficult for the unsophisticated or the stressed consumer. My sense is that trustees feel that their supervisors expect them to act as inquisitors. Yet the statistics about "abusive filings" suggests that this is a remedy without an ailment. We've just succeeded in pricing bankruptcy out of the reach of too many.

While the Bankruptcy Code and pronouncements from the bench mouth the platitudes about compensating counsel for consumer debtors consistent with fees paid to lawyers in other fields, it doesn't happen consistently enough to attract capable and committed lawyers to this field. Court-sanctioned "flat fees" are crafted not so much to pay the average value of services, but rather the minimum that a consumer case could cost. Judges apparently fear overpaying the journeyman lawyer more than they do starving the capable out of the field. The issue of fees for representation after plan completion but before discharge, such as lien-stripping and Rule 3002.1, is without guidance or procedures.

Statement of Wayne A. Silver (Mountain View, Calif.)

I've been practicing bankruptcy law in the Northern District of California for more than 30 years. I chair the California State Bar's Bankruptcy Law Advisory Commission. My practice of late focuses on bankruptcy litigation, including bankruptcy crimes, and that's where I will confine my comments. The challenge that debtors and their bankruptcy attorneys face in the litigation arena is the systemic bias against them. The deck is stacked in favor of creditors, and it's not fair.

Let's face it. Most debtors can barely scrape together a minimum fee to pay a competent bankruptcy attorney. Their limited funds cover preparation of the bankruptcy schedules, an appearance at the meeting of creditors, maybe a lien-strip or reaffirmation. But what happens when a well-heeled creditor files a nondischargeability adversary proceeding against a debtor? Or when a debtor has to defend an 11 U.S.C. § 727 action for denial of discharge brought by the U.S. Trustee, perhaps where the civil action is also a discovery tool for a parallel but undisclosed criminal investigation?

Most debtors can barely scrape together a minimum fee to pay a competent bankruptcy attorney. Their limited funds cover preparation of the bankruptcy schedules, an appearance at the meeting of creditors, maybe a lien-strip or reaffirmation.

There is no safe harbor in the Federal Rules of Bankruptcy Procedure to level the playing field for debtors; they are treated the same as any other litigant in federal court. That's because most of the Federal Rules of Bankruptcy Procedure adopt the Federal Rules of Civil Procedure (FRCP) verbatim. That means that all of the FRCP 26 initial disclosure rules apply, including the rules covering electronically stored information (ESI). Add all of the FRCP 16 pre-trial rules, and the debtor (and often his/her bankruptcy attorney) is suddenly overwhelmed. These are serious legal matters, and debtors should have access to qualified legal counsel to assist them.

There are two things that could be done to address these problems. First, provide a streamlined discovery and pre-trial procedure in nondischargeability and denial-of-discharge adversary proceedings, and make that streamlined procedure the default in consumer debtor cases. Next, incentivize qualified attorneys to represent debtors in these kinds of cases. For example, how about awarding attorneys' fees to the debtor if he/she prevails, and making sure the award is payable in "new money," not just added to the creditor's claim. Or allocating a portion of bankruptcy case filing fees (or chapter 11 U.S. Trustee fees) to fund a legal services program that provides litigation counsel to debtors? These are a few ideas to deal with a difficult issue. abi

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What's Happening at ABI

Consumer Commission Identifies Study Issues and Sets July Public Hearing Date

ABI's 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, and other best practices that judges, trustees and lawyers can implement. The Commission's next open meeting will be held on July 15 at the NACTT Annual Meeting at the Sheraton Seattle Hotel in Seattle from 4-5:30 p.m. PT, and is a field hearing for the Chapter 13 Committee. More information will be posted online at ConsumerCommission.abi.org.

The Consumer Commission has also established an overall list of topics to be considered. The topics have been grouped within each of the three corresponding committees that support the Commission: the Committee on Case Administration and the Estate, the Committee on Chapter 7 and the Committee on Chapter 13. Each committee, comprised of five Commissioners and 10 non-Commission members, will take the lead in addressing the following topics:

Committee on Case Administration and the Estate

1. Student loans;
2. Roles and responsibilities of attorneys, including (a) the unbundling of services, (b) payment of chapter 7 debtors' attorneys; (c) the use of no-look fees and other issues regarding the amount of attorneys' fees; (d) the use of appearance counsel for both debtors and creditors; and (e) the payment of chapter 13 attorneys' fees in the plan;
3. The roles and responsibilities of U.S. Trustees/Bankruptcy Administrators, including (a) the supervision and appointment of chapter 7 and chapter 13 trustees; (b) inconsistent application of statutes; and (c) § 341 practice;
4. Systems issues, including (a) new bankruptcy forms; (b) the number of bankruptcy judgeships and status of temporary judgeships; and (c) CM/ECF modernization;
5. Notice and service issues, including (a) Bankruptcy Rule 7004(h)/insured depositary institutions and (b) notice lists;
6. Pre-petition repossession, including (a) the duty to return collateral; (b) post-petition fees and expenses for retained collateral; and (c) the post-petition sale of collateral; and
7. Exemptions, including (a) the trustee's sale of exempt property; (b) post-petition changes in value in estate assets; (c) addressing bad-faith conduct under *Law v. Siegel* and *Schwab v. Reilly*; and (d) the relocation and application of state exemption law.

Committee on Chapter 7

1. Pre-petition credit counseling and a post-petition financial-management course;
2. Chapter 7 trustees, including (a) the compensation of chapter 7 trustees; (b) the hiring of trustee law firms and (c) chapter 7 trustee specialization;
3. Dischargeability and discharge issues, including (a) the "return" in § 523(a)'s unnumbered paragraph and (b) remedies for discharge violations;
4. Means tests, including (a) the inconsistency between above- and below-median debtors; (b) the application to converted cases; and (c) arbitrary distinctions in application (different types of debtors and debts vs. lack of debt);
5. Property of the estate, including (a) a debtor's right of first refusal for a proposed sale by trustee; (b) unliquidated estate property; and (c) a debtor's disclosure of causes of action;
6. Surrender, including (a) creditor indifference toward the return of collateral and/or a refusal to accept surrendered collateral; (b) a debtor's duty to cooperate; and (c) the relationship to automatic stay;
7. Redemption, including (a) a time limit on redemption; and (b) the oversight of redemption lenders; and
8. Reaffirmation, including (a) leases and reaffirmation and (b) lender notices and reaffirmation.

Committee on Chapter 13

1. Chapter 13 eligibility, including (a) debt limits; and (b) § 109(g) refiling;
2. FRBP 3002.1 issues;
3. Homeowner issues, including (a) underwater liens; (b) loan modifications in bankruptcy; and (c) homeowners' association fees;
4. Chapter 13 plans, including (a) emergency funds; (b) secured claim matters such as proof of claim vs. plan; (c) direct mortgage claim payments by a debtor in chapter 13 plans; (d) conduit plans; (e) interest rates in the plan; (f) national plan form; and (g) strict compliance with the 60-month rule;
5. Credit reporting and bankruptcy;
6. Local legal culture and chapter 13 such as (a) the role of local legal culture in chapter choice and (b) racial disparities in the use of chapter 13; and
7. Section 1306 and the scope of estate property in unclosed cases.

Getting Involved

Persons submitting written statements or making public statements at Commission meetings are welcome to address any of the Commission's overall topics. Experts/interested stakeholders within a given topic area are encouraged to provide their input to the corresponding Committee that will be addressing that topic. Written statements can be submitted via email at ConsumerCommission@abiworld.org. To make an oral statement at a Commission or Committee meeting, check the Commission's website at ConsumerCommission.abi.org for scheduling and submission guidance.

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Speaker List
April 20, 2018 Hearing
Washington, D.C.

10 a.m. - 11:00 a.m.

Dan Fisher
General Counsel and Corporate Secretary, Educational Credit Management Corp.
Minneapolis. Minn

Mr. Fisher is the primary legal advisor to the Corporation and affiliates, including its executive management team and board of directors. Mr. Fisher also provides executive oversight to the legal department, compliance department, and several shared services departments. In addition to ensuring the compliance with all laws and regulations, he has been critical in forming ECMC's national bankruptcy litigation strategy. He has argued appeals involving student loan dischargeability standards, due process matters and collection cost issues. He is admitted to practice in most federal appellate courts and the U.S. Supreme Court. Mr. Fisher also serves as the secretary for the ECMC Group Board of Directors. Prior to joining ECMC in 2000, Mr. Fisher served on active duty in the U.S. Army as a Judge Advocate for six years in Georgia and the Washington, D.C. area, where his primary focus was court-martial litigation.

John R. Byrnes
Former Regional U.S. Trustee
Roanoke, Va

Mr. Byrnes, now retired, was the Assistant U.S. Trustee involved in the prosecution of attorney John Gellene (Bucyrus bankruptcy case). He exercised the duties of the U.S. Trustee Program in hundreds of matters in consumer and commercial cases. He is especially experienced in attorney compensation, conflicts, misrepresentation, and other ethics matters. He is also a former United States Attorney.

Karen Cordry
National Association of Attorneys General
Washington, D.C.

Ms Cordry is Bankruptcy and Special Issues Counsel for NAAG. She serves as a resource person to the states for all issues relating to the effect of bankruptcy on the activities of the Attorneys General. In particular, she provides substantive support for the states with respect to any bankruptcy filings by tobacco companies and other mass tort cases. She conducts a yearly seminar on bankruptcy topics, maintains a large list of state and local contacts dealing with bankruptcy issues, and writes a monthly Bankruptcy Bulletin on recent cases of interest to government counsel.

11:30 a.m. -12:30 p.m.

Hon. Colleen Brown
U.S. Bankruptcy Judge (D. Vermont)
Burlington, Vermont

Judge Brown has served as the Chief United States Bankruptcy Judge for the District of Vermont since 2000, and was reappointed in 2014. Prior to judicial service, she was in private practice focused on bankruptcy, both debtors' and creditors' rights, foreclosure and workouts. She previously served as law clerk to Hon. Beryl E. McGuire, Chief United States Bankruptcy Judge for the Western District of New York, as the Estate Administrator in that court, and as the Assistant United States Trustee for the Western District of New York.

Judge Brown has served the NCBJ as the Second Circuit representative to the Board of Governors, a member of two NCBJ Education Committees, Chair of the NCBJ's U.S. Trustee Liaison Committee (which she represents today), Chair of the NCBJ's Liaison Committee to the National Association of Women Judges, and Chair of the NCBJ President's Special Task Force for Cost Containment.

Mary Ida Townson
Chapter 13 Trustee, N.D. Ga
Atlanta, Georgia

Ms. Townson is the Standing Chapter 13 for the Northern District of Georgia, one of the heaviest consumer dockets in the U.S. She is a Past President of the National Association of Chapter 13 Trustees.

John D. McMickle
JDM Public Strategies
Washington, D.C.

Mr. McMickle has a governmental affairs practice in Washington, and represents clients in matters before Congress and Federal agencies. He is a former legal counsel to Sen. Chuck Grassley on bankruptcy matters, where he was deeply involved in the creation and enactment of BAPCPA in 2005.

