COMMENTS ON THE PENDING BANKRUPTCY REFORM

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The 106th Congress will soon address the issue of bankruptcy reform, left unfinished by the 105th Congress. The House[1] and Senate bills[2] of 1998 resulted in a Conference Report published in October, 1998,[3] which will probably serve as a starting-point for legislation during 1999 and 2000.[4]

This Article assumes that some sort of bankruptcy reform will pass, whether bankruptcy practitioners like it or not. Thus, instead of raging against the coming darkness, it will suggest a series of workable legislative compromises that should make a Presidential veto less likely and will make it easier for practitioners and the courts to implement the proposed reforms.

This Article does not pretend to be a comprehensive discussion of the problems presented by the Conference Report, a document more than 50,000 words long. Instead, it will focus on a few of the more crucial issues, beginning with the "needs-based" bankruptcy proposal and its effect on Chapter 13 administration. Sections I through IV of this Article propose alternatives to the current legislation. Section I discusses solutions to "needs-based" bankruptcy. Section II describes incentives for trustees and attorneys to accomplish a successful Chapter 13 plan. Section III states that Chapter 13 debtors should be rewarded for completion of a plan. Section IV explains how current "anti-cramdown" provisions are overbroad.

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1. H.R. 3150, 105th Cong. (1998).
2. S. 1301, 105th Cong. (1998).
3. H.R. CONF. REP. NO. 105-794 (1998).
4. This article assumes the reader has a copy of the Conference Report on hand.

Sections V through VII propose changes to the Bankruptcy Code. Section V asserts that assets in "Asset Protection Trusts" should be property of the estate. Section VI discusses the "Homestead Cap." Section VII examines the Chapter 7 estate's rights to the debtor's capital gains exclusion. Sections VIII and IX suggest the redrafting of two portions of the Conference Report. Section VIII critiques the audit procedures, and Section IX critiques the notice provision in Section 603. Finally, Sections X and XI defend a few provisions currently contained in the Conference Report, in the hope that those provisions will survive the coming legislative battle. Section X defends the "Installment Redemptions" proposal, and Section XI defends the provisions to discourage bad faith repeat filings.

I. THE "GATEKEEPER/POOL" SOLUTION TO "NEEDS-BASED" BANKRUPTCY: ENCOURAGING TRUSTEES TO INVESTIGATE DEBTORS WHO SHOULD NOT TAKE ADVANTAGE OF CHAPTER 7

A. "Needs-Based" Access to Bankruptcy: When Do the Means Justify the End?

Supposedly, the British playwright George Bernard Shaw was seated next to a pompous lady at a dinner party. Idly, he asked her, "Would you spend the night with me for a million pounds?" She pondered his rhetorical question and said that yes, she probably would.[5]

He followed up: "Would you do so for five pounds?" She was shocked: "What kind of a woman you think I am?" Shaw murmured, "We've already established what you are, madam; we're merely haggling over the price."

In a slightly less risque vein, everyone would agree that a wastrel with a very high income and very large credit card debts should not be permitted simply to declare bankruptcy under Chapter 7 and walk away from debts, but should be forced to pay off creditors over time in a Chapter 13 plan.[6] Everyone would also agree that a

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5. This has been called a "familiar but possibly apocryphal story." Iain Johnstone, *GBS on One Hand*, THE TIMES (LONDON), May 13, 1990.

6. To oversimplify, Chapter 7 provides for liquidation of the debtor's assets and the discharge of the debtor's obligations under 11 U.S.C. § 727; Chap-

moderate-income family that had incurred crushing medical bills should be permitted to file Chapter 7 to obtain a fresh start, instead of being forced into Chapter 13.

In other words, everyone would agree that at some level, access to Chapter 7 should be "needs-based" or "means-tested." But now we must haggle over the price.

