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2020 Caribbean Insolvency Symposium

Consumer Track

Final Report of the ABI Consumer Commission

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2019 Annual Spring Meeting

Consumer

ABI Consumer Commission Final Report

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CONCURRENT SESSION

2019

ABI Commission on Consumer Bankruptcy

Fact Sheet on Final Report and Recommendations

- Created by the Executive Committee of the American Bankruptcy Institute's (ABI) Board of Directors in December 2016, this two-and-a-half-year study examined the consumer bankruptcy system with a goal of issuing a report containing recommended improvements to be implemented within the existing structure. The Commission was supported by grants from the ABI Endowment Fund and the National Conference of Bankruptcy Judges Endowment for Education.
- ABI is uniquely situated to the task as the largest nonprofit and nonpartisan association dedicated to insolvency. Its nearly 11,000 insolvency professionals practice in all areas of bankruptcy, including the judiciary and academia. ABI does not lobby Congress but serves as a resource for expert analysis of bankruptcy matters, including participation at Congressional hearings.
- 22 Commissioners (17 voting), comprised of leading consumer practitioners, academics and government officials, volunteered to serve. The Commission was co-chaired by retired Bankruptcy Judges William Houston Brown and Elizabeth Perris, who have a combined 50 years of 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 was 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 was comprised of five commissioners and ten additional bankruptcy experts. The three committees met a total of 45 times throughout the process.
- The Commission utilized an open information-gathering process: Through its website, the Commission received 131 topics for consideration. Six public meetings were conducted, during which a total of 72 speakers addressed areas of the bankruptcy system potentially in need of reform.
- The Final Report provides recommendations focused on 48 discrete issue areas to improve the consumer bankruptcy system. Its more than 250 pages are supported by nearly 700 footnotes, with the basis for each recommendation fully documented. Each recommendation was considered individually and approved by at least a two-thirds majority of the Commission. The final report was approved by the commissioners unanimously.

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- Key themes of the recommendations center on achieving a financial fresh start for debtors, improving certainty for creditors, lowering costs for all parties, making chapter 13 work for all stakeholders, facilitating access to the bankruptcy system, and improving its overall effectiveness.

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Summary of Selected Recommendations by ABI’s Commission on Consumer Bankruptcy

The Bankruptcy Code is more than 40 years old, and its last major amendments, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, are 14 years old. In that time, the amount of debt Americans now hold has increased, how they incur that debt has changed, and the types of problems that debt can create have evolved. Technological changes also have transformed how Americans find information about legal options and professional services available to them.

The ABI Commission on Consumer Bankruptcy was created in December 2016 to research and recommend improvements to the consumer bankruptcy system that can be implemented within its existing structure. The Commission’s Final Report contains recommendations for amendments to the Code and Rules designed to make the consumer bankruptcy system more accessible and efficient for both financially struggling Americans and the professionals who serve them. After soliciting public feedback, Commission members identified nearly 50 discrete issues for study and divided these issues among three advisory committees composed of 52 bankruptcy professionals. The commissioners and committee members represent all diverse stakeholders in the bankruptcy system.

Some of the issues and recommendations addressed in the Final Report include:

Issue	Recommendation
Student Loans	<p>Student loan debt significantly depresses U.S. economic activity, and current bankruptcy law ineffectively addresses it. The Commission recognizes that recent graduates should generally be required to repay government-made or guaranteed student loans, but it recommends statutory amendments to discharge student loans that are</p> <ul style="list-style-type: none">• made by nongovernmental entities;• incurred by a person other than the person receiving the education;• being paid through a five-year chapter 13 plan; or• first payable more than seven years before a chapter 7 bankruptcy is filed. <p>In addition, the Commission recommends administrative procedures and interpretations of current law to facilitate reasonable relief from student loan indebtedness.</p>