John Loughnane
Nutter McCennen & Fish, LLP
Boston, Mass.

Mr. Loughnane is Special Projects Leader for ABI's committee on Mediation. He will be joined by former bankruptcy judge **Louis Kornreich** (D. Me) to discuss the use of mediation in consumer bankruptcy cases.

Dan Fisher
General Counsel
Educational Credit Management Corporation
111 Washington Avenue South, Suite 1400
Minneapolis, MN 55401

Ladies and Gentlemen:

Thank you for the opportunity to discuss the important matter of the treatment of student loans in bankruptcy. Educational Credit Management Corporation (ECMC) is a nonprofit guaranty agency that helps the U.S. Department of Education (ED) administer the Federal Family Education Loan (FFEL) Program. As a nonprofit organization, our mission includes providing financial literacy and college access services to families and default prevention services and default resolution services for schools and student loan borrowers. ECMC is one of the largest guaranty agencies in the country and is the designated guarantor for six states. In addition, ECMC administers FFEL loans in bankruptcy for the Department of Education as well as 21 of the other 25 guaranty agencies. Since our founding in 1994, ECMC has serviced 682,000 student loan borrowers who have filed for bankruptcy and we have returned nearly $6 billion to the U.S. Treasury.

Changes to the Higher Education Act of 1965 (HEA) ended new originations in the FFEL Program in 2010 and all originations since then have been made in the Direct Student Loan (DSL) Program. DSL loans are administered by ED, which is represented in Bankruptcy Courts by local U.S. Attorney's offices.

As a major holder of student loans in bankruptcy, we are uniquely positioned to offer insights into the process to assist borrowers and other stakeholders.

Non-Bankruptcy Alternatives

As a service to ED and the other FFEL Program guaranty agencies, ECMC regularly defends adversary proceedings in bankruptcy where the borrower claims the student loan should be included within the general discharge as an undue hardship under Section 523(a)(8). For many years, a significant number of student loan borrowers have filed adversary proceedings alleging a permanent disability that causes a hardship in the repayment of their student loans. This is unnecessary as there are processes outside of bankruptcy to administratively discharge student loans for a borrower who meets the Total and Permanent Disability (TPD) standard under 34 CFR § 402(c). In recent years, ED has expanded the ways a borrower can show disability. For example, a military veteran can now use documentation from the VA showing a service-connected disability; a borrower who receives Social Security Disability

benefits can use documentation showing the SSA's notice of award. These are in addition to a borrower submitting a certification from a physician.

In addition to TPD, borrowers can file for administrative discharge of their student loans if they were fraudulently induced to enroll in a school and took out loans to attend this school. These claims, known as Borrower Defense to Repayment (DTR) discharges have become more common since the collapse of several large for-profit career schools. Similarly, borrowers whose schools close while they are enrolled or shortly thereafter are eligible for administrative relief if the closure precluded them finishing their education. Borrowers who can show that they were the victims of identity theft are also eligible for administrative discharge without the need to file an adversary proceeding.

Because we continue to see adversary proceedings alleging facts that would support administrative discharges, ECMC urges the Commission to work with consumer attorney groups to ensure that borrowers and their counsel are aware of these remedies that can avoid expensive and unnecessary adversary proceedings – especially for those borrowers for whom student loan debt is a major reason for filing bankruptcy.

Plan Language Issues

Student loan holders, like ECMC have a heightened sensitivity to improper Chapter 13 plan provisions after the Supreme Court's decision in *Espinosa*. ECMC encourages bankruptcy judges and trustees to share this sensitivity to preclude improper plan language involving student loans. We continue to see improper provisions that purport to cure defaults.[1]

The HEA and its implementing regulations allow defaulted student loan borrowers to cure a default through a specific process known as rehabilitation, as detailed in 34 CFR § 682.405. This process includes an agreement with the guaranty agency to make nine monthly, on-time payments in 10 months in an amount that is reasonable and affordable to the borrower. At that point, the guaranty agency will certify these regulatory provisions were satisfied and will return the loan to good standing with an eligible lender. The guaranty agency then directs the credit bureau to remove the default status and the borrower is thereafter eligible for additional federal student aid.

While the borrower cannot merely state that the loan default is cured, both ED and ECMC can allow the borrower to complete the rehabilitation within bankruptcy. But to do this, the court needs to be aware of this process,

[1] Under the Higher Education Act and implementing regulations, a student loan defaults after at least 270 days without payment. This only occurs after the guaranty agency assists the servicer with default prevention efforts between days 60 and 270 of delinquency.

including the requirements under § 682.405, which includes an agreement with the guaranty agency, on-time monthly payments, and the return of the loan to an eligible lender – which cannot occur until the bankruptcy is completed.

Undue hardship

There have been many articles written in industry press and media outlets about undue hardship adversary proceedings. ED has issued a Request for Information on this topic that asks for responses by May 22. While Congress has not further defined what constitutes undue hardship in Section 523(a)(8), it is important to discuss the guidance that ED has issued on this topic for guaranty agencies and its own portfolio. Federal regulations currently require guaranty agencies to evaluate each undue hardship adversary proceeding to determine whether repayment would constitute an undue hardship under the legal standards in effect in that jurisdiction. If the agency concludes that the borrower does not meet the legal standard, and it is economically feasible to do so, the agency is required to defend the adversary proceeding. ED has also released industry guidance in DCL GEN 15-13 that details this process and includes hypothetical situations providing additional guidance and also notes that guaranty agencies are subject to reviews by ED to ensure that they comply with these regulations.

It is important to note that ECMC, like others, take this obligation seriously and will engage in discovery to determine whether the borrower meets the applicable undue hardship standard. If so, ECMC will stipulate to the discharge of some or all of the student loan debt. This is not an uncommon occurrence.

For many years, bankruptcy and appellate courts have differed in their approaches to analyzing various Income-Driven Repayment (IDR) Plans in undue hardship matters. Some courts consider IDR Plans in the first prong of the *Brunner* test as whether borrowers can make the monthly payment of the most favorable repayment plan available to the borrower. Others consider this in the analysis of the third prong – whether the debtor has made a good faith effort to repay his or her loans. While policy makers have created several different IDR Plans in an effort to shift the national educational priority from access to assistance with debt loads, we do not believe that the availability of an IDR Plan for a borrower is determinative on the undue hardship issue. But if the borrower is eligible for an IDR Plan payment, this should be the appropriate measure under the first prong. And the borrower's measure exploration of IDR Plans is highly probative on his or her good faith effort to repay the student loan.

John R. Byrnes Remarks
April 20, 2018

Thank you for the opportunity to appear before the Commission. I retired from the U.S. Trustee program after having served in the Department of Justice for almost 35 years, including services as Assistant U.S. Attorney, U.S. Attorney, and 25 years in the UST Program. I mention my service as the U.S. Attorney to show that I had some familiarity with enforcement-type issues before Article 3 Judges before I started with the U.S. Trustee. That experience was invaluable in assessing appropriate enforcement actions and identifying evidentiary and other trial issues.

During my service with the U.S. Trustee, I dealt with a wide variety of enforcement issues—both civil and criminal—involving debtors, creditors, and attorneys representing them. The issues remained relatively constant over the course of my service. Some were resolved informally, usually through warnings and discussions about the potential consequences of continuing certain types of behavior. More serious misconduct involved referrals to the U.S. Attorney in extreme cases, filing disciplinary complaints with the court, or filing complaints with state disciplinary boards. Typically, referrals to state disciplinary authorities were the least effective in securing a lasting remedy.

Remedies available from the bankruptcy courts are typically adequate to address everyday issues involving inadequate performance by attorneys. If the attorney is not a bankruptcy specialist, a mild admonishment and direction on corrective action are sufficient. If the attorney is a bankruptcy specialist, the threat of disbarment, suspension, or modified mandatory filing requirements (for example, specific detailed sworn verification by the attorney) should be effective.

I was never forced to commence a disciplinary action in district court, although there are many cases in which the respondent has disputed the authority of the bankruptcy court to impose monetary or other equitable sanctions. These typically involve large, multi-state practitioners or debt relief agencies with a lot of money at stake.

Unfortunately, in some instances referral to the U.S. Attorney is necessary. These typically include obvious cases of perjury (for example, the case involving John Gellene), or cases involving an attorney filing false documents on behalf of a debtor or creditor. This remedy is often ineffective, however, because some U.S. Attorneys are reluctant to bring such cases, frequently citing the press of other business. The real reason, in my opinion, is a lack of familiarity with bankruptcy laws and procedures and reluctance to rely on the U.S. Trustees to provide expert knowledge. Notwithstanding, the USTP has continued to refer appropriate cases. Between 2006 and 2017, the USTP made over 21,000 criminal referrals.

Although most bankruptcy attorneys are honest and diligent and will not participate in or assist their clients in dishonest acts, there continues to be a substantial number who will. Identifying particular cases is a difficult process. Unfortunately, some judges tolerate a level of inadequate performance on an ongoing basis from barely competent practitioners. Bankruptcy practice has for many years appealed to otherwise unsuccessful lawyers who see an opportunity

for "easy money." As the total volume of cases declines in some areas, more lawyers try and compete on price, and a reduction in the quality of services follows.

As the Commission considers the recommendations, I would urge it to examine any changes in allowable practices with a view toward the potential for abuse, especially from less diligent practitioners. Specific enforcement mechanisms should considered as part of any substantial change. An example of this relates to proposals permitting attorneys to limit the scope of representation, i.e. unbundling.

At present most bankruptcy courts will require an attorney who filed a case to continue to represent the debtor until the case is closed. They cite as a legal basis the general ethical requirement to complete an engagement. As a practical matter, most judges believe the debtor's attorney is in the best position to identify risks of potential litigation before the case is filed and either include that risk in the cost quoted or decline the representation. They also recognize that allowing withdrawal post-petition will simply leave the debtor unrepresented.

An unusual circumstance in my district related to the review of substantial abuse issues under 707 of the code. Upon the commencement of such a motion, many attorneys would immediately consent to dismissal or convert the case to Chapter 13, regardless of whether the debtor had a compelling explanation. We ultimately modified our practice to conduct informal discovery with the debtor and their attorney to inquire about income and expenses. Often the debtor had a story (usually post-petition unemployment or major medical expenses) that was satisfactory to us but unknown to their attorney. I remain proud of the fact that in our office the government actually called people, together with their attorney, to get their side of the story before launching litigation. Attorneys simply dumping such cases on an automatic basis would have been a grave disservice to their clients.

Incidents such as these will proliferate if attorneys have carte blanche to limit the services from the outset. It also seems unlikely that there will be any significant reduction in fees to the debtor over the long haul. Therefore, when considering practice changes, I strongly encourage the Commission to take into account the potential for abuse in relation to the changes and the ability to identify and enforce appropriate actions against bad actors.

Testimony Before ABI Commission on Consumer Bankruptcy

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I would like to thank the Commission for inviting me to appear and testify with respect to governmental issues in consumer bankruptcy cases. I would like to begin with the standard disclaimer of all governmental (or, in my case, quasi-governmental) witnesses – that, while we are attempting to make statements that correspond with the views of the officials with whom we work, our statements should not be taken as official statements of policy, nor should they be viewed as the view of any or all of the state Attorneys General, in my case. I would also add that, my personal work with the States tends to be more business-bankruptcy oriented, so I do not have the degree of personal experience with individual debtor cases that others on these panels may have. That said, though, I hope the comments below are useful in illustrating at least some of the many issues governmental counsel may deal with on a regular basis.