B. The Current Proposal: Every Debtor with a Net Monthly Income of $83.33 Is Forced into Chapter 13

In sections 101 and 102 of the Conference Report,[7] a Chapter 7 filing would be "abusive" if the debtor's net monthly income exceeds $83.33 per month, or if his net income could fund a Chapter 13 repayment plan that would pay off 25% of his unsecured debts over five years.[8] In other words, even if the debtor could not fund a 25% repayment plan, he would be forced into Chapter 13 if his net monthly income exceeds $83.33. Net income would be defined as gross income reduced by payments on secured debt, payments on priority debts, such as alimony and child support, and payments to meet the debtor's necessary expenses, defined by standards issued by the Internal Revenue Service ("IRS").[9] The trustee in bankruptcy appointed by the court would be required to review the debtor's financial records and to move to dismiss any "abusive" Chapter 7 filings.[10] In order to escape dismissal, the burden of proof would be on the debtor to show "extraordinary circumstances."[11]

Judge Eugene Wedoff of Chicago, in materials prepared for the American Bankruptcy Institute, explained the effect of that proposal: "For example, a debtor with medical bills totaling $200,000 and disposable income (under the formula) of $90 per month, would be found to have made an abusive Chapter 7 filing, even though less than 3% of the unsecured debt could be paid in a five-year Chapter 13 plan."[12]

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ter 13 provides for the filing of a plan for the payment over time of all or part of the debtor's assets under 11 U.S.C. § 1322.

7. H.R. CONF. REP. NO. 105-794, at 4-8 (1998).
8. *See id.* at 5.
9. *See id.*
10. *See id.* at 7.
11. *Id.* at 5.
12. Hon. Eugene Wedoff, *Conference Report on H.R. 3150—Major Con-*

C. Problems: Harsh, Impractical, Muddy, Rigid, and Underfunded

Aside from the fact that the President has promised to veto any bill containing any such provision, there are several other problems with that proposal:

First, it sets the bar far too low, sweeping in thousands of families with modest incomes and forcing them to pay off their debts in protracted and burdensome Chapter 13 plans, rather than obtaining a fresh start.

Second, overinclusion is not only harsh, it is also impractical. Many people forced into Chapter 13 will seek permission from the bankruptcy courts to escape back into Chapter 7, where they belong, and the courts will be overwhelmed with those motions.

Third, beyond the sheer number of "escape" motions, the courts will be burdened by the muddy and imprecise IRS standards contained in the congressional formula. Imprecise standards are not only difficult to administer, they also encourage litigation, since they do not lead to predictable results.

Fourth, two-thirds of all current Chapter 13 plans fail and are converted to Chapter 7, even though the debtors have voluntarily chosen Chapter 13.[13] Forcing marginal debtors into Chapter 13 will greatly increase the failure rate, at great expense to all involved.

Fifth, the "gatekeepers" charged with administering the new rule are the trustees in bankruptcy, who are already underpaid, receiving approximately $60 for each "no asset" case that they handle.[14] Adding an extra burden to their load will ensure that the job will not get done.

D. A Solution: Fair, Practical, Clear, Appropriate, and Adequately-Funded

The solution is obvious in principle but difficult to define: The bar should be set at a realistic level. The "$83 in net income" test is simply too low. A successful Chapter 13 repayment plan depends upon the availability of discretionary income to pay off a percentage

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sumer Provisions, (visited Apr. 10, 1999) <http://www.abiworld.org/legis/bills/confreportanal10-9-98.html>.

13. *See* Henry J. Sommer, *Causes of the Consumer Bankruptcy Explosion: Debtor Abuse or Easy Credit?*, 27 HOFSTRA L. REV. 33, 46 (1998).

14. *See* 11 U.S.C. § 330(b) (1994).

of the old debts, while the debtor tries to rebuild his life. A person with $83 in net income who is shackled to a repayment plan will not be able to make a fresh start.

Rather than using an arbitrary, and wrong, "$83 in net income" test, is there a more principled way to choose the cutoff point? In statistics, there is a concept called "standard deviation," a measure of the spread of the familiar bell-shaped curve.[15] Given a normal distribution, about two-thirds of any given statistical sample should be within one standard deviation of the mean. Individuals more than one standard deviation above or below the mean are, by definition, out of the ordinary. Congress could require Chapter 13 plans for all debtors whose incomes are more than one standard deviation above the mean, thus forcing upper-income debtors into Chapter 13, while still permitting ordinary moderate-income debtors to stay in Chapter 7.