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Remedies for Discharge Violation	<p>Current law presents difficulties both in enforcing the discharge injunction and in determining its scope. Most courts allow enforcement of the discharge only through contempt proceedings, which may not provide effective relief. The Commission recommends:</p> <ul style="list-style-type: none"> • the creation of a statutory private right of action for violations of the discharge, like the action for violations of the automatic stay, which would provide the full range of sanctions, including costs, attorney fees, and punitive damages; and • amendments to the Bankruptcy Rules allowing motions to determine whether particular creditor conduct would violate the discharge.
Protection of Interests in Collateral Repossessed Prepetition	<p>The circuit courts are divided on the question of whether collateral seized by a creditor before a bankruptcy filing must be returned to the party entitled to possession afterward. To balance the need of the debtor for return of the collateral, often a vehicle, and the need of the creditor for adequate protection, the Commission’s principal recommendation is:</p> <ul style="list-style-type: none"> • § 362(a)(3) should be amended to provide expressly that a creditor’s retention of estate property violates the automatic stay, but only if proof of insurance or other security is provided for property subject to loss of value.
Chapter 7 Attorney’s Fees	<p>Current law largely prohibits collection, after the bankruptcy case is filed, of unpaid attorney fees for a chapter 7 debtor’s representation. This often leads either to delayed filings so that the anticipated fee can be paid in advance, or to the filing of chapter 13 cases simply to ensure fee payment. The Commission recommends:</p> <ul style="list-style-type: none"> • several steps to reduce the overall fees needed for chapter 7 representation, allowing prompter advance payment; and • consideration of changes in the debtor’s discharge to allow the collection of unpaid fees postpetition, including: <ul style="list-style-type: none"> — delay of discharge to allow collection of attorney fees; and — an exception from discharge, with judicial oversight.
Attorney Competency and Remediating Lawyer Misconduct	<p>There are well-established rules of conduct governing attorney conduct in bankruptcy cases. The Commission recommends:</p> <ul style="list-style-type: none"> • vigorous enforcement of these rules by the responsible entities; • the formation of committees or other bodies at the local level to investigate and resolve complaints against offending attorneys; • the publication of all disciplinary orders; and • the award of enhanced fees, as authorized by § 330(a)(3)(E), for board-certified or otherwise demonstrably skillful and experienced practitioners.

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<p>Credit Counseling and Financial Management Course</p>	<p>The Commission recommends:</p> <ul style="list-style-type: none"> • eliminating prepetition credit counseling, because requiring individuals to receive a credit counseling briefing as a prerequisite for any bankruptcy filing imposes costs in money, time, and complexity that are not outweighed by any benefit in helping them avoid unnecessary filings; • eliminating the requirement for a course in financial management in chapter 7, but retaining it in chapter 13, with further study of its effectiveness.; and • amending the Fair Credit Reporting Act to require consumer reporting agencies to report the debtor’s successful completion of a financial management course, so that the effectiveness of the course may be measured by changes in the debtor’s credit rating.
<p>Means Test Revisions & Interpretations</p>	<p>The means test assesses a debtor’s ability to repay debt by calculating the debtor’s disposable income—total income less defined living expenses. The means test determines both whether a debtor should be presumed to be abusing chapter 7 and so barred from relief under that chapter, and whether a debtor’s chapter 13 plan may be denied confirmation because it provides for inadequate payments on unsecured claims. The test incorporates numerous detailed provisions for determining both income and allowed deductions. The Commission recommends retaining the means test, but amending it</p> <ul style="list-style-type: none"> • to require reduced documentation from debtors with below-median income; • to exclude from income public assistance, government retirement, and disability benefits, capped by the maximum allowed Social Security benefit; • to remove the presumption of abuse if the debtor shows special circumstances, even if the circumstances arose voluntarily; and • to allow certain statutory expense deductions from income only to the extent actually incurred by the debtor and necessary for the support of the debtor and debtor’s dependents.
<p>Chapter 13 Debt Limits</p>	<p>To expand the availability of relief under chapter 13 and reduce the need for individuals to file under chapter 11, the Commission recommends:</p> <ul style="list-style-type: none"> • increasing the chapter 13 debt limit to \$3 million, eliminating the distinction between secured and unsecured debts; and • for married couples, applying the limit separately to each spouse and not aggregating the spousal debt, even in joint cases.