1. Uniform Plans

Under the Constitution, Congress is required to enact *uniform* laws of bankruptcy. The Supreme Court majority held in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006) that the concept was so crucial that it showed that Congress had decided (without ever uttering a word to that effect) that it warranted overriding State sovereign immunity that carried over intact under the new Constitution in every other Article I area. The need for such uniformity is particularly important to creditors with respect to Chapter 13 plans in light of the large number of such cases and the variety of plan payments and structures that are allowed (as compared to the relatively straightforward process in Chapter 7 cases). A creditor seeking to deal with those variables in cases where the dollars available are usually quite small and the plans are expected to be confirmed quickly has a difficult task to be able to actually analyze and react to problems with such plans. Yet the Supreme Court's decision in the *Espinosa* case made it imperative to find and ferret out problems – and leaving the task to overworked bankruptcy judges to find them for creditors and revise plans *sua sponte* was not likely to work out well.

That is why States were happy to see the project over the last several years that tried to move Chapter 13 cases in the direction of a truly uniform plan. As largely involuntary creditors, whose debtors can readily move all over the country, while owing debts to the States for which they often will have no ability to obtain security or other controls, they frequently needed to cope with plans whose variety was limited only by the ingenuity of debtors' counsel. In addition, even as courts began to move towards uniform or model plans in a district, there was still nothing that required District A's uniform plan to be consistent with District B's plan. As a result, trying to train staff to know what to look for, where to find it, and where to check for the hidden booby traps required starting over with each new district, if not each plan. A truly uniform plan, on the other hand, would make it far easier to train staff working on such cases to review the plans,

determine the government's treatment and evaluate if the attorney might need to object. In light of the volume of cases, this initial triage almost inevitably will have to be done by paralegal staff, so it is critical to ensure that they can be trained as to what for and where to look. In short, Judge Wedoff and I may have been the two most enthusiastic supporters of a national plan.

The final result of all of those efforts was a mixed bag – notwithstanding a great deal of work, it proved to be impossible to convince many to move away from the comfort of what was familiar. So, a truly national plan could not be reached, but at least a requirement was put into place that requires each district to adopt *a* uniform plan. As a result, the number of potential plan variants has gone from infinite to less than 85. 13 districts are using the national plan and the remaining 81 adopted their own plan.

Even with the differences, though, the process undoubtedly served to bring plans a good deal closer together. And the Rules required several minimum provisions be included in any district plan, including an opening paragraph dealing with several crucial issues and a closing paragraph describing any nonstandard provisions. Both of those requirements tell creditors where to look for what is likely to be most important to them. And, from my perspective, one of the most important requirements for these plans – and I take some credit for hammering on this point – is the provision in rule 3015(c) that "a nonstandard provision is *effective only if it is included in a section of the form designated for nonstandard provisions and is also identified in accordance with any other requirements of the form*" and the even clearer language in Rule 3015.1 that any nonstandard provision placed other than in the appropriate spot is void. With those provisions, I trust that the sort of ambush provisions that could slide by under *Espinosa* will no longer work. I am looking forward to the panel on Saturday about experience to date under Rule 3015.1 and I urge every judge to make sure these provisions are applied as they read.

Now that we have a degree of uniformity I hope we will be able to generate meaningful data that will allow us to evaluate the effects of different provisions that are used in various "standard" plans. If, for instance, there are 10 districts whose Plan A is essentially equivalent to the Plan B adopted in 15 other districts with the one distinction that Plan A has the trustee make all mortgage payments while in Plan B payments are made directly by the debtor, which district has better results in terms of payments made and plans completed? Or Plan C districts where property revests in the debtor and Plan D districts, where it remains property of the estate? In short, can we actually get credible, detailed data to allow the bankruptcy system to determine "best practices?" There are many such issues that now are largely debated in the abstract – if the trustee is to make payments to creditors, should it be for all obligations or only major ones? Do such provisions better ensure that the plan is followed? And do they allow the trustee to know if there is a problem early enough to try to fix it? Similarly, do plans work better if payments are made *to* the trustee via wage order rather than by having the debtor send in a payment?

If those determinations can be made, we suggest that the Commission should strongly encourage districts using the other approach to rethink their decision and adopt those best practices. Which, dare I say it, might move us closer towards a truly uniform national plan over time! Certainly, to the extent we know what works best, it should not necessarily be left to the debtor's voluntary choice (or more likely what his counsel chooses). While having trustees make payments to creditors undoubtedly causes some increase in trustee costs and debtor fees,

there is not at least the conflict of interests seen in Chapter 7 where added activity benefits the trustee by costing the debtor.[1] And, to the extent there is some debtor who is uniquely benefitted by doing something different than the norm, the model plans still accommodate that approach.

Another area is the question of whether debtors should be able to choose whether or not to keep post-confirmation property in the estate or not. This is something that should be uniform, rather than what individual debtors happens to think will best suit them. Since many consequences flow from whether property remains in the estate or not – including, most importantly, whether the automatic stay still applies or not – this means the debtor and only the debtor decides how much control other parties can assert over the course of the next five years of his life. This ties in to my next point which deals with how plans handle postconfirmation expenses.

2. Administrative expenses, 28 U.S.C. 959-type governmental claims, and property of the estate.

Unlike most parties that deal with the debtor during the course of the debtor's life under his or her Chapter 13 plan, [2] the government will, in most instances, be an involuntary creditor. This applies most obviously to ongoing taxes, but it also applies to many other aspects of the debtor's life where he or she is obligated to make payments to the government but does not – in matters ranging from traffic and parking tickets to water bills to dog licenses. To be sure, for some expense, like utility bills, the government is eventually able to cut off the supply and stop accumulating debt but, in the meantime, significant liabilities may have been incurred.

The debtor is certainly required to propose a plan that shows that it can feasibly pay expected ordinary course post-confirmation bills including those for existing long-term secured debt and those payments are worked into the plan before any payments are designated for unsecured prepetition creditors. Indeed, a debtor may be able to confirm a Chapter 13 plan without setting aside *any* funds for unsecured creditors even if it has done so by devoting all of its payments to postpetition expenses that it has budgeted for. Such expenses are functionally equivalent to administrative expenses since they are paid before claims filed in the case, even those with priority status. And those expenses may well include luxury items that are not, in any way, reasonably necessary for the debtor's existence. *See, e.g.*, *Drummond v. Welsh (In re Welsh)*, 711 F.3d 1120 (9th Cir. 2013) where the court held that the debtor was entitled to pay on secured claims relating to an expensive home, several vehicles, an Airstream trailer, and two

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[1] See Henry E. Hildebrand, III, *Behind the Curtain: The Chapter 13 Trustee's Percentage Fee*, ABI Journal, p. 24 (December 2014). " Unlike chapter 7 trustees, chapter 13 trustees do not "eat what they kill" but are paid a fixed compensation, which is to be paid from the percentage fee that has been established by the attorney general in accordance with 28 U.S.C. § 586. A little like Nathan Detroit in "Guys and Dolls," the chapter 13 trustee takes a small piece of every pot."

[2] The discussion here will focus on Chapter 13 debtors and plans. However, although there are a substantially smaller number of cases involving individual Chapter 11 debtors, much the same problems can arise there under the equivalent provisions in that chapter, including Sections 1115 and 1141.

ATVs, while at the same time excluding Mr. Welsh's social security income as a source for plan payments to unsecured creditors.[3]

Yet, when it comes to governmental claims for postpetition expenses that the debtor has not budgeted for and/or has chosen not to pay, it is not at all clear that such claims will be paid at all during the case, much less treated like administrative expenses. The decision in *City of Chicago v. Marshall*, 281 F. Supp. 3d 702 (N.D. Ill. 2017), which dealt with an effort by the City to enforce parking and traffic tickets the debtors ran up during the term of their case, is a good example. The court comes up with numerous reasons as to why governments should not be allowed to enforce the laws against debtors in Chapter 13 that are operating in much the same way as debtors-in-possession in Chapter 11. Primary among them is the concern that requiring a debtor to pay his new expenses from his current income comes at the potential expense of the debtor's ability to pay its prepetition creditors – but is that not already the case with budgeted expenses? Why is it different just because these expenses are ones the debtor didn't necessarily plan to pay? And, what kind of mischief can arise if debtors know they can operate with a degree of impunity during the case?[4]

This problem is greatly exacerbated when the debtor's plan provides for all of the debtor's property including all of his future wages to remain property of the estate throughout the time the plan is being paid.[5] In Chapter 11, a plan may provide for a debtor to make payments over an extended time, but substantial consummation with its limitations on the debtor's ability to modify the plan occurs once payments have begun, not at the end when they have been completed. Similarly, Section 1141 (like 1327) ordinarily vests property of the estate in the debtor on confirmation and, unlike the emerging trend in Chapter 13, that remains the norm in Chapter 11. That is why there are numerous cases that state that, post-confirmation, a debtor must on its own two feet and is no longer a ward of the court. It must balance its post-

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[3] While the States in these comments are generally looking at issues that are more specific to governmental entities, this case is a good example of all of the problems with the way the means test and related provisions are drafted. It was meant to ensure that those who "could pay, should pay" and that only the minimum amount of bankruptcy relief necessary to protect the "poor but honest" debtor was provided. As drafted, though, the provisions far too often fail to meet those basic goals, providing unneeded relief to those with higher total incomes who could and should pay (including by allowing deductions for luxury items and by failing to count all sources of income such as Social Security) while imposing burdensome requirements on those at the bottom end of the scale. A thorough review and revision of these provisions with the experience gained from the last 13 years of cases is critically needed.

[4] A search of the bankruptcy docket, for instances shows that these debtors filed a Chapter 7 case in 1991, a Chapter 13 case in 1996, a Chapter 7 case in 2005, and three more (partially overlapping) Chapter 13 cases, in 2014 and 2015. That history answers, in part, the court's suggestion that the city was dilatory in not trying to collect the tickets prior to the November 2015 petition date – a suggestion that overlooks the fact that the debtors had been in two prior cases for the year before that date.

[5] *In re Jemison*, 2007 Bankr. LEXIS 3107 (Bankr. N.D. Ala. 2007) has a good discussion of the absurd results that follow if one tried to literally apply the concept that all of the debtor's income remains property of the estate subject to the supervision of the bankruptcy court.

confirmation earnings and expenses – all of its expenses – on its own and, if the result doesn't add up, so be it. The automatic stay does not stand in the creditor's way and, by virtue of being able to enforce its claim in the normal course, the payments automatically have the equivalent of administrative expense status.

In Chapter 13, though, only the postpetition expenses that the debtor anticipates and deals with in the plan are allocated a payment that the debtor is expected to abide by. Other costs, whether anticipated or not, are given only very limited options for enforcement that do not necessarily work for those creditors, and that are not necessarily even better for debtors or the prepetition creditors.

