

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>

<p>Remedies for Discharge Violation</p>	<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.
<p>Protection of Interests in Collateral Repossessed Prepetition</p>	<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.
<p>Chapter 7 Attorney’s Fees</p>	<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.
<p>Attorney Competency and Remedying Lawyer Misconduct</p>	<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.

<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.

<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.