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2019 ANNUAL SPRING MEETING

<p>Racial Justice in Bankruptcy</p>	<p>The Commission finds, based on substantial empirical evidence, that African Americans are both disproportionately more likely to file chapter 13 cases than debtors of other races and disproportionately less likely to obtain a discharge. To ensure that all individuals have equal access to justice, the Commission recommends several actions, including:</p> <ul style="list-style-type: none"> • organizational training programs for bankruptcy professionals aimed at reducing implicit racial bias; • amendment to 28 U.S.C. § 159 requiring both the collection of race and ethnicity information on bankruptcy petitions and the dissemination of that data by the Administrative Office of U.S. Courts; and • in the absence of such an amendment, consideration of collecting race and ethnicity information on bankruptcy filers through official bankruptcy forms, with appropriate privacy protections.
<p>Reserve Fund in Chapter 13 Cases</p>	<p>Reflecting the advice of nearly all financial management professionals, the Commission finds that chapter 13 debtors should be allowed and encouraged to maintain a reasonable reserve fund, held by the trustee, to address unanticipated expenses. The Commission recommends:</p> <ul style="list-style-type: none"> • amendments to § 1322(b) to allow such a reserve fund, not to exceed one month of scheduled expenses, subject to restoration to the extent drawn upon, excluded from disposable income, and payable to meet unanticipated expenses on notice and an opportunity to object; and • consistent amendments to the relevant bankruptcy rules and forms. <p>In the absence of these amendments, the Commission recommends that current law be interpreted to allow the creation of such a limited reserve fund through the debtor’s plan, with provisions for disbursement from the fund on notice and opportunity to object, and for differing disposition of the fund at the conclusion of the case depending on the debtor’s income level: payment of the fund balance to debtors with below-median income, and for above-median debtors, payment to the unsecured creditors.</p>
<p>Chapter 7 Trustee Compensation</p>	<p>The Commission finds that chapter 7 trustees are substantially undercompensated. The Commission recommends statutory amendments that would:</p> <ul style="list-style-type: none"> • increase the trustees’ base compensation from \$60 to \$120 in each case, with the increase coming from existing fees rather than an increase in filing fees or a reduction in payments to creditors; and • increase the commission allowed under § 326(a) by increasing the levels of distributions to creditors at which lower percentages of the distributions are paid to the trustee.

Foreword

A. Commission Creation & Charge

Creation. The Bankruptcy Code is over forty years old. Its last major amendments, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, are fourteen years old. Changes in the bankruptcy law come slowly. Changes in American society have happened rapidly during those years.

According to Federal Reserve and Census data, the country's population increased by 46% during the past 40 years, while, after adjusting for inflation, mortgage debt grew by 238%, and consumer credit grew by 256%. In 1978, the median home price was \$218,000 in inflation-adjusted dollars (or \$58,300 in 1978 dollars) as compared to \$325,000 in 2018.

Even since the 2005 amendments, there have been large social and economic shifts. For one, the country experienced one of its deepest financial crises in the Great Recession. The Affordable Care Act brought massive changes in health care finance. As a symbol of how Americans' use of technology has rapidly shifted, consider that, in 2005, Blockbuster Video was only one year past its peak employment level, and video stores have all but disappeared in 2019. In 2005, the most prevalent mobile devices were keypad-based flip phones. Student loan debt was small enough that it was not part of the Federal Reserve's monthly statistical release of consumer debt. The first release of Bitcoin was still four years into the future. The whole financial technology, or "fintech," industry had yet to develop.

The amount of debt Americans hold has increased, how they incur that debt has changed, and the types of problems that debt can create have evolved. The technological changes also have transformed how Americans find information about the legal options and professional services available to them. These same technologies have changed how bankruptcy professionals work and how courts operate.