For example, judging by the fairly crude breakdown published in the Statistical Abstract of the United States by the Census Bureau, it appears that, in 1995, families earning more than one standard deviation above the mean were those earning more than $75,000 per year.[16] The median income for a family of four was $49,531;[17] "mean" and "median" are not synonymous, but they are often related.[18] Almost everyone would agree that families who file

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15. *See* Palmer v. Schultz, 815 F.2d 84, 92 n.7 (D.C. Cir. 1987):

> The "standard deviation" is a unit of measurement that allows statisticians to measure all types of disparities in common terms. Technically, a "standard deviation" is defined as "a measure of spread, dispersion, or variability of a group of numbers equal to the square root of the variance of that group of numbers." The "variance" of the group of numbers is computed by subtracting the "mean," or average, of all the numbers, "squaring the resulting difference, and computing the mean of these squared differences."

Id. at 92 n.7 (citations omitted).

16. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1997, at 469 (117th ed. 1997)[hereinafter STATISTICAL ABSTRACT].

17. *See id.* at 466.

18. Mean is defined as "the average value of a set of numbers," while median is defined as "relating to or constituting a middle value in a distribution." AMERICAN HERITAGE DICTIONARY, 1116, 1120 (3d ed. 1992). *See also* State v. Williams, 525 N.W.2d 538, 543 (Minn. 1994) (stating that "[m]ost people

bankruptcy with incomes of $75,000 or more should be forced into Chapter 13, absent extraordinary circumstances such as big medical bills. To look at that number in another light, the average poverty level for a family of four in 1995 was $15,569.[19] The figure of $75,000 is about five times the poverty guideline.

E. A Benchmark: Five Times the Poverty Level

For the sake of simplicity and ease of administration, I suggest using a five-fold multiple of the most-recently published federal poverty guideline[20] as the benchmark for access to Chapter 7. The federal government prepares the poverty guidelines and distributes them widely. Most crucially, the government tailors the guidelines to local conditions and family size and updates them every year.

The use of a crisp, clear, and reasonable benchmark tied to local poverty standards will solve many of the problems articulated above. It is not overinclusive, avoiding both harsh results and court congestion. It is easy to administer, so that both courts and litigants can resolve disputes quickly; a clear standard enables litigants to predict the outcome of litigation, avoiding many fruitless motions. It takes account of regional differences in the cost of living and it changes over time, unlike the current congressional formula.

The only other "fix" necessary to complete the package is some additional compensation for Chapter 7 trustees, who will be required to act as gatekeepers. Since their efforts will increase the number of Chapter 13 plans and will therefore increase the payouts to the creditors of Chapter 13 debtors, a very small percentage of those payments should be set aside and pooled to pay for the services rendered by the gatekeepers. Without additional statistical analysis of the current Chapter 7 caseload, it is impossible to say how much extra compensation the gatekeeper should receive or what percentage of the Chapter 13 payments should be reserved for that purpose. That analysis should not be very difficult.

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who make judgments based on statistical analysis . . . will look not just to the mean figure but also to the mode and median figures.").

19. *See* STATISTICAL ABSTRACT, *supra* note 16, at 476.

20. *See* 45 C.F.R. pt. 1611 (1999).

F. Start the Experiment Cautiously

Advocates of needs-based access to Chapter 7 will argue that this Article has set the bar too high. This Article provides two responses to that argument: First, is there a principled reason to set the benchmark elsewhere? Second, we have never tried needs-based access to Chapter 7 before. It is therefore better to start this experiment with the bar set too high, rather than too low. If the bar is too high, if too few upper-income debtors are carried into Chapter 13, then Congress can easily amend the legislation next year by changing the multiplier. If, however, we start too low, then chaos will result: the courts will be swamped with debtors seeking to escape from Chapter 13, and all other business of the bankruptcy courts will stop.

If Congress is serious about enacting bankruptcy reform next year and avoiding a veto, it should adopt a more moderate, reasoned, and workable approach to needs-based bankruptcy. The current proposal is Procrustean, Draconian, and Dickensian.

G. Brief Summary of the Gatekeeper Process

Each debtor who files a Chapter 7 petition will be required to fill out simple income and expense disclosure forms, backed by supporting documents. The Chapter 7 trustee will conduct a confidential review of those forms. All trustees who conduct that review will be entitled to an extra fee of $5, to be paid from a pool funded by a modest increase in filing fees.