Section 1305(a)(1) and (b) allows postpetition taxes to be allowed claims – but requires that they be treated as if they were incurred prior to the case – which limits them to being priority taxes at best. And, while the claim is allowed, it is far from clear whether the debtor *must* or merely *may* amend its plan to provide payment for that claim. If it does so, that should, in most instances, at least theoretically require full payment over the term of the plan since the taxes would normally enjoy priority status. Interest and penalties for failure to make timely payment, though, could not be included since the tax debt is deemed to only come into play at the petition date and to be subject to payment under the terms of the plan. So, at best, the taxing authority will find that its payments are severely delayed for what should be an ordinary course timely expense. Conversely, if the debtor chooses not to include those claims, or the government decides not to file a claim for those costs in order not to forego those other aspects of the claim, the question as to how the government is to enforce its rights to those taxes becomes very uncertain.

The problem for other types of costs the government may incur, such as the traffic fines in the *City of Chicago* case, or other governmental postpetition expenses, is even greater since it is not clear that there is any provision that deals with them. (Section 1305(a)(2), for instance, appears to be more geared to expenses such as replacing a car or stove that dies during the course of the case, not the incurral of a ticket for running a red light, since it is difficult to envision a circumstance in which doing so is "necessary for the performance of the plan.") The court in *City of Chicago* suggested three alternatives for a creditor in the scenario where the debtor retains property in the estate until the completion of the plan – a) move to lift the stay to allow the creditor to collect, b) move to dismiss the case, or c) simply wait out the five years of the case and try to collect then.

All of those have obvious flaws:

a) the cost for a lift-stay motion (a minimum of $181 before even counting the attorney time and expense to both the creditor and the debtor) hardly makes it realistic for many of these debts which are often relatively small; moreover, if granting the motion is expected to be relatively automatic, why impose those costs on either side when it will only diminish the small likelihood of creditors being paid?

b) having the case dismissed (assuming the court would agree it should do so based on failing to pay postpetition debts if the debtor was otherwise complying with the payment terms) would often require the creditors to cut off their nose to spite their face. Certainly, the prepetition creditors who are being paid want the case to continue and, postpetition creditors will often also have other prepetition claims on which they are being paid and that they would like to continue. Nor would the debtor seem to be benefitted by that result. Although it might be able to refile and try to treat those debts as subject to a new plan, the limits on serial filings in the Code may make that option unavailable.

c) waiting five years to be able to collect any funds is 1) unfair to the new creditors (especially those who are owed relatively small amounts and may not be in a position in try to resume collecting after they have already waited five years), and/or 2) likely to merely set up a debtor to need a new filing as soon as he finishes the first one if the debts are significant in scope.

Moreover, taking the position that a debtor doesn't need to abide by the laws post confirmation or pay the costs imposed for violations of those laws is bad public policy for any number of reasons. A prior witness, Elizabeth Gunn from the Office of the Attorney General in Virginia, has already spoken to you about the problems she and others dealing with domestic support issues have found in trying to ensure that ongoing payments are made, even with the enhanced tools given by the BAPCPA. A substantial part of that problem arises from trying to deal with the issues that arise when the debtor's plan purports to retains all of his earnings for up to five years as property of the estate.

Accordingly, I believe that a more appropriate approach would consider the complex of issues that arise from the current structure of Section 1305, 1306, and 1327. To the extent that the new model plans require a debtor to more clearly spell out what he or she is attempting to do with property of the estate that may help with trying to figure out how to interpret the overlap between the default language in Sections 1306 and 1327. It would be useful, though, to have some revisions to those sections so that the courts are not left to try to determine which of the multiple approaches to that issue they should adopt. The confusion leaves taxing authorities and other postpetition creditors between a rock and a hard place in trying to decide when, whether, and how they can try to collect on amounts that are owed postpetition. In *Cal. Franchise Tax Bd. v. Kendall (In re Jones*), 657 F.3d 921 (9th Cir. 2011), for instance, the court dealt with a Chapter 13 case where the debtor's plan did not directly address the question of vesting of property of the estate. The debtors filed a postpetition tax return but did not pay the $6,000 of taxes that were owed. The plan was dismissed several years later and a year thereafter one of the debtors filed a Chapter 7 case and treated the debt as discharged because it accrued more than three years before that petition date. The Ninth Circuit held that, under any of the three applicable theories that it might be inclined to adopt, that the state was not precluded from attempting to collect the debt because "at, the very least, some estate property revests in the debtor at confirmation," and the state could have tried to collect from that property – whatever it was, however its extent could be determined, and whether or not there was any chance that it

came close to meeting the amount of the debt at issue. *Id*. at 928. That uncertain prospect hardly gives any comfort to a taxing authority that it can proceed without requiring costly litigation and stay determinations in virtually every case. Better clarity would be much appreciated.

Interestingly, the one approach the court rejected, as a matter of statutory reading, the "estate preservation approach," is one that is now explicitly treated as being an appropriate option under the model plans. That approach, the court stated, "holds that although property of the estate "vests" in the debtor upon plan confirmation under § 1327(b), the property does not become property of the debtor. Instead, the estate remains fully intact and protected by the automatic stay until the case is closed, dismissed, or converted." *Ibid*. It noted that no court had adopted that reading of the default meaning of Sections 1306 and 1327. However, since Section 1327 says the plan may "provide otherwise," and since one may now do so, merely by checking a single box, many debtors now do obtain exactly that maximum level of protection. (A drawback of that approach, though, is that debtors will presumably ensure that, under *Jones*, tax debts will remain nondischargeable since collection is precluded during such a plan.)

The problems created by an ever-growing number of plans that include broad retention of property of the estate (and the scope of the stay) underscore the need for improved provisions dealing with postpetition debt. With respect to Section 1305, at a minimum, the Commission should consider expanding its bounds to include a greater collection of postconfirmation debts, especially those owed to the government. That is particularly needed where a debtor is allowed to choose whether to maintain the stay in place for the entire plan. It is not fair to hold postconfirmation creditors hostage to the stay but not require that they be dealt with in a timely fashion during the case, or do son only on condition that they forego a substantial portion of their claim.

Simply expanding its scope, though, is not enough since, as discussed above, it is by no means an optimal solution even for the areas it currently covers. One suggestion would be that, to the extent creditors are included in Section 1305, they could send the debtor a deficiency notice for unpaid postpetition obligations. The debtor could request a show-cause hearing before the bankruptcy court to contest the notice, but, if found to owe the funds, the debtor must either arrange to have them paid immediately or, with the creditor's consent, paid through the plan, or the case will be dismissed. Similarly, if the debtor does not respond or contest the amounts within a specified time, the case will also be dismissed. Alternatively, the creditor may be able to opt to have the stay lifted at the end of this process. In either case, the process should go forward without additional costs being imposed on the creditor. When the debtor is receiving the value of a Chapter 13 filing, and is opting to maintain the stay in place for its own benefit, it should not be able to impose the costs of its non-compliance on its creditors when it fails to meet its obligations.

3. Student loans

Turning to some completely different topics, another area of great interest to the states is student loans. Unlike most parties in the process, governmental entities have dueling interests. On the one hand, they may have obligations to enforce and collect on student loans and are deeply interested in having greater clarity as to when and if a student loan may be discharged and how it should be treated in Chapter 13 in terms of separate classification and other special

payment provisions. On the other hand, the Attorneys General are often at the forefront of investigating educational institutions that fail to serve the interests of students, whether due to deliberate fraud or mere incompetence. When an institution lures students in with promises of great career opportunities and high-paying jobs and sends them out with massive debts and an education that is wholly inadequate to qualify them for such jobs, the Attorneys General have not hesitated to sue those institutions and to appear in bankruptcy to protect the interests of the students in not being forced to repay those fraudulently incurred debts. It would be a distinct understatement to say that this raises issues within their offices. (It does, though, make for great topics for our ethics session at our most recent NAAG Bankruptcy Seminar where the program was based on a hypothetical derived from exactly that fact pattern.)

The prior administration had issued some guidance on when and whether collection efforts should continue in those situations and had agreed to voluntarily cease trying to collect on some of those loans and allow them to be discharged. The current administration has pulled back from that process which does raise concerns. However, one helpful thing it has done is to issue a request for comments about what standards should be used for evaluating hardship discharges and when, and under what circumstances, the lender should voluntarily discharge the debt. *See*: https://www.federalregister.gov/documents/2018/02/21/2018-03537/request-for-information-on-evaluating-undue-hardship-claims-in-adversary-actions-seeking-student.

The deadline for comments is May 22: to the extent that the Commission has a position by then it would be useful to submit it. I expect that some or all of the Attorneys General will have comments that they will choose to submit by that time, but they haven't been formulated yet so I will not purport to speak for the Attorneys General. I would only say that, as my purely personal opinion, I tend to think student loans don't belong in the bankruptcy system at all. Not, I hasten to say, that I believe they should be automatically dischargeable at once or after a period of years. Rather, I think it would make more sense to treat them in an administrative process within the Department of Education for instance. You could have a single national set of standards that could be enforced with some uniformity. There would not have to be the stigma, costs, and burdens imposed on a person by being forced to file bankruptcy when their only real problem is the student loans. Nor would you have the wholly inappropriate (although wholly understandable) situation in which courts are objecting to being forced to dismiss cases in which the debtor has too much student loan debt to file in Chapter 13, even though that is otherwise the best choice for them. *See In re Pratola*, 578 B.R. 414 (Bankr. N.D. Ill. 2017) and *In re Fishel*, 2018 Bankr. LEXIS 965 (Bankr. W.D. Wi. 2018).

The decision of how much someone would have to pay could be integrated with the Income Contingent Repayment Plans and/or other loan forgiveness programs so that the discharge would come automatically at the end of that process. I would suggest that the Commission recommend that those programs be changed so that at the end of the payment process, the debts are treated as if they were discharged in bankruptcy. It does a debtor little good to pay faithfully for 25 years what they could afford and be left at the end with a huge tax liability for the cancellation of the indebtedness. If we believe in that program, we have to make it an offer that, in the words of the Godfather, the students "can't refuse" and that won't happen if the debt has not really been dealt with. And, finally, to the extent that the Department determined that there were serious problems with the college, so that the debts deserved to be

discharged without payment, that decision could be made and applied across the board.

All of that said, I would also note that dealing with the student loan problem goes far beyond anything the bankruptcy system can remedy on its own. It is a function of declining public support for colleges coupled with rising tuition; of the decline of apprenticeship programs that directly match training with job needs; and of the well-meant effort to send everyone to college when that may not be what they want or need (or what employers want or need). Those are matters for those who have a broader ability to grapple with these problems in the legislatures and many are discussing such ideas. What this group can do in the meantime is to try to help the group that is still caught in the current system until other forms of help can arrive.

