The Consumer Issues Agenda of the National Bankruptcy Review Commission

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By Alvin C. Harrell

I. Introduction

Over the past year the National Bankruptcy Review Commission (the Commission) issued a Consumer Bankruptcy Memorandum (Memorandum) and Consumer Bankruptcy Issues List (Issues List). These distributions raised a number of important issues regarding consumer bankruptcy law and its impact on private creditors. Subsequently, published reports from the Commission suggest that the Commission has reached certain tentative conclusions or may be moving in certain directions with regard to these issues. The purpose of this article is to address some of these issues.

II. The Memorandum

The Consumer Bankruptcy Memorandum issued by the Commission notes the rising numbers of consumer bankruptcy filings and recognizes that consumer bankruptcies (and, it might be added, bankruptcy law) affect business practices and lending policies and decisions. Obviously, the pricing of and access to consumer credit are related to some extent to prospective default and bankruptcy losses. The enormous volume of consumer credit transactions means that bankruptcy law changes which affect these transactions even slightly may have a very significant impact on consumer credit costs and availability.

The Memorandum asks whether the bankruptcy system is being used by those in serious financial trouble or by clever charlatans to avoid repaying manageable debts. While this is an interesting question, this statement of the issues over-simplifies the policy choices by focusing on two extremes. It may be that the number of consumers who are unavoidably in bankruptcy or are clever charlatans is relatively small compared to the number of those in between, who may have the ability to avoid bankruptcy and use other means to settle or pay their debts but possibly find bankruptcy a more convenient alternative. Within this larger group the extent to which bankruptcy is truly necessary may vary considerably, along with the extent to which bankruptcy law may constitute an inducement to file bankruptcy or even to incur excessive debt. The charlatans and the unavoidable bankruptcies possibly are comparatively rare, and in any event are the easy cases. Consensus as to the treatment of such cases can be achieved quickly. But these are not necessarily the cases driving the increased number of bankruptcy filings and creating the problems in modern bankruptcy law, and it may be inappropriate to make them the primary focus of the inquiry. In this sense, the Memorandum may inadvertently divert attention from more difficult issues that need to be emphasized.

The more difficult issues are raised in the broader context of the debtors situated between the two extremes cited in the Memorandum. These issues relate to the public policy grounds and parameters pursuant to which federal law should intercede in voluntary transactions between private parties. To answer this by saying in the Memorandum that “most bankrupt debtors are in serious financial trouble” is to beg the question, and is not helpful without a consensus as to what constitutes “serious financial trouble.” It also may be misleading to the extent it suggests that most filings are necessary and unavoidable, hereby precluding a discussion of available alternatives.

Some of the more pertinent questions might be: Why are so many consumers filing bankruptcy during a period of relative economic prosperity? How serious...
should a consumer's financial problems become so severe that he or she finds it necessary to liquidate assets or make bankruptcy discharge as an alternative to payment? Does the Bankruptcy Code unnecessarily induce financial irresponsibility and default on the right to the benefits of bankruptcy? to achieve the adverse impact on the consumer's post-bankruptcy access to credit? How many bankruptcy filings are truly unavoidable? Considering the potential adverse impact of bankruptcy on both debtors and creditors, and the dependence of debtors on the advice of lawyers who may have a financial incentive to favor bankruptcy, how can the law enhance the opportunities for debtors to remedy the differences between the Bankruptcy Code and creditor behavior?

To what extent should the debtor's pre-bankruptcy behavior, even incorrect new debts or spending, affect the claim to bankruptcy relief?

While it may be too much to expect the Commission or anyone else to develop or articulate a national consensus on these issues, it does seem that one might expect more than a suggestion that most bankruptcies are due to financial trouble. In a published report, the Commission further addressed this by announcing a goal of limiting bankruptcy to "debtors who are legitimately in need of the bankruptcy system..." But again, while this is an admirable sentiment, it is little more. With the Commission apparently poised to propose significant changes in bankruptcy law, it is surprising that more attention has not been given to these fundamental issues.

With respect to these issues, current bankruptcy law often represents a means-

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The potential impact on private claims and contracts is obvious. Consideration is also being given to elimination of legally enforceable reaffirmation contracts. Creditors may be justly concerned over such matters.