The trustee will first determine and verify whether the debtor's income is at least five times the applicable federal poverty level. If not, the trustee's duty to conduct a review ends at that point, although the trustee may investigate further. If, however, the income is above that level, the trustee must determine whether the debtor's projected disposable income is sufficient to pay off twenty percent of his unsecured nonpriority debts over a five-year period. If it is, the Chapter 7 trustee will file a simple § 707(b)[21] motion to dismiss the

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21. 11 U.S.C. § 707(b) (1994). Section 707(b) provides, in pertinent part, that

> [a]fter notice and a hearing, the court, on its own motion or on a motion by the United States trustee . . . may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer

Chapter 7. The debtor can then oppose the motion, dismiss the Chapter 7, or pursue another alternative, such as Chapter 13.

If the debtor voluntarily dismisses the Chapter 7, or if the court grants the trustee's motion, the trustee will be entitled to additional compensation, up to a maximum of $50. That compensation will be paid from a pool funded by a retention from Chapter 13 distributions on unsecured claims. The opportunity to earn that extra gatekeeper fee in some, but not all, cases will encourage trustees to conduct a careful income review in every Chapter 7, to see whether the debtor is really qualified for Chapter 7.

In addition, creditors will have standing to bring their own § 707(b) motions, and they will be compensated in the same way.

H. Suggested Legislation Implementing the Gatekeeper Proposal

1. The Chapter 7 trustee's gatekeeping duties

TRUSTEE'S DUTIES - Section 704 of title 11, United States Code, is amended as follows:

(A) by striking "and" at the end of paragraph (8);

(B) by striking the period at the end of paragraph (9) and inserting "; and"; and

(C) by adding at the end the following:

"(10) with respect to an individual debtor filing a petition under Chapter 7,

(a) review all materials provided by the debtor under section 521,

(b) investigate and verify the debtor's projected disposable income,

(c) determine and report whether the debtor's income is at least five times the most-recently published poverty level applicable to the debtor's location and household or family size, in conformity with the definitions contained in the poverty guidelines updated annually in the Federal Register by the U.S. Department of Health and

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debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter.

Human Services under authority of section 673(2) of the Omnibus Budget Reconciliation Act of 1981,

(d) if so, determine whether the debtor's projected disposable income, as defined by 11 U.S.C. § 1325(b)(2), would be sufficient to fund a Chapter 13 plan that would repay at least 20% of the debtor's scheduled unsecured, nonpriority debts over a five-year period following the confirmation of a Chapter 13 plan, and

(e) if so, file a motion under § 707(b) to dismiss the debtor's Chapter 7 petition."

DISMISSAL OF CHAPTER 7 PETITION FOR SUBSTANTIAL ABUSE - Section 707(b), title 11, United States Code, is amended to read as follows:

"(b)(1) After notice and a hearing, the court, on its own motion or on the motion of the United States Trustee or any party in interest, may dismiss a case filed by an individual debtor under this chapter if, given the totality of the circumstances of the debtor's financial situation, it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. Grounds for dismissal include (but are not limited to) those provided by paragraph (2)(a) of this subsection.

(2) For purposes of subsection (b) of this section

(A) A petition filed under this chapter shall be deemed to be in substantial abuse of the provisions of this chapter if the court finds that

(i) the debtor's income is at least five times the most-recently published poverty level applicable to the debtor's location and household or family size, in conformity with the definitions contained in the poverty guidelines updated annually in the Federal Register by the U.S. Department of Health and Human Services under authority of section 673(2) of the Omnibus Budget Reconciliation Act of 1981; and

(ii) the debtor's projected disposable income, as defined by 11 U.S.C. § 1325(b)(2), would be suf-

ficient to fund a Chapter 13 plan that would repay at least 20% of the debtor's scheduled unsecured, nonpriority debts over a five-year period following the confirmation of a Chapter 13 plan.

(B) If the debtor opposes a motion that is based in whole or in part on the grounds set out in paragraph (2)(A) of this subsection, the debtor may introduce evidence of extraordinary circumstances or expenses to show the debtor's inability to fund such a plan.

(C) If a party in interest, including a trustee appointed under this title or the United States Trustee, files a motion under this subsection and the case is subsequently dismissed or converted to another chapter, either voluntarily or involuntarily, the court shall award to such party in interest its fees and costs, not to exceed the sum of $50, which shall be paid immediately from the fund established pursuant to 11 U.S.C. § 707(c)."