4. Tax sales

In *BFP v. Resolution Trust Corporation,* 511 U.S. 531 (1994), the Supreme Court gave categorical protection to the results of foreclosure sales as opposed to attempts to attack them as being constructively fraudulent transfers. What that case did not address, and which has begun to arise in an increasing number of cases, is the status of tax sales; i.e., sales of real property for nonpayment of property taxes owed thereon. The basic problem is that, unlike foreclosure sales that do operate under a single paradigm – obtain as much money as possible for the property via competitive bidding (even if the result does not reach an ideal "market value"), tax sales use a variety of approaches. Some, like foreclosures, try to obtain a maximum price for the property from which the taxes are deducted first; in other cases, the system appears to be designed to generate the smallest amount of revenue necessary to ensure payment of the taxes so that the debtor will have the greatest ability to redeem the property. While the latter approach is useful for the debtor that can do so, it becomes a great deal more problematic if the debtor cannot and files bankruptcy with the prospect of permanently losing his home over a relatively small debt.

The courts are all over the map on this with respect to both the possibility of an avoidance action and whether the debtor can pay off the redemption amount over the course of a Chapter 13 plan. Without trying to recommend what the final result should be, it is clear the States would benefit greatly from having a uniform decision on what they can and cannot do to protect their ability to collect and retain their taxes. And, even if the effect of an avoidance action may fall initially on the private party that made the tax sale payment, it is clear that, just as was noted in *BFP*, the existence of doubt and the possibility of losing their rights can only serve to chill the willingness of parties to buy these tax debts and ensure that governments are paid. The net result will be adverse to government's ability to predict and collect revenue, which as the Supreme Court said is the "lifeblood of government." In short, there ought to be clear and predictable rules that government can rely on in deciding how to write their laws.

5. Zombie properties.

Others have, I am sure, discussed the problems with properties that the debtor wants to surrender but the lender does not wish to accept. This obviously creates problems for the debtor, but it also creates significant problems, especially for municipalities. Properties where a debtor has abandoned his or her claim and moved away, but the lender is refusing to accept title to, quickly become eyesores and likely magnets for criminal activities. No one keeps up the

property so squatters may move in and take over. No one mows the lawn during the summer to keep down pests, or shovels the sidewalks in the winter, creating hazards to everyone living around the area. These properties bring down the value of neighboring homes by their presence.

At the same time, debtors who have complied with all applicable provisions of the Code and have received their discharge remains saddled with costs of a property they no longer occupy. They are forced to pay utilities, insurance, HOA fees, etc. or risk being sued for those debts even after they are nominally discharged and have received their fresh start. The end result is that debtors find that fresh start to be significantly hampered, hindering them from returning to being a productive citizen in the economy. Conversely, the lender whose rights to proceed *in personam* against the debtor have been discharged is effectively continuing to put the economic burden of the property on the debtor, in direct contravention of the Bankruptcy Code's intent.

To whatever extent you believe the bankruptcy laws can impose a duty on the lender to accept the property after a specified time has passed since the debtor has surrendered the home, we urge you to recommend such a provision. Or if you wish to make it clear to debtors that, after offering the property to the lender, they can stay without making payments unless and until the lender formally takes over the property, that may be useful too. At least, that would keep someone in the house so it does not just sit vacant and deteriorate. The status quo is simply unacceptable – while the problem has lessened in recent years as housing prices have started going back up again, it will likely come to the fore again with the next recession. It would be good to start the process now of getting these "Walking Dead" homes out of the system and back into productive use. Certainly, if the bankruptcy system does not do so, it may well be the role of state and/or local government to take over these houses after a time and fix them up or sell them for whatever can be obtained and provide nothing to either the lender or the debtor. That is plainly not optimal for those parties but it will ensure that the government can provide for the common welfare of the neighborhood.

6. Rules on *pro hac* admissions and local counsel requirements

While these may or may not be viewed as falling within the purview of this commission, the States take the occasion to raise these concerns whenever possible. Another consequence of being involuntary creditors is that it is fairly common for the debtor to incur debts in one locality (without any voluntary action by that governmental entity or the ability to protect its interests by obtaining security interest) and then move elsewhere. Thus, it is quite common for governmental entities to be forced to follow their debtors to other states in order to try to collect. Many courts routinely allow attorneys for the federal government to appear in without local counsel and with, at most, minimal admission requirements for out of state counsel, even though the federal government has offices throughout the country. Some (but a much smaller number) do so for state and local counsel, even though they do *not* have the same option that the United States does to use local designee. We believe that, in the current day – and in a system that operates under a *uniform* law of bankruptcy, there is little reason to make governmental counsel comply with burdensome and/or costly admission and local counsel processes – certainly they will not be in a position to represent numerous clients and set up a local practice without being admitted to the local bar. Delaware, for instance, with numerous out of state cases, does have very simple rules in this regard. We would urge the Commission to recommend that all districts do the same.

STATEMENT OF MARY IDA TOWNSON
CHAPTER 13 STANDING TRUSTEE
TO THE AMERICAN BANKRUPTCY INSTITUTE
CONSUMER BANKRUPTCY COMMISSION

My name is Mary Ida Townson. I am grateful for the opportunity to submit this written testimony to the American Bankruptcy Institute Consumer Bankruptcy Commission and to appear before the Commission at its 36th Annual Spring Meeting April 19-22, 2018 in Washington, D.C.

I am one of three (3) Chapter 13 Standing Trustees in the Northern District of Georgia, with cases in the Atlanta and Rome divisions. My office currently administers approximately 10,000 active Chapter 13 cases, receiving, on average, 350-400 new case filings each month. My office disburses approximately $4,500,000-$5,000,000 to creditors each month.

I will celebrate my 15th anniversary as a Chapter 13 Trustee on May, 4, 2018, which means more to me than I can convey. Being a Chapter 13 Trustee is such an incredibly rewarding position in the national bankruptcy community and I am happy to say that I still look forward to coming to work each and every day.

Prior to my appointment as a Chapter 13 Trustee, I represented debtors in consumer bankruptcy cases for over seven (7) years, was a Chapter 7 panel Trustee for two (2) years, and represented mortgage lenders and servicers in consumer bankruptcy cases for almost four (4) years.

I am the Immediate Past President of the National Association of Chapter 13 Trustees (NACTT) and am the current President of the Southeastern Bankruptcy Law Institute. That said, I am submitting this written testimony, and will be appearing before the Commission, in my individual capacity and not on behalf of any association or institute.

In my capacity as a Chapter 13 Trustee, I have been asked to focus my testimony and comments on my observations over the past fifteen (15) years related to the debtor attorney bar in consumer bankruptcy cases. At the outset, I want to make it very clear that I have had the pleasure of working with so very many talented and exceptional debtor attorneys throughout my legal career.

Representing debtors in consumer cases is most definitely not an easy endeavor. Debtor attorneys are representing individuals who are usually experiencing several traumatic events all at once. Oftentimes, the debtor has lost a job, while simultaneously having medical problems, and not infrequently, he or she might be going through a divorce proceeding. These stressors, combined with the real threat of possibly losing the family residence and/or one's only source of transportation certainly may make the debtor behave uncharacteristically needy, rude, or unrealistic regarding what their attorney may be able to accomplish in a Chapter 7 or Chapter 13 case.

As previously stated, I am not appearing on behalf of the NACTT or any other association or institute. That said, I did reach out to my Chapter 13 Trustee colleagues to get a sense of what they are experiencing "in the trenches", so to speak. I want to thank so many of my colleagues for their thoughtful and well-articulated comments. I am going to break down what we are seeing nationally regarding debtor attorney practices into three (3) categories: (1) the Good, (2), the Adequate, and (3) the Unacceptable.

The Good—these are the attorneys who do the following in almost each and every case:

1. Begin the process with one or more in person extensive consultations with their prospective clients.
2. Insist that the debtor provide all necessary documents, along with a complete list of creditors, prior to the case filling.

3. Utilize questionnaires which illicit complete and accurate answers from the debtor.
4. Strive to have as many Chapter 13 plans as possible confirmed at the first hearing date setting.
5. Employ competent and sufficient amount of staff to handle non attorney related matters.
6. Do not allow staff to perform tasks that the attorney should perform. (ie. practice law without a license)
7. Appear personally at section 341 meetings of creditors and at court hearings.
8. Return calls and emails from the debtor, creditors, and the Trustee in a timely manner.
9. Keep abreast of emerging case law and attend bankruptcy specific seminars.
10. Is realistic with the debtor when deciding what type of Chapter 13 plan the debtor should file and what plan payment the debtor can afford.
11. Charges a reasonable fee for the services provided.
12. Timely file Conflict Notices pursuant to Local Rules.
13. Think through and prepare all pleadings thoroughly and completely, including all facts and following all applicable laws.
14. Practice appropriate courtroom decorum.
15. Is respectful of the Court, the Trustee, their clients, the law, and the industry as a whole.

The Adequate—these are the attorneys who do most of the above in most cases, but who don't rise to the level of The Good attorneys. Examples:

1. Fail to obtain relevant information from the debtor that the Trustee or staff attorney for the Trustee discover at the 341 meeting of creditors.
2. File the case before obtaining certain documents such as pay advices, tax returns, and/or complete information for creditors.
3. Too often requests resets of plan confirmation hearings due to failure to cure Trustee and/or creditor objections.
4. Rely too heavily on staff to discuss issues with debtors, many of which require legal advice.
5. Fail to regularly attend consumer bankruptcy related seminars.

The Unacceptable—these are the attorneys who should not represent debtors in consumer bankruptcy cases at all. Their routine failures include the following:

1. Fail to personally meet with debtors, even at the initial consultation.
2. Provide debtors with unrealistic expectations regarding what the bankruptcy case can achieve for the debtor.
3. Fail to properly inform debtors of their responsibilities during the case, especially related to attending hearings, making payments to the Chapter 13 Trustee, remitting mortgage payments directly to the mortgage servicer, if required, and remitting annual tax returns and tax refunds, if required.
4. File petitions and plans with little or no knowledge whatsoever of the Bankruptcy Code, Bankruptcy Rules, local rules, or case law.
5. File skeletal petitions, fail to file Motions to Extend Time to File, and then either file the schedules, statement of financial affairs, means test, pay advices, etc. late or not at all.
6. Utilize staff to basically practice law without a license.
7. Fail to personally appear at section 341 meetings of creditors and/or court hearings.
8. Fail to return calls and emails from debtors, creditor attorneys, and the Trustee's office.
9. Fail to cure Trustee objections in a timely manner, requiring multiple reset hearings.

The above examples are by no means comprehensive, but I know that they are at least representative of the types of consumer bankruptcy attorneys that Chapter 13 Trustees encounter on a daily basis. While it isn't terribly difficult to identify the levels of proficiency related to the debtor attorney bar, it is a much more difficult endeavor to determine which practices and procedures might be implemented to either

improve individual attorney performance or to prevent problem attorneys from representing debtors in consumer bankruptcy cases. I presented this question to my Chapter 13 Trustee colleagues and received several thoughtful responses. While there is no one perfect answer, I do believe that a combination of the following ideas could result in an increase in the number of The Good and a reduction in the number of The Unacceptable where the consumer debtor attorney bar is concerned.

One common theme related to this issue relates to attorney fees and to various attorney fee structures nationally. As I am sure most of the Commission is aware, the overwhelming majority of courts have implemented a "no look" fee structure in Chapter 13 cases. Under this fee structure, the court issues a general order setting a fee amount which a debtor attorney may charge a debtor without filing a fee application.