Creditors also may be concerned that the Bankruptcy Code will be "streamlined" by converting bankruptcyfrom a judicial procedure consistent with our common law tradition (which allows creditors a forum for asserting their contract rights), into a quasi-administrative process designed to expedite the debtor's remedies quickly, inexpensively, and with minimal creditor participation.

This concern may be reinforced by "[the] most developed proposal," to eliminate a layer of appellate review for bankruptcy court orders. These proposals may be viewed as going far beyond an evolutionary effort to improve the current Bankruptcy Code, and reflecting a philosophy fundamentally at odds with the common law and statutory precepts that have heretofore guided American bankruptcy law. The consequences could be significant.19

IV. The Issues

The Issues List distributed by the Commission provides a series of specific questions relating to the issues addressed generally in the Memorandum and in the text above. While the Issues List merely presents and does not answer various questions, the tenor of the questions and the Commission's subsequent pronouncements suggest that the Issues List may reflect a movement of the discussions and proposals in certain directions, as suggested above at Part III. In addition, the Issues List provides a fairly specific look at the Commission's agenda of issues to be considered.

The first question on the Issues List is: "What is the goal of consumer bankruptcy?" This has been discussed above at Part II in general terms. Presumably this goal includes appropriate relief for truly needy debtors within clearly defined parameters. Unfortunately, the Commission to date has not articulated how it intends to define such need, and its published reports do not seem to have devoted excessive attention to the proper parameters of bankruptcy. The other questions in the Issues List are more specific, and this discussion will focus on those questions.

A. "Should Audits of Debtors' Financial Backgrounds Become a Part of the Consumer Bankruptcy System?"

The Commission's published report seemed to endorse such audits, on a "random" basis.20 Obviously in concept the prospect of financial audits offers hope in a means to address possible abuses. However, as always, the devil is in the details, and a formalized financial audit procedure does not necessarily offer more protection than is provided by the current judicial discretion. The proposal to make such audits "random" potentially detracts from the proposal's effectiveness, as this could imply a minimalist approach. The idea of audits in worth pursuing, but probably is not a panacea and may be wholly ineffective unless tightly structured.

Additional specific, statutory safeguards, both procedural and substantive, are clearly needed. For example, there is no valid reason to prohibit creditors from moving for dismissal on grounds of substantive abuse, within specified guidelines,21 and there should be an attempt to define substantial abuse and to provide objective criteria for entitlement to bankruptcy relief. Perhaps pre-petition debtor counseling by a party with no financial interest in promoting a bankruptcy filing should be mandatory.

B. "Is Repetitive Filing a Significant Problem? How Can it Be Controled?"

Repetitive filing is obviously a significant problem. In some instances a pattern of repetitive filings provides obvious evidence of willful intent to use bankruptcy in an abusive manner. A modest solution would be to limit consecutive discharges under Chapters 7 and 13, by providing at section 1328 a limit on Chapter 13 filings similar to that for Chapter 7 at section 727(a)(8). Indeed, it is surprising that this has not been done before, and the expanded use of Chapter 13 for delinquency liquidations (by confirmation of zero-payment plans) makes the need for this reform even more obvious. In addition, the limitation period at section 727(a)(8) could be extended, perhaps to ten years, with an exception allowing a repeat filing after six years for delineated hardship cases. The Commission's report contemplating a prohibition against successive filings "only to obtain automatic stay protection against eviction" is wrong.

D. "Does Section 707(b) of the Bankruptcy Code in its Current Form Serve a Useful Function?"

The apparent purpose of section 707(b), addressing bankruptcy abuse, is salutary, but the current provision is of limited usefulness. The current provision is defective in that it bars the only party with likely knowledge of abuse (the creditor) from acting on that knowledge, while the party required to act often will be without that knowledge. The current section is not even consistent with the public policy, it is odd to bar disclosure of abuse by the only party likely to have knowledge of that abuse. Clearly the potential remedies represented by section 707(b) needs to be redefined and expanded. The Commission's report indicates only that the protection which obtains under section 707(b) is a problem.

E. "What Are the Consequences to Debtors and Creditors of Decreasing the Scope of the Bankruptcy Exchanges? Should it be Further Constrained?"