2. The forms to be filed by the debtor

DEBTOR'S DUTIES - Section 521 of title 11, United States Code, is amended as follows:

(1) by inserting "(a)" before "The debtor shall – ";

(2) by striking paragraph (1) and inserting the following:

"(1) file under penalty of perjury and to the best of the debtor's knowledge and belief

(A) a list of all creditors, including those from whom the debtor expects to receive any regular monthly bills for goods or services received before the filing of the petition; and

(B) unless the court orders otherwise –

(i) a schedule of assets and liabilities;

(ii) a schedule of current income and current expenses, which for petitions involving individual debtors must include all household income and all household expenses;

(iii) a statement of the debtor's financial affairs,

including

(I) for petitions involving individual debtors, the employment history for debtor and debtor's spouse during the past five years, and a statement disclosing any changes in employment, income, or expenses reasonably anticipated during the 12-month period following the date of filing;

(II) for petitions involving non-individual debtors, an explanation of the reasons for filing the petition, any significant changes in business operations during the past six months, and financial statements for the past two years;

(iv) for petitions involving individual debtors, a certificate

(I) of an attorney whose name is on the petition as the attorney for the debtor or any bankruptcy petition preparer signing the petition pursuant to section 110(b)(1) indicating that such attorney or bankruptcy petition preparer delivered to the debtor any notice required by section 342(b) of this title; or

(II) of the debtor that such a notice was obtained and read by the debtor if no attorney for the debtor is indicated and no petition preparer signed the petition;

(v) for petitions involving individual debtors, either a Chapter 13 plan or an alternative statement containing sufficient information to show whether the debtor's projected disposable income, as defined by 11 U.S.C. § 1325(b)(2), would be sufficient to fund a Chapter 13 plan that would repay at least 20% of the debtor's scheduled unsecured, nonpriority debts over a five-year period following

the confirmation of a Chapter 13 plan."

(3) by inserting "(A)" after "(4)" in paragraph (4), and adding at the end the following:

"(B) in the case of an individual debtor, provide to the trustee at the meeting required under section 341(a) of this title the following:

(i) copies of any federal or state tax returns, including any schedules or attachments, filed by the debtor for the 3-year period preceding the filing of the petition;

(ii) copies of all payment advices or other evidence of payment, if any, received by the debtor or debtor's spouse from any employer in the 60-day period preceding the filing of the petition; and

(iii) copies of any court orders requiring debtor or debtor's spouse to pay child or spousal support, or court orders awarding payment of child or spousal support to debtor or debtor's spouse; and

(iv) if requested by the trustee, proof of debtor's identity, social security number, residential address, and marital status.

(C) in the case of an individual debtor, provide to the trustee within 30 days of the trustee's written request the following:

(i) copies of documents relating to debtor's interest in any property claimed as exempt on the schedules filed with the court, including copies of any notes, deeds, or other evidence of title or liens affecting real or personal property, or documents relating to the debtor's interest in any retirement accounts or pension plans;

(ii) documents evidencing debtor's household income or expenses;"

(4) by replacing "(5)" in paragraph (5) with "(6)," and by adding new "(5)" as follows:

"(5) in a case of an individual debtor under Chapter 7, 12, or 13, provide to the trustee

(A) at the time filed with the taxing authority, all tax

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returns, including any schedules or attachments, with respect to the period from the commencement of the case until such time as the case is closed;

(B) at the time filed with the taxing authority, all tax returns, including any schedules or attachments, that were not filed with the taxing authority before the first meeting under section 341(a) with respect to the three-year period before the filing of the petition;

(C) any amendments to any of the tax returns, including schedules or attachments, described in paragraph (A) or (B);

(D) in a case under Chapter 12 or 13 only, for each tax year following confirmation of the plan until the case is closed, a statement under penalty of perjury by the debtor as to the debtor's monthly income and expenses, which shall disclose

(i) the amount and sources of total household income of the debtor;

(ii) the identity of any persons responsible with the debtor for the support of any dependents of the debtor; and

(iii) the identity of any persons who contributed, and the amount contributed, to the household in which the debtor resides."

3. Funding

FUND FOR PAYMENT OF "GATEKEEPER" INVESTIGATORY FEES - Section 1930, title 28, United States Code, is amended as follows:

(1) by striking "$130" in subsection (a)(1) and inserting "$135;"

(2) in subsection (e), by inserting "(1)" after "(e)";

(3) by adding at the end the following:

"(2) From each fee paid to the clerk pursuant to subsection (a)(1) of this section, the clerk shall segregate the sum of

> $5, to be deposited by the clerk in a separate account maintained solely for the payment of fees awarded to the trustee pursuant to 11 U.S.C. § 326(a)(2)."