While the district in which I am a Trustee no longer has a no look fee, I do believe that this fee structure has worked well for many courts over the years. Overall, my Trustee colleagues seem to agree with this fee structure, with some common adjustments. For example, it is common for debtor attorneys to be able to charge more fees for business cases. Some courts allow debtor attorneys to charge a higher fee if they are certified by the American Board of Certification or a similar organization.

That said, several of my Trustee colleagues believe that the Chapter 13 bankruptcy system would benefit by altering the no look fee structure to include a sort of reward structure for the attorneys who consistently excel in client representation. I believe that each court would want to examine different ways to analyze debtor attorney performance, with a corresponding fee structure. Obviously, the goal would be to incentivize attorneys to consistently excel, while simultaneously to discourage failing attorneys from filing cases. Inadequate attorneys should not be rewarded by receiving the same fee as good, diligent attorneys. Doing so diminishes the consumer bankruptcy practice as a whole.

Over the twenty eight (28j years that I have worked in the consumer bankruptcy arena, I have often heard attorneys say that debtors have the option to choose any attorney they wish to hire. While that is ostensibly true, the reality is another story. Many, if not most, debtors have not previously sought legal counsel of any kind. They are uneducated regarding making informed decisions about choosing competent, or at least adequate, legal counsel. Obviously, the attorneys who have more money to spend on advertising often attract the most clients. While many of these attorneys indeed fall into The Good or The Adequate categories, extensive advertising does not equal adequate representation.

As Chapter 13 Trustees, we encourage all Courts to meet and discuss ways they are adjudicating attorney misconduct, negligence, and/or incompetence. In addition, we encourage all Courts to investigate ways to mandate that these inadequate attorneys either improve or leave the consumer bankruptcy practice altogether.

Trustees are diligently working to bring issues related to inadequate attorneys to the attention of the Courts and to the regional United States Trustees (UST's), but we need their assistance in improving the debtor bar, and ultimately, the consumer bankruptcy field as a whole. This must be a collaborative effort. To that end, I recommend that representatives of all parties in the consumer bankruptcy system come together and develop Best Practices for debtor attorneys nationally.

This proposed working group should include Bankruptcy Judges, UST's and/or their trial attorneys, debtor attorneys, creditor attorneys, Chapter 7 Trustees, and Chapter 13 Trustees. I am fully aware that this proposed Best Practices document would not solve all of the issues I have discussed in these comments. That said, I do strongly believe that having all parties come together will engender meaningful dialogue regarding debtor attorney performance, as well as the consumer bankruptcy practice as a whole. I would welcome the opportunity to participate on this proposed working group should the Commission decide to convene it.

In closing, I just want to once again thank the American Bankruptcy Institute Consumer Bankruptcy Commission for affording me this opportunity to provide these comments, as well as to present them to the Commission on Friday, April 20, 2018. Also, thank you all for all of your hard work on the Commission. I know that the work you are doing will result in an overall improved national consumer bankruptcy community.

STATEMENT OF JOHN D. MCMICKLE/DRAFT

Summary of Statement

The ABI Commission can play a valuable role in vetting bankruptcy policy proposals to assist Congress when or if Congress considers consumer bankruptcy reform proposals. In order to ensure that the Commission's work resonates with policy makers, I would suggest that all stakeholders be integrated in the process for developing Commission recommendations. I would also point out that, as an overriding principle, Congress prefers predictable legal systems that produce predictable results. Thus, in my view, the Commission should be mindful that proposals that create uncertainty would unlikely to meet with broad support in Congress. In other words, the Commission should propose reforms that rely on bright line rules.

Following the 2008 financial crisis, the bankruptcy system – through enforcement actions and changes to the rules of procedure – has focused heavily on creditor misconduct that may harm consumers. Ten years on from the crisis, I believe there should be an equal focus on debtor attorney conduct that may harm consumers. As discussed below, attorneys representing debtors can be susceptible to many of the same financial motivations as creditors to the detriment of consumers.

Finally, I suggest the ABI Commission propose greater transparency and oversight, increased enforcement and explore the use of software programs to enable consumers to file bankruptcy.

Overview and Principles for Bankruptcy Reform Proposals

My name is John McMickle and I am pleased to provide a statement to the ABI Commission on Consumer Bankruptcy. I am not a practitioner in this area of the law. I was, however, the staff counsel for the Senate Judiciary Committee for most of the time that Congress considered BAPCPA. As such, I would like to share my perspective on the process for developing bankruptcy policy in Congress. Finally, from a consumer protection perspective, I suggest greater oversight of all stakeholders in the bankruptcy system.

As an initial matter, I would encourage the Commission to seek input from everyone. When or if Congress decides to revisit consumer bankruptcy

issues, the Commission can play a valuable role in vetting various reform proposals. When I worked for the Senate, there was a strong perception in Congress that the National Bankruptcy Review Commission had not fully included all points of view. This perception was reinforced by individual commissioners who believed the process had been unfair and slanted. As a result, may of that Commission's proposals were viewed with caution. It would be a mistake and lost opportunity, in my view, for the ABI Commission to labor long and produce a similar result.

At the very beginning the bankruptcy reform process that lead to the enactment of BAPCPA, in the late 1990s, Congress made a fundamental policy decision to reduce the amount of discretion in the bankruptcy process. This decision was premised on the belief that a rules-based system is preferable for all participants. Policy makers believed that there was simply too much variation under prior law that resulted in less consistent legal outcomes to the detriment of the US economy. Stated another way, increased discretion correlates to increased variability and Congress tends to prefer legal frameworks with the predictable results (even if that goal is not perfectly achieved as was the case with BAPCPA.)

The evolution of the means test for determining chapter eligibility illustrates this point. Initially, the Senate passed legislation that simply removed certain legal barriers to creditor-initiated abuse motions with little in the way of guidance for judges to evaluate 707(b) motions. The House of Representatives, on the other hand, passed legislation that provide objective, bright line standards for determining which prospective debts belonged in a repayment plan. As happens in Congress, the two bodies met in a conference committee and reconciled the two approaches. The Senate agreed to bright line standards, but also insisted on exceptions. The essence of this conceptual compromise laid the groundwork for the current means test.

It also became clear to me during the deliberations on bankruptcy reform that all sides of the bankruptcy equation were advocating for narrow parochial interests. Car lenders sought to protect liens on automobiles, credit card companies wanted to decrease losses from customer defaults, student lenders wanted to reduce underwriting risk by preventing the discharge of student loans and attorneys representing debtors sought to protect fees and reduce legal risk by opposing various proposals related to attorney conduct.

For policy makers, creditor interests are straightforward. Creditors seek to ensure repayment of loans and the protection of collateral. Debtor attorney interests were less clear at first blush. I believe it is important to understand that, like various creditors, debtor attorneys have parochial self-interests. This notion is not to imply that debtor attorneys are in some way less trustworthy than other participants in the bankruptcy process, merely that policy makers may view them as stakeholders with unique financial interests.

The efforts to ensure payment of attorneys' fees provides a clear example. On the on hand, during the debate on bankruptcy reform, many arguments were made by debtor attorney representatives that excepting debts from discharge would burden the fresh start. On the other hand, debtor attorney representatives and others have argued attorney fees should be excepted from discharge. There is, of course, nothing inherently wrong with a creditor - in this case an attorney - seeking payment for services rendered. My point is simply that attorneys-as-creditors advocate for policy outcomes that support their own financial self-interest.

The growth of third party financing for attorneys also shows how attorneys may seek income in ways that can be injurious to clients. As I will discuss below in more detail, when an attorney functionally receives his or her payment for services from third party, legitimate questions may arise as to the opacity of financing arrangements. In fact, Congress has examined this issue in hearings, and I understand that legislation is being drafted to require greater disclosure of such financial arrangements.

The attorney-as-stakeholder dynamic is further illustrated by the resistance to Section 526, which among other things prohibits attorneys from counseling a client to incur debt in contemplation of bankruptcy. Such conduct was viewed as abusive and contrary to the "clean hands" required of a litigant seeking extraordinary equitable relief. The opposition to this proposal in Congress colored the view of many policy makers. As we know, the Supreme Court later unanimously upheld this prohibition in the *Milavetz* decision.

In short, to the extent that the ABI Commission makes recommendations to further increase predictability, and balances the interests of all stakeholders, I believe – based on my experience - such proposals may have broad support

in Congress. If, on the other hand, the ABI Commission makes recommendations that that single out certain creditors for particularly favorable treatment while disadvantaging others, I would suspect that Congress would view such ideas with caution.

Finally, I would raise a new consumer protection concern that has received much attention in Congress recently. Arising from a bankruptcy case in North Carolina, *In re Garlock Sealing Technologies, LLC*, there is credible evidence that claims filed by individuals in mass tort Chapter 11 cases are false or fraudulent. The evidence to date seems to indicate that attorneys for consumers who have claims have advised clients to make false representations in Proofs of Claim, 2019 statements and demands filed with post-confirmation trusts. These assertions may directly conflict with statements made in state courts. In my view, the ABI Commission should consider recommendations to require audits and review of claims filed by tort plaintiff attorneys against post-confirmation trusts, to include comparisons with claims made in state court litigation. Such a proposal would also reinforce the recommendations of the ABI Commission to the Reform of Chapter 11, which pointed out the need for greater transparency for post-confirmation trusts.

The Next Step in Consumer Protection in the Bankruptcy System

As is well known, as a result of the surge in delinquencies and home foreclosures arising from the 2008 financial crisis, the US Trustee Program was involved securing in the National Mortgage Settlement. Under this agreement, the Department of Justice and 49 states reached a settlement agreement with the nation's five largest mortgage servicers to address mortgage servicing, foreclosure, and bankruptcy practices. This settlement was approved in 2012. At the time, the US Trustee Program described the National Mortgage Settlement as "the largest consumer financial protection settlement in United States history."

Whatever criticism may be leveled at particular elements of the National Mortgage Settlement, it is surely not controversial to say that all actors in the bankruptcy system – including mortgage creditors - must act with integrity to ensure that system operates in a balanced, transparent way.

Beginning under the prior Administration in 2016, the US Trustee Program seemingly turned more of its attention to protecting consumers and the

bankruptcy system from misconduct by debtor attorneys. I believe this is a positive development and would be supported by the Congressional champions of BAPCPA.

As mentioned earlier in my statement, attorneys representing consumer debtors are best viewed as one of many stakeholders with specific financial interests of their own. Just as creditors can bend the rules in order to maximize recoveries in a bankruptcy case, so too can debtor attorneys who seek to maximize fee income.

Viewed from this perspective, one can see a clear need for independent oversight of debtor attorney business practices to ensure that the financial interests of an attorney do not conflict with or override the financial interests of the client. For instance, BAPCPA mandated certain disclosures in advertising by debtor attorneys, mandated fee disclosure and required certifications by attorneys that reaffirmation will not be subject debtors to an undue hardship. In addition, the law also provided for fee limitations to prevent non-attorney petition preparers from overcharging consumers.