Shortly before he became president-elect of the ABI in April 2016, Judge Eugene Wedoff approached Samuel Gerdano, ABI's executive director, about the possibility of ABI sponsoring a commission on consumer bankruptcy to propose reforms. The model for such a commission would be the ABI's successful Commission to Study the Reform of Chapter 11. The ABI convened an exploratory committee to consider the idea, and that committee — composed of Judge Wedoff and Gerdano as well as Judge William Brown, Ariane Holtschlag, Richardo Kilpatrick, Professor Lois Lupica, and Ronald Peterson, met two months later.

The exploratory committee concluded both that an examination of consumer bankruptcy was timely and that ABI was in the best position to advance it. The committee also determined that the project should be limited to a consideration of discrete issues arising in consumer bankruptcy cases under chapters 7 and 13, culminating with a set of findings and recommendations much like those produced by the chapter 11 commission. To advance the project, the exploratory committee proposed a commission composed of skillful bankruptcy professionals representing all major constituencies affected by bankruptcy, who would work toward consensus rather than seeing their roles primarily as advocates for an interest group. The exploratory committee discussed several examples of issues that the commission might address,

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2019 ANNUAL SPRING MEETING

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including student loan debt, regulation and compensation of professionals, exemption law, and the effectiveness of chapter 13. The committee proposed that the commission be headed by two retired bankruptcy judges as co-chairs and that its initial work be conducted through supporting committees of professionals with relevant experience for the issues treated by the committees. Finally, the exploratory committee noted the need for the project to be supported by a well-qualified reporter.

Based on the exploratory committee's recommendations, the ABI contacted a number of individuals to determine their willingness to serve on the proposed commission. Judges William Brown and Elizabeth Perris agreed that they would serve as the commission's co-chairs, and Professor Robert Lawless agreed to serve as reporter. With these individuals identified as the potential project leaders, Judge Wedoff presented on behalf of the exploratory committee a formal proposal for creation of the commission to ABI's Executive Committee in December 2016. It was unanimously adopted. Between then and the first meeting of what became the ABI Commission on Consumer Bankruptcy in April 2017 and consistent with the board's instructions, the leadership team completed the Commission's membership.

Charge and Scope of Work. The resolution of the ABI board of directors creating the Commission stated:

The Commission is charged 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, administrative rules or actions, recommendations on proper interpretations of existing law, and other best practices that judges, trustees, and lawyers can implement.

The Commission took its charge seriously and emphasized a pragmatic, problem-solving approach. Legislative change can take years, if it comes at all. Although it did not avoid recommendations for statutory amendments, the Commission proposed, where possible, solutions that could be implemented through the bankruptcy rules; through best interpretations of the existing statutes; through actions by other governmental actors such as the Administrative Office of U.S. Courts or the U.S. Trustee Program; or through the efforts of private organizations of bankruptcy professionals, like the ABI and other associations.

Caveats. Statutory drafting is a difficult, time-consuming task. Soon after its formation, the Commission decided that it did not have the resources or time to engage in statutory drafting. In a number of places, the Commission's recommendations suggest or imply specific language that might go into a statute, but readers should understand all of these instances as examples rather than as the Commission's recommendation of specific language in any statutory amendment.

All of the Commission's actions should be understood as applying only to consumer bankruptcy, consistent with its charge to consider "improvements in the consumer bankruptcy system." Thus, each recommendation should be read as if it began with the qualifier "In consumer cases . . ." The Commission takes no position whatsoever on whether its recommendations should be adopted in nonconsumer cases.

VIII

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FINAL REPORT OF THE ABI COMMISSION ON CONSUMER BANKRUPTCY

Finally, by “consumer,” the Commission does not mean the term in the same strict sense of the statutory definition for “consumer debt” in section 101(8) – incurred “primarily for a personal, family, or household purpose.” The Commission also does not mean “consumer” as a synonym for “individual.” For example, some individual chapter 11 cases might be considered consumer cases, whereas others might not. Although the distinction between a consumer case and a nonconsumer case is clear at the extremes, the distinction blurs in the middle. Consistent with its position on not drafting statutory language, the Commission decided it would leave the line-drawing on the scope of its recommendations to the legislative process.