There is an argument for shifting the focus and foundation of consumer bankruptcy (and thus the discharge) from Chapter 7 to Chapter 13. For obvious reasons, there seems to be a societal concern that Chapter 13.composition agreements are favored over Chapter 7 liquidations. This is evidenced by the debtor incentive built into Chapter 13,22 in an apparent effort to stifle individual debtors with a "regulate income"23 from Chapter 7 to Chapter 13.

Chapter 13 is far from perfect, and the potential for Chapter 13 abuses (such as arbitrary modifications of secured claims and disguised liquidations in Chapter 13) need to be addressed. But if Chapter 13 is crafted into a more effective composition procedure, the focus of consumer bankruptcy could be shifted from Chapter 13 as the "primary" form of consumer bankruptcy relief, with Chapter 7 discharge as the exceptional and more limited remedy, available only to truly needy debtors within specified limits.

A significant problem was created in consumer bankruptcy law when the Bankruptcy Reform Act of 1978 created a substitute insolvency as a predicate to a bank-ruptcy filing. This opened the door to the opening of bankruptcy to debtors able to repay most or even all of their debts, who simply find bankruptcy discharge a more convenient alternative. As noted above, in P. J. D., current section 1325(b) is inadequate to deal with this problem. There seems to be a broad consensus on this, so perhaps there should be recognized a public policy decision, articulated in the Bankruptcy Code, that an individual debtor will be limited to Chapter 13 relief unless certain specified criteria are met as a prerequisite to Chapter 7. These criteria could be articulated so as to limit the more drastic remedy of a liquidation to debtors who have suffered catastrophic personal or financial reverses or are otherwise truly unable to repay a significant part of their debt from future earnings. On the other hand, this would require that the creditor safeguards in Chapter 13 be strengthened, to address the abuses evident in some of the cases filed under that chapter.

The Commission may be moving in a different direction. The proposals, as noted supra, 24 to create a new "Basic Bankruptcy" chapter would further blur the distinctions between Chapter 7 and Chapter 13 liquidations and Chapter 13 compositions, by offering the debtor a menu of new options not available under current law. Unless significant safeguards are included, the result could be an expansion of the discharge and reduced incentives for solvent and capable consumers to repay their debts. More information on the Basic Bankruptcy proposals appears elsewhere in this issue, and the reader can consider those proposals on their merits.

F. "Should the Bankruptcy System Permit In Forma Pauperis Filings of Bankruptcy Petitions?"

For many years there has been a widespread recognition that the legal and economic consequences of bankruptcy arrangements are so extensive and complex as to warrant considerable explanation and guidance by knowledgeable councils. The increasingly complex nature of today's financial marketplace suggests that this need is greater than ever, not less. It seems counterproductive to suggest in these circumstances that consumer debtors should be able to file a lawsuit with such dramatic implications and potential long-term consequences, without legal advice. It clearly seems more appropriate to move in the

19. See Commissioner's Consumer Bankruptcy Report, supra note 1, at A3. See also various articles on this issue.

20. Id.

21. See Bankruptcy Rule 2002(b) (providing for detailed report in all bankruptcy cases) and the "white sheet" guidelines that has been prepared by a "substantially similar form in all cases." See also毋 report in Bankruptcy Law Journal, supra note 3.

22. See also supra note 20. The problem of Chapter 13 annexation to "affirmative defenses and objections the creditor's claim or interest under the "allowance of a discharge." In the case above, the purpose was the protection of the "substantially similar form in all cases." See also supra note 20.

23. See supra note 20.

opposite direction, to require greater disclosure, explanation, and consultation prior to bankruptcy.

Again, however, the Commission appears to be moving in a different direction. The Commission's emphasis on a "more cost-effective, streamlined, predictable system that better reflects the [s]ystem's needs" of the 1990s,23 and the desire to "give debtors and creditors a simplified system that reponds to their specific needs without requiring complex legal advice," suggests movement toward some sort of administratrive procedure that would effectively broaden the discharge and convert bankruptcy as a simple and easy alternative to repayment.24 While efforts to simplify and reduce the cost of bankruptcy are admirable, a problem is that restructuring of debts is inherently a complex matter, unless one sweeps aside important consumer law principles. Creditors may have some concern that "simplification" will be achieved by reducing creditors' rights and current restraints on the debtor.