There are recent of examples of the financial interests of attorneys possibly overriding the interests of consumers. The so-called "No Money Down" cases from California are one such example. According to court documents, in these cases, attorneys offering legal services for consumers seeking to file bankruptcy failed to follow the advertising mandates mentioned above, failed to disclose the financial interests of third party lenders and failed to disclose income received by clients. As an article in Bloomberg Law noted, in one case, the client unknowingly paid a lender interest and fees amounting to 40 percent. As I understand it, in these cases, an attorney offers to prepare and file and bankruptcy election for no fee. However, the consumer agrees to pay the attorney for post-bankruptcy services, often for a set amount. A factor then advances to the attorney a discounted amount and bills the client for the full fee. It appears, based on press reports and legal documents that the consumer is not aware of the financial arrangement between the law firm he or she has retained and the factor.

I would suggest that failure to disclose such financial relationships is highly inconsistent with protecting consumers. The CFPB and consumer groups have routinely criticized hidden fees and expenses and used the legal process to compel transparency.

The same principle should apply to attorneys representing debtors, perhaps to an even grater degree because – unlike a credit card or pre-paid card company seeking a new customer – an attorney has a fiduciary duty to his or her clients.

The ABI Commission should consider recommending that all terms and provisions of any agreement used by an attorney that involves factors or other providers of credit be disclosed on a standard form created by the Judicial Conference. The Commission should also recommend that Congress ask the GAO to survey the use of factors and other providers of credit to determine the extent of this business practice and to determine whether additional rules should be adopted.

The monetary sanctions leveled against Upright Law provide another example of the need for increased consumer protection. In this case, debtors were counseled to engage in sham transactions with a towing company and as a result of "high pressure sales tactics." The judge in that case specifically noted that UpRight Law focused on "cash flow over professional responsibility." While this case is on appeal, the comments of the judge are noteworthy.

Unfortunately, in some instances, there may even be examples of debtor attorneys furthering their financial interests at the expense of the clients in a manner that disproportionately affect African American consumers. Pro Publica and the Atlantic Monthly collaborated to publish an article that reveals minority consumers are often steered into Chapter 13 repayment plans simply because the attorney representing the consumer can be more easily compensated. In the article, a Memphis bankruptcy judge specifically cites attorney compensation as a primary driver for filing Chapter 13 bankruptcy cases. As the author of the Pro Publica article noted, "an entrenched legal culture has made bankruptcy a boon for attorneys while miring clients" in a cycle of futility. In other words, the economic motives of attorneys – rather than the best interests of consumers – can drive bankruptcy filing decisions. This situation is clearly ripe for consumer protection enforcement initiatives.

There are of course many debtor attorneys who provide a valuable service to consumers in need, just as there are many lenders who provide credit to consumers in need. The lesson of the "Zero Money Down" cases and UpRight is to understand that consumers can be helped or harmed by

creditors *and* by debtor attorneys. The legal system should be there to guard against abuse that might arise from any quarter. Accordingly, I believe the ABI Commission should recommend that the Justice Department, perhaps in conjunction with state authorities, be directed to devote additional resources to investigating attorney-as-creditor conduct to ensure consumer protection.

Of note, there is a possible a technology-based solution to some of these financial concerns. I would encourage the ABI Commission to recommend the use of software-based programs that would permit consumers to file bankruptcy without the need for an attorney or other professional. Just as tax preparation software has revolutionized the tax filing process for low-to-moderate consumers, bankruptcy preparation computer programs could provide consumers better and less expensive access to bankruptcy court.

Recommendations and Conclusion

Thank you for this opportunity to provide my perspective. In general, proposals for reform should rely on clear rules that promote uniformity and predictability, based on input from borrowers, lenders and other stakeholders. To summarize, I would suggest the ABI Commission consider making the following specific recommendations:

- The ABI Commission should consider recommending that all terms and provisions of any agreement used by an attorney that involves factors or other providers of credit be disclosed on a standard form created by the Judicial Conference.
    - The Commission should also recommend that Congress ask the GAO to survey the use of factors and other providers of credit to determine the extent of this business practice and to determine whether additional rules should be adopted.
- The ABI Commission should consider recommendations to require audits and review of claims filed by plaintiff attorneys against post-confirmation trusts, to include comparisons with claims made in state court litigation.
- The ABI Commission should recommend the use of software-based programs that would permit consumers to file bankruptcy without the need for the use of an attorney or other professional.

- The ABI Commission should recommend that the Justice Department, perhaps in conjunction with state authorities, be directed to devote additional resources to investigating attorney-as-creditor conduct to ensure consumer protection.

Statement of the ABI Mediation Committee

Prepared for the ABI Commission on Consumer Bankruptcy

March 2, 2018

Introduction

The ABI Mediation Committee ("Committee") respectfully submits this statement ("Statement") to the ABI Commission on Consumer Bankruptcy ("Commission") to assist the Commission in fulfilling its charge of "researching and recommending improvements to the consumer bankruptcy system that can be implemented within its existing structure." As set forth below, the Committee believes that opportunities for mediation should be expanded in consumer matters. In that regard, the Committee urges the Commission to adopt the specific recommendations identified below.

This Statement consist of three parts. Part I contains background information regarding the Committee's work analyzing mediation in consumer matters. Part II discusses a sampling of: (A) existing court programs for mediating consumer disputes; (B) empirical evidence regarding the effectiveness of such programs; and (C) perspectives from experienced consumer practitioners and judges regarding such programs. Part III sets forth specific recommendations for the Commission.

As described below, mediation plays an important role in the resolution of disputes in consumer bankruptcy proceedings. Unfortunately, as currently formulated, the nation's bankruptcy system does not uniformly reap the benefits of mediation as not all districts have such programs. The Committee urges the Commission to act to improve the system by addressing this issue.

I. Background

In the Fall of 2017, leadership of the Committee discussed the "List of Topics for ABI's Commission on Consumer Bankruptcy" (available here) and noted the absence of mediation from the list. That observation led to the Committee's commitment to undertake a special project assessing the use of mediation in consumer cases and preparing a statement to make specific recommendations to the Commission.

By letter dated November 29, 2017 the Committee informed the Commission of work performed as of that date on this topic. The letter outlined a timetable for the Committee to conclude its work and its intent to submit a final statement to the Commission in advance of the Commission's meeting at the 2018 Annual Spring Meeting.

Under the auspices of its Special Projects Task Force, the Mediation Committee has gathered information from several sources in connection with the preparation of this Statement including:

- In the Fall of 2017, leadership of the Mediation Committee submitted a request to both the Mediation Committee and the Consumer Bankruptcy Committee seeking both feedback on experiences and recommendations on the topic of mediation in consumer proceedings;

- In December, 2017, the leadership of the Mediation Committee met at the WLC to discuss feedback received as of that date;

- The Committee's newsletter circulated in February 2018 provided an update on the preparation of this Statement and again solicited input on the topic of mediation in consumer cases;

- The Committee requested information from various bankruptcy courts known to have empirical information about the use of mediation in consumer proceedings including: the Central District of California, the Southern District of Florida, the Eastern District of Michigan, and the Western District of Pennsylvania.

After gathering information as set forth above, the Committee's Special Projects Task Force prepared drafts of this Statement which were circulated to Committee members for comment early in 2018. The Committee discussed the status of the work at leadership meetings ultimately agreeing to submit this final form for submission to the Commission.

II. Sampling of Existing Mediation Programs for Disputes Arising in Consumer Cases

A. Types of Consumer Disputes Suitable for Mediation

As noted in the 2016 ABI book Bankruptcy Mediation, in a chapter authored by Judy W. Weiker, "by far the largest category of adversarial disputes [in individual debtor cases] sent to mediation by the courts is whether a discharge should be allowed."[1] The book highlighted common disputes that arise regarding dischargability actions under 11 U.S.C. § 523(a) in individual cases and provided a summary in the following chart[2]:

Chart: Dischargeability Exceptions for Individuals	
Exception	**Dispute**
False Pretenses and Fraud (a)(2)	Mortgages and Consumer Loans
Fraud or defalcation while acting in the capacity of a fiduciary (a)(4)	Business Partnerships
Support Agreements and Debts incurred relating to Divorce Proceedings (a)(5) & (15)	Former spouses and child dependents
Willful and malicious injury to property (a)(6)	Single Asset Real Estate, Landlord disputes
Repayment of educational loans and hardship exception (a)(8)	Student Loans

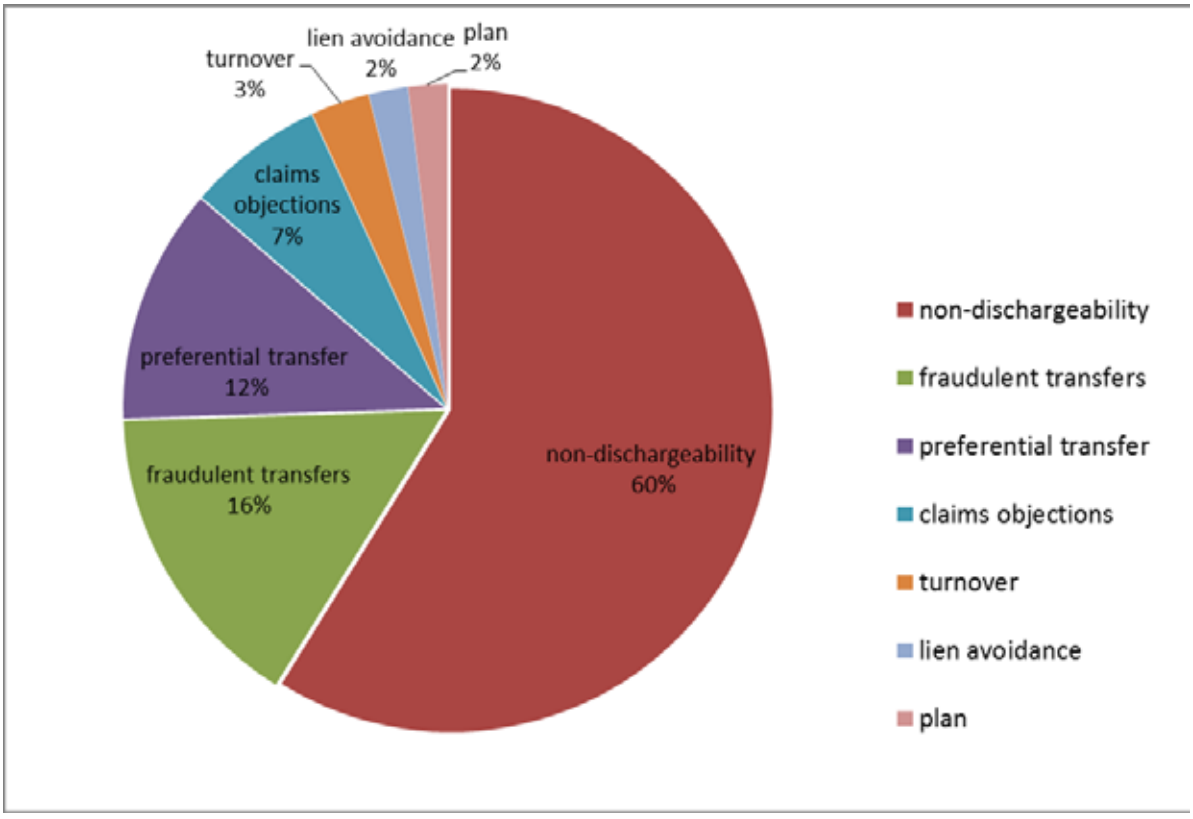
In addition to disputes relating to dischargability issues, another common dispute relating to consumer debtors relates to residential mortgages with certain districts offering loss

[1] Bankruptcy Mediation at 52 n.41 (citing to Steven Hartwell & Gordon Bermant, Alternative Dispute Resolution in a Bankruptcy Court: The Mediation Program in the Southern District of California, FEDERAL JUDICIAL CENTER (1988) ("80 percent [of the adversary proceedings] were brought under 11 U.S.C. § 523(a), Dischargeability, including (a)(2), (a)(4), (a)(5) and (a)(6), which list circumstances and conditions that prevent an individual debtor from receiving a bankruptcy discharge of a particular debt.").