B. Commission Procedures

Topic list. The Commission first needed to create a list of the topics it would study. The Commission cast a wide net and gathered suggestions from multiple sources. The principal work of generating topics went to the three committees, each of which came up with many ideas for areas of consumer bankruptcy in need of study. Through its website, the Commission also solicited public suggestions of topics. Most of the 131 written submissions the Commission received suggested topics for consideration. In addition, the Commission and its three committees conducted six public meetings at which a total of seventy-two speakers addressed areas of the bankruptcy system potentially in need of reform.

The Commission co-chairs and reporter drafted the initial topic list, then revised it after consultation with the committees. The Commission divided the topic list into roughly equal workloads for the three committees. As the Commission work proceeded, new topics were added to the list as appeared appropriate.

Not every topic suggested to the Commission made it on the list for study. Topics that went outside the Commission charge of “recommending improvements to the consumer bankruptcy system that can be implemented within its existing structure” were excluded. The Commission also was mindful that it could not possibly address every issue facing the consumer bankruptcy system and prioritized topics that affected more people.

Committees. The three committees were the front line for consideration of each topic. The Commission provided the committees with the Committee Operating Procedures (see Appendix D), which provided ethical guidelines, confidentiality rules, and an encouragement to work by consensus. Generally, the committees could choose how to structure themselves and the procedures that worked best for each committee.

After receiving the topic list, the committees broke the topics into smaller subtopics and assigned these subtopics to working groups within the committee. The working group’s task was to develop a report for the committee to consider. The committee then would discuss the report at a meeting. The committee either would make a final decision on the working group’s report, or refer the matter back to the working group for revising the report in light of the committee’s discussion and for more consideration at a future meeting.

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2019 ANNUAL SPRING MEETING

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The three committees met a total of forty-five times. Each committee had one in-person meeting. The rest of the meetings were conducted telephonically. After each committee meeting, the Commission's reporter circulated meeting notes that the committee chair had approved and that contained a record of the meeting. Thus, all committee members always knew what was discussed and decided at each meeting. The committees completed their work between March and May of 2018.

An affirmative committee vote was not a prerequisite to the Commission's consideration of a topic. The Commission's reporter prepared forty-nine cover memoranda that relayed the three committees' actions to the Commission. Each of these cover memoranda detailed the committee's action and included any opposing viewpoints. A few topics arose for the first time at the Commission level at a stage where the committee processes already had concluded. These topics obviously did not have the benefit of committee action or a cover memorandum from the reporter.

Commission. The Commission itself met twenty-eight times, including six in-person meetings and twenty-two telephonic meetings. The first Commission meeting occurred in April 2017 and was an organizational meeting at which the Commission adopted bylaws (see Appendix C). At the rest of its meetings, the Commission discussed whatever committee actions that the co-chairs had identified, in a previously circulated agenda, for Commission consideration.

The Commission discussed each committee recommendation separately. Sometimes, the Commission then asked the committee or a working group of commissioners to revise the committee's recommendation considering the Commission's discussions. These revised proposals then came back to the Commission later. For both in-person and telephonic meetings, the Commission used meeting software so all commissioners could see the precise wording of any recommendation on which the Commission might vote.

In accordance with the Commission bylaws, no recommendation was considered approved unless it carried a two-thirds majority of the commissioners present and voting at a meeting. (A commissioner who abstained from voting was not counted as present.) When the Commission discussion suggested there was no opposition to a recommendation, the co-chairs would ask if any commissioner would like a vote. On these occasions, if no one asked for a vote, the Commission considered the recommendation adopted by unanimous consent.

During its meetings, the Commission had the benefit of advice from its *ex-officio* members. *Ex-officio* members could comment on any matter before the Commission and received all Commission communications. *Ex-officio* members had no vote at the Commission meetings. The Commission had two *ex-officio* members who were representatives of the U.S. Trustee Program and Internal Revenue Service. These two *ex-officio* members provided technical assistance and institutional perspectives but took no position on proposals before the Commission.