G. "Should Property Exemptions in Bankruptcy be Uniform in All Fifty States? If Not, Should the Federal Exemptions Provide a Ceiling on State Exemptions? Should the Federal Exemptions Provide a Ceiling on State Exemptions?"

This is a difficult issue. On the one hand, it is important to recognize the interests of the states in retaining control over an issue that has traditionally been a matter of state law, and which may be subject to genuine public policy differ-ences among the various states and regions. On the other hand, these differences may create a need for enormous variation in consumer loan underwrit- ing standards and collection policies, representing very costly administrative and legal burdens for multi-state creditors, which ultimately add unnecessarily to the cost of consumer credit.

It would, of course, be desirable if the states would move toward greater uniformity in this area of law, thereby diminishing the need for a potentially controversial intrusion in this area of state law by the federal government as part of proposed bankruptcy reform.

To the extent that uniform bankruptcy exemptions, overriding state law, are deemed appropriate, it seems desirable to provide both a floor and a ceiling within which the states could act. Perhaps this would provide a means to address the more extreme variations. The Commission appears to be moving in this direction.25 The states that have created this problem should be aware that they may be on the verge of losing control of the situation.

H. "Should Consumer Bankruptcy Be Organized Around a Chapter 7?/Chapter 13 Split? If So, Should the Differences Between the Chapters Be Expanded or Contracted? Should Individuals Be Required to Use One Chapter or the Other?"

As suggested supra,26 one obvious route for reform is to address the prob-lem of unnecessary Chapter 7 liquidations and discharges by sternly steering consumers to Chapter 13 as the pri-mary consumer bankruptcy chapter, leaving Chapter 7 as a limited but more dra stic alternative in delineated circum-
cstances. This would require some addi-tional reform to address creditor concerns involving the routine strip-down of items, and would require emphasis on the dis-
tinctions between Chapters 7 and 13.

Chapter 13 is based on the traditional common law remedies of composition and extension. These remedies are inher-ently different from a Chapter 7 liquidation. It is thus essential that Chapters 7 and 13 be retained as mutually exclusive alternatives, and as a basis for distinguishing between debtors with temporary cash flow problems and oth-
ers facing more severe and permanent difficul-
ties. As noted supra, the Commis-sion appears to be moving in the oppo-site direction.

I. "Should More Be Done to Provide Counseling Alternatives to Bankruptcy? Should Consumer Education Become a Part of the Bankruptcy Process? Who Should Perform This Function?"

This has already been discussed supra, at II.4A, IV.C, and IV.F. Suffice it to repeat here that additional mandatory counseling is desirable, if provided before bankruptcy by a knowledgeable counselor who does not have a personal financial interest in promoting a bank-
ruptcy filing. Perhaps funding for a system of such counselors could be provided by requiring a small fee on each bank-
ruptcy filing.

The Commission seems to be embracing the concept of "mandatory educa-
tion," but possibly only for "bankrupt debtors," as "part of the bankruptcy pro-
cess," suggesting only a need for post-petition counseling. Obviously, at that point the counselor is too late. This is a really case of the devil being in the details, as nearly everyone can agree on the need for more "counseling," but such a system could be useful or harmful de-
pending on the design and implementa-
tion of the system.

J. "Should Small Businesses be Permitted to Reorganize in Chapter 13 Or Should Business Bankruptcies be Handled in Other Chapters?"

One of the emerging abuses under ex-
isting bankruptcy law, logically to be ad-
dressed in any reform effort, is the use of Chapter 13 by business debtors. Chapter 13 clearly was designed for use by indi-
vidual wage earners.27 Chapter 13 is ex-
sentially a wage earners' version of Chap-
ter 11, in which the creditor protections of Chapter 11 are largely eliminated in order to reduce costs and save time. In return, the most likely large secured claim (the home mortgage claim) is intended to be protected from modification28 in Chapter 13. The smaller secured claims (typically loans on vehicles and house-
hold goods) are sacrificed by allowing unilateral modifications in the plan,29 apparently on grounds that the Chapter 14 procedural safeguards are not cost effective in the context of such small amounts.