[2] Bankruptcy Mediation at 52.

mitigation or foreclosure mediation programs in Chapter 13 proceedings.[3] In contrast to dischargeability and mortgage modification disputes, which have proven capable of consensual resolution, actions to deny a debtor a discharge under 11 U.S.C. § 727 are often not considered not appropriate for compromise.[4]

The below chart, provided to the Committee from the United States Bankruptcy Court for the Central District of California, shows the percentage breakdown of the types of matters assigned to mediation from the program's inception in 1995 through January 31, 2018.[5] Of the 5,894 matters referred to mediation, 4,784 matters arose in chapter 7 matters and 228 arose in chapter 13 matters.



[3] Bankruptcy Mediation at 56 (listing districts with mortgage modification programs).

[4] See Louis P. Rochkind, Paul R. Hage and Patrick R. Mohan, Not for Sale: An Approach to the Approval of Chapter 7 Discharge Settlements by Trustees, ABI Journal (November 2014) available at https://s3.amazonaws.com/abi-org-corp/journals/2014/july/straight.pdf; See also Andrew F. Emerson, So You Want to Buy a Discharge? Revisiting the Sticky Wicket of Settling Denial of Discharge Proceedings in the Chapter 7 Bankruptcy 92 American Bankruptcy Law Journal 111 (2018).

[5] The percentages in the chart total slightly over 100% due to the overlap of issues in matters assigned to the program.

B. **Empirical Evidence Existing Regarding the Effectiveness of Mediation Programs for Consumer Disputes.**

The Committee collected empirical evidence from several source as detailed below:

- The United States Bankruptcy Court for the Central District of California provided a report to the Committee with details of the program established in that jurisdiction in 1995. A link to the Third Amended General Order No. 95-01 which governs the program is contained in the Appendix. The program consists of a panel (currently numbering 180 members) consisting of attorneys and non-attorney professionals such as accountants, real estate brokers, physicians, and professional mediators. The report provided to the Committee states:

> *All issues which arise in bankruptcy cases are eligible for referral to the Program and all 21 of the active bankruptcy judges in the Central District's five divisional offices assign matters to the panel. From the Program's inception in 1995 through January 31, 2018, the judges have assigned 5,894 matters to mediation; 5,630 of those maters have concluded and 3,526 of the concluded matters settled. The settlement rate has held steady over the years at a very favorable rate of 63%.*

The program solicits feedback by means of a comprehensive, anonymous questionnaire which is sent to all of the parties and attorneys who attend mediation conferences with results tabulated and analyzed by a customized statistics software program. From 1995 through January 31, 2018 the data consistently indicates that approximately 89**%** of respondents are satisfied with the mediation process, approximately 88**%** would use the program again, and approximately 92**%** would use the same mediator again.

- Information provided to the Committee concerning the mediation program in place at the United States Bankruptcy Court for the Western District of Pennsylvania demonstrate the impact in that jurisdiction. Since the beginning of the period during which statistics have been tracked in the jurisdiction (2000), 238 cases have been sent to mediation with 156 reported as fully resolved and another 6 as partially resolved for a resolution rate of 74.7 percent. Mediation survey data collected in 178 cases since June 30, 2013 reveals that mediation cases included 71 chapter 7 cases and 25 chapter 13 cases. Of those 178 cases, 139 were reported as fully resolved and 5 partially resolved.

- The United States Bankruptcy Court for the Eastern District of Michigan reported that its mediation program has been in existence for over 15 years. A link to information about the program is contained in the Appendix. Settlement through mediation has proven more expedient and less costly than traditional litigation. Chief Deputy Clerk Todd M. Stickle reported that mediation has proven to be a "very efficient process" as evidenced by statistics about the program. Specifically, "Settlement rates have averaged around 70% in each of the last three (3) years. Adversary Proceedings typically settle within 63 days of the mediation order." Not

surprisingly, "dischargeability issues are the most frequently mediated nature of suit" as determined by records kept of the mediation program.

- Statistics regarding mortgage modification mediation in the United States Bankruptcy Court for the Southern District of Florida from April 1, 2013 through December 31,2017 indicates that 4,396 matters have reached resolution through mediation out of a total of 13,275 motions filed (including both pro se and attorney motions) which equates to a success rate of 18.32 percent.[6]

- Data from the mortgage modification program of the United States Bankruptcy Court for the Middle District of Florida through October 2017 also revealed impactful results.[7] For example, for 2017 through October, 425 mediations had been completed with 240 modifications achieved for a success rate of 56.5 percent. A total of 3,869 loans have been modified since 2010 through the program.

C. Perspectives of Consumer Practitioners and Judges Regarding Mediation of Disputes Arising in Consumer Disputes.

In the course of preparing this Statement, the Mediation Committee received perspectives from bankruptcy lawyers and judges experienced with mediation programs in their districts. The following is a sampling of responses received:

- Michael T. O'Halloran, a practitioner in the Southern District of California for the past 36 years, pointed out several virtues of mediation in the consumer context including the importance of economics savings of an avoided trial, the preservation of judicial resources, the ability to lend a new perspective into a situation not previously considered by the parties, and the opportunity for the parties to learn and evaluate information not previously understood.

- Stuart Gold echoed similar sentiments in noting that success of the bankruptcy mediation program applicable to both commercial and consumer cases in the Eastern District of Michigan since 1997 and the recent introduction of a similar program by the Western District of Michigan. Attorney Gold shared that in light of its reduced costs and time, the overall efficiency of the program has been well documented over time.

- Another practitioner submitting a comment, Marc. S. Stern of Seattle, observed that while mediation is generally beneficial, mandating its use in consumer cases would be undesirable if doing so resulted in an increase of costs. He cautioned that "mandating another procedure that will require additional fees and costs that

[6] Official website of the United States Bankruptcy Court for the Southern District of Florida at http://www.flsb.uscourts.gov/mortgage-modification-statistics

[7] Date for the mortgage mediation program for the Middle District of Florida obtained on November 20, 2017 from Laurie K. Weatherford, Chapter 13 Trustee for the Middle District of Florida.

no one can afford accomplishes nothing except making the process even more expensive and cumbersome."

- Retired Judge Louis Kornreich, who served for the United States Bankruptcy Court for the District of Maine noted that judges actively encouraged mediation in that jurisdiction with another judge in appropriate cases. Judge Kornreich reported that "Most parties took advantage of the opportunity; and most referred cases settled." He attributed the success to several factors including: (i) the voluntariness of the program; (ii) the skills of the judicial mediators who served; (iii) the cost advantages of settlement before a judicial mediator as opposed to litigation; (iv) the desire of many attorneys to air a troublesome case informally before a neutral; and (v) the inclination of the judicial mediators to educate the parties and counsel at the mediation session. Judge Kornreich highlighted the importance of the educational component: "More often than not, debtors and creditors in consumer cases did not understand the nature of the proceedings and frequently their attorneys lacked broad experience in bankruptcy matters. The judicial mediators were able to fill this gap with instruction on the general nature of the law and its application without rendering legal advice or providing conclusions. This information often diffused the tensions and created an environment conducive to settlement."

III. **Recommendations**

As noted above:

1. Mediation has proven to be important means of enabling the resolution of certain disputes in consumer cases in districts with mediation programs.

2. Local rules in certain jurisdictions providing for mediation in consumer cases have achieved notable success on a number of levels – for the disputants, for the mediators and for the courts. Of course, not all cases mediated result in a consensual resolution but even the process of mediation can be beneficial in narrowing issues, conserving resources and furthering the interests of justice.

3. The existence of an opportunity for mediators to serve in select cases on a pro bono basis has also proven valuable to mediators in gaining experience, to parties lacking resources to pay and to the courts.

For all of those reasons, the Committee recommends to the Commission that any consideration of changes to consumer provisions of the Bankruptcy Code emphasize and take necessary action to ensure counsel and judges consider mediation in every contested matter/adversary proceeding arising in consumer cases for which a compromised result would be acceptable. Towards that end, the Committee believes the Commission should act to encourage the establishment of procedures for the referral of disputes in consumer proceedings to mediation. Such procedures should include the establishment in each judicial district of a registry of qualified mediators. In addition, the procedure should provide for the availability of

pro bono mediation with the Court authorized to make a condition of serving on the registry a mediator's indication of willingness to accept pro bono assignment periodically.

Conclusion

In sum, the ABI Mediation Committee believes that it is imperative that the ABI Commission on Consumer Bankruptcy take action to promote the continued adoption and use of mediation in consumer cases. The successful experiences of the judicial districts that have used such programs should serve as a basis for widespread adoption.

The Committee is grateful to all who contributed information for the preparation of this Statement and to the volunteers on the Commission for the work devoted to the study of these issues. The Committee looks forward to presenting further on this topic at the Commission's meeting on April 20, 2018 to be held in conjunction with the 2018 ABI Annual Spring Meeting in Washington, DC.

Appendix

A. **Summary by Judicial District for United States Bankruptcy Courts with Mediation Rules** -- https://mediatbankry.com/2016/12/06/a-list-of-bankruptcy-districts-that-have-and-have-not-adopted-local-mediation-rules/

B. **Sampling of Local Rules/Orders Establishing Mediation Programs**

1. United States Bankruptcy Court for the Central District of California -- http://www.cacb.uscourts.gov/sites/cacb/files/documents/general-orders/3rd%20Amended%20G.O.%2095-01.pdf

2. United States Bankruptcy Court for the District of Massachusetts -- http://www.mab.uscourts.gov/pdfdocuments/localrules/appendix/2016_Appendix7.pdf

3. United States Bankruptcy Court for the Eastern District of Michigan -- http://www.mieb.uscourts.gov/sites/default/files/courtinfo/LocalRules.pdf (Rule 7016-2)

4. United States Bankruptcy Court for the Western District of Michigan – Administrative Order 2016-1 dated January 5, 2016 entered as an interim rule adopting Alternative Dispute Resolution procedures for the Court -- http://www.miwb.uscourts.gov/sites/miwb/files/general-ordes/ADR.pdf

5. United States Bankruptcy Court for the Middle District of Florida – Third Amended Administrative Order Prescribing Procedures for Mortgage Modification Mediation -- http://pacer.flmb.uscourts.gov/administrativeorders/DataFileOrder.asp?FileID=67