After each meeting, the Commission's reporter circulated meeting notes that the co-chairs had approved and that recorded the Commission's actions. Each commissioner also had access to a cloud storage space in which the reporter stored these notes and other Commission and committee materials. Throughout

2020 CARIBBEAN INSOLVENCY SYMPOSIUM

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FINAL REPORT OF THE ABI COMMISSION ON CONSUMER BANKRUPTCY

the process, commissioners thus always had access to whatever information they might need about the Commission's work. The Commission finished its review of the committees' actions in December 2018.

Report Drafting and Final Approval. After the Commission had approved a recommendation, the reporter finalized the recommendation's language and prepared a narrative discussing the Commission's reasoning. The reporter then made the proposed recommendation and draft narrative available electronically to the commissioners for a minimum of three weeks. The commissioners could leave edits and remarks for the reporter and others to review. The reporter and co-chairs together considered the commissioners' edits and remarks and finalized the recommendation and narrative.

The reporter then made the final draft available electronically to all commissioners. The Commission then approved the final draft as a whole by a unanimous vote and instructed the reporter to transmit the report to the ABI for printing and distribution.

In issuing its final report, the Commission considers itself to have spoken as a law-reform group. The report and its recommendations do not necessarily represent the views of any individual. Readers of the report should not understand membership on the Commission or its committees as endorsement of any particular recommendation. The Commission worked toward consensus whenever possible, but consensus was not always possible. The Commission's discussions were respectful, professional, scholarly, and robust. The Commission structured itself so its final report would be the product of an iterative and deliberative process in which many different ideas were heard and considered. The recommendations that follow result from that process. It is likely no one will agree with all of them, but together, they represent the Commission's collective professional judgment about the best ways to improve the consumer bankruptcy system for all its stakeholders.

Table of Contents

ACKNOWLEDGMENTS	V
FOREWORD	VII
REPORTER’S NOTE.....	XIII
CITATION AND STYLE CONVENTIONS	XV
I. EFFECTUATING THE FRESH START	
A. DISCHARGE AND DISCHARGEABILITY	
§ 1.01 STUDENT LOANS.....	1
§ 1.02 REMEDIES FOR DISCHARGE VIOLATION	14
§ 1.03 DISCHARGEABILITY OF HOMEOWNERS ASSOCIATION (HOA) FEES	17
§ 1.04 DEFINITION OF A TAX RETURN FOR PURPOSES OF NONDISCHARGEABILITY	20
B. JUDICIAL ESTOPPEL	
§ 1.05 JUDICIAL ESTOPPEL	25
§ 1.06 TRUSTEE’S SALE OF EXEMPT PROPERTY	29
§ 1.07 POSTPETITION CHANGES IN VALUE.....	33
§ 1.08 EXEMPTIONS FOR DEBTORS WHO MOVE STATES.....	36
§ 1.09 INCREASE OF WILD-CARD EXEMPTION FOR HOUSEHOLDS WITH DEPENDENTS.....	38
§ 1.10 INCREASE IN FEDERAL HOMESTEAD EXEMPTION.....	40
II. IMPROVING CREDITOR CERTAINTY AND LOWERING COSTS	
§ 2.01 PROTECTION OF INTERESTS IN COLLATERAL REPOSSESSED PREPETITION	43
§ 2.02 DEFINITION OF “SURRENDER”	46
§ 2.03 STATEMENT OF INTENTION — DEADLINES AND CONSEQUENCES	50
§ 2.04 REAFFIRMATION IMPROVEMENTS.....	54
§ 2.05 REPEAT FILERS	61
§ 2.06 DEFINING AND VALUING THE PRINCIPAL RESIDENCE, TIMING ISSUES.....	67
§ 2.07 IMPROVEMENTS TO FEDERAL RULE OF BANKRUPTCY PROCEDURE 3002.1 — PAYMENT CHANGE NOTICES AND NOTICES OF FINAL CURE.....	71
§ 2.08 DENIAL OF EXEMPTION FOR KNOWING AND FRAUDULENT CONCEALMENT	81
III. FACILITATING EFFECTIVE ACCESS TO BANKRUPTCY	
A. PAYING FOR BANKRUPTCY	
§ 3.01 CHAPTER 7 ATTORNEY’S FEES	83
§ 3.02 UNBUNDLING OF LEGAL SERVICES	93
§ 3.03 PRESUMPTIVELY REASONABLE ATTORNEY’S FEES IN CHAPTER 13S.....	96
B. ATTORNEY ROLES & RESPONSIBILITIES	
§ 3.04 ATTORNEY COMPETENCY & REMEDYING LAWYER MISCONDUCT.....	100
§ 3.05 STAND-IN COUNSEL	110
C. LOWERING BARRIERS TO ACCESS	
§ 3.06 CREDIT COUNSELING AND FINANCIAL MANAGEMENT COURSE	114
§ 3.07 MEANS TEST REVISIONS & INTERPRETATIONS	120