An essential ingredient in this struc-
ture is the inherent judgment that any claim big enough to be worth of fight-
ing over will be protected from unitary modification in Chapter 13, either under section 1325(a)(3) or by chapter 11 non-modification of busi-
ness bankruptcies with significant assets into Chapter 11. Unitary modi-
fications by the debtor of secured claims under section 1325(b)(2) will be lim-
ited to loans secured by autos and house-
hold goods, where collateral values (and hence the stakes in an individual case) are relatively low.30 The only safeguards for such claims in Chapter 13 rest in the flexible and discretionary judicial (imi-
tations on confirmations of the plan as provided at section 1325). While such procedural economy may be justified by the need to provide summary treatment in essentially no-asset consumer cases, it may lead to abuses when significant assets are involved, such as in a business reorganization.

The apparent solution is to tighten the Chapter 13 eligibility requirements at section 109(e).51 The debt limits at section 109(e) are not accompanied by corres-
ponding asset limits, so that a business debtor with $2 or $3 million in assets may be able to restructure its debt in order to meet the requirements of section 109(e) and then commence a unilateral cram-
down of secured debt under section 1322(b)(2). Chapter 13 was clearly not designed or intended to allow this.32

There have been reports of sizable busi-
ness corporations converting their or-
erational structure to multiple insider so-
le proprietorships, each with debt just below the limits at section 109(e), in or-
der to circumvent the entire commercial cre-
ter into a series of Chapter 13 fil-
ing. The vague "good faith" requirement at section 1325(a)(3) is not sufficient to deal with this problem, and an invi-
ocated loan in nonuniformly in the case law nationwide. Surely there is a broad con-
sensus that these cases are abusive; if so, reform of section 109(e) to limit Chapter 13 to wage earners and bona fide low-
asset sole proprietors (based on a dollar threshold) should be an obvious and uncontroversial solution. Your author is not aware that the Commission has yet addressed this issue.

K. "Is Retail or Wholesale Valuation More Appropriate for Determining a Creditor's Allowed Secured Claim for Assets the Debtor Wants to Keep in a Chapter 13?"

There appears to be a consensus emerging at the appellate court level that replacement value (i.e., the retail value of used goods of like character) should be the appropriate valuation standard in consumer bankruptcy cases.33 Valuation methodology has always been a problem-
atic issue for bankruptcy courts,34 and this emerging consensus, together with leg-
islative reform efforts, should present an opportunity to settle this issue and bring needed uniformity to the cases nation-
wide.

The obvious basis for using replace-
ment cost is that this represents the fair market value of the collateral pursuant to established appraisal standards and techniques. Moreover, this is the amount that the consumer would have to replace the collateral and therefore repre-
sects his or her opportunity cost. It is also a reasonable measure of the creditor's oppor-
tunity cost, as many creditors resent repossessed collateral at retail value. Re-
placement cost is the traditional measure of fair market value and defines the term "value" in economic terms. This should be specified in the statute as a response to abetional decisions that have re-
sulted from the lack of a specified stan-
dard in the current statutory language. Your author is not aware that the Com-
mission has yet addressed this issue, though some of the Bankruptcy proposals apparently contemplate use of wholesale value.
A hallmark of consumer bankruptcy debates is the question of the costs versus the effectiveness of creditor safeguards. Debtors' advocates may argue that cost considerations require procedural streamlining that will eliminate creditor protections. A fundamental question in these debates is whether bankruptcy will continue to be a judicial process, consistent with the traditions of our adversary system, with both sides entitled to full participation, or whether it will become something else, perhaps in the nature of an administrative process based on debtor entitlement of only perfunctory creditor involvement.

The section 341 hearing is a key part of the current model of a traditional judicial process. Given the restrictions imposed by the automatic stay, section 341 provides creditors a unique opportunity to communicate directly with the debtor. This is often a crucial piece of information needed to participate meaningfully in the remainder of the process. It is also one of the few tools available to detect (and therefore discourage) bankruptcy fraud.

Given the obvious importance of the section 341 hearing, it is surprising that this section was singled out in the commission's issue list, for consideration as to possible elimination.

IV. Conclusion

Four fundamental points are worthy of note in the context of the issues discussed above.

First, most of these issues do not represent simply a clash between "creditors'" and "debtors'" interests. Ultimately, whatever

1. QUARTERLY REPORT

1. "For Consumer Bankruptcy Reforms, Is the [Section] 341 Meeting Efficient and Effective?"

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