2020 CARIBBEAN INSOLVENCY SYMPOSIUM

2019 ANNUAL SPRING MEETING

AMERICAN BANKRUPTCY INSTITUTE

§ 3.08 APPLICATION OF MEANS TEST IN CONVERTED CASES 135
§ 3.09 DOCUMENT-PRODUCTION REQUESTS BY BANKRUPTCY TRUSTEES..... 137
§ 3.10 CHAPTER 13 DEBT LIMITS 139
§ 3.11 TRANSLATION SERVICES..... 144
§ 3.12 MENTAL HEALTH ISSUES IN BANKRUPTCY 147

IV: MAKING CHAPTER 13 WORK FOR ALL STAKEHOLDERS

A. CHAPTER 13 PRACTICE

§ 4.01 RACIAL JUSTICE IN BANKRUPTCY 151
§ 4.02 NONUNIFORM COURT PRACTICES 158

B. CHAPTER 13 PLANS

§ 4.03 RESERVE FUND IN CHAPTER 13 CASES 162
§ 4.04 CHAPTER 13 TRANSFER OF DEBTOR’S PRINCIPAL RESIDENCE SUBJECT TO AN UNDERWATER MORTGAGE..... 167
§ 4.05 LOAN MODIFICATIONS IN CHAPTER 13 170
§ 4.06 CONDUIT MORTGAGE PAYMENTS 174
§ 4.07 NO AUTOMATIC DISMISSAL WHEN CHAPTER 13 PLAN PAYMENTS ARE NOT COMPLETED WITHIN SIXTY MONTHS..... 178
§ 4.08 CONFLICTS BETWEEN PROOFS OF CLAIM AND CHAPTER 13 PLAN TERMS 180
§ 4.09 INTEREST RATES IN CHAPTER 13 PLANS 183
§ 4.10 SECTION 1306 IMPROVEMENTS 184

V: SYSTEMS ISSUES

§ 5.01 CHAPTER 7 TRUSTEE COMPENSATION 187
§ 5.02 CHAPTER 7 TRUSTEE EMPLOYMENT OF PROFESSIONALS..... 191
§ 5.03 MEDIATION IN CONSUMER BANKRUPTCY..... 192
§ 5.04 CHAPTER 13 BUSINESS DEBTOR REPORTING 195
§ 5.05 STANDARDIZATION OF CREDIT REPORTING AFTER BANKRUPTCY..... 197
§ 5.06 BANKRUPTCY FORMS..... 198
§ 5.07 CASE MANAGEMENT (CM)/ELECTRONIC CASE FILING (ECF) & DOCKETING IMPROVEMENTS 201
§ 5.08 NOTICE & SERVICE ISSUES 204
APPENDIX A: MEMBERS OF THE ABI COMMISSION ON CONSUMER BANKRUPTCY 209
APPENDIX B: ADVISORY COMMITTEE MEMBERS 224
APPENDIX C: ABI COMMISSION ON CONSUMER BANKRUPTCY BYLAWS..... 235
APPENDIX D: ABI COMMISSION ON CONSUMER BANKRUPTCY COMMITTEE OPERATING PROCEDURES 240