In addition, Section 326(a), title 28, United States Code, is amended as follows:

(1) by inserting "(1)" after "(a)";

(2) by adding at the end the following:

> "(2) In a case under Chapter 7 filed by an individual debtor, the court shall award the trustee an extra fee of $5 from the fund established under 28 U.S.C. § 1930(e)(2), after the trustee has certified that the trustee has completed the investigation required by section 704(10) of this title."

FUND FOR PAYMENT OF "GATEKEEPER" FEES FOR SUCCESSFUL PROSECUTION OF SECTION 707(b) MOTIONS - Section 707, title 11, United States Code, is amended by adding at the end the following:

> "(c) There is hereby established in the Treasury of the United States a special fund to be known as the "11 U.S.C. § 707(c) Fund" ("the Fund"). Monies in the Fund shall be available to the bankruptcy courts in order to pay the fees authorized under section 707(b), and for no other purpose. The United States Trustee shall transmit to the Congress, not later than 120 days after the end of each fiscal year, a detailed report on the amounts deposited in the Fund and a description of expenditures made under this section."

In addition, Section 1322(a), title 11, United States Code, is amended as follows:

(1) by striking the period at the end of paragraph (3) and adding "; and"; and

(2) by adding at the end the following:

> "(4) provide for the retention by the trustee of money equal to one-tenth of one percent of each payment on an unsecured claim scheduled to be made under the plan, to be paid quarterly by the trustee into the Fund established pursuant to 11 U.S.C. § 707(c)."

II. CHAPTER 13 TRUSTEES AND ATTORNEYS SHOULD HAVE AN

INCENTIVE TO CONFIRM AND CONSUMMATE A SUCCESSFUL PLAN

A. Description of Incentives

The gatekeeper approach suggested above should result in a substantial increase in the number of Chapter 13 filings. All participants in the bankruptcy system have a strong interest in the success of Chapter 13 plans, and the system should therefore encourage active monitoring by the "shepherds," the Chapter 13 trustee and the debtor's attorney.

Various provisions of the pending bills will also add substantially to the administrative tasks performed by Chapter 13 trustees and their attorneys. In order to provide an incentive to the trustees to perform those tasks and to actively assist the progress of the Chapter 13 plan on an ongoing basis, Chapter 13 trustees should receive an additional bonus at the end of a successful Chapter 13 plan. Similarly, attorneys for Chapter 13 debtors should get a comparable incentive to remain closely involved with the Chapter 13 case until it is successfully completed. Both of these incentive payments should be paid out of a national pool funded by a retention from Chapter 13 distributions on unsecured claims.

By the same token, it may be counterproductive to impose harsh sanctions and onerous investigatory duties on Chapter 13 attorneys, as now provided in some parts of the currently-pending legislation, such as in section 102(b)(2)(iii) of the Conference Report.[22] Those disincentives will only serve to drive Chapter 13 attorneys out of the system, leaving pro se debtors to fend for themselves, at great expense to the courts and the creditors. Under current law, the courts are plagued with incompetent filings by pro se debtors, often "assisted" by non-lawyer "bankruptcy petition preparers" who provide debtors with bad advice and outdated, inaccurate, and incomplete forms. Penalizing Chapter 13 attorneys, instead of rewarding them

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22. *See* H.R. CONF. REP. NO. 105-794, at 6-7 (1998). Section 102(b)(2)(iii) adds language that requires an attorney to perform a reasonable investigation into the circumstances that gave rise to the bankruptcy petition and to determine if the petition is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. If the court finds that the attorney failed to do so, the court may assess a civil penalty against the attorney. *See id.* at 7.

for competent work, will only exacerbate this problem.

B. Suggested Legislation Providing Appropriate Incentives to Chapter 13 Trustees and Attorneys

INCENTIVE PAYMENTS TO CHAPTER 13 TRUSTEES AND ATTORNEYS - Section 326(b), title 11, United States Code, is amended as follows:

(1) by inserting "(1)" after "(b)";

(2) by adding at the end the following:

> "(2) If a trustee appointed under section 1302(a) has provided exemplary services throughout a Chapter 13 plan that is successfully completed, the court in its discretion may award bonus compensation, not to exceed an additional one percent of all payments made on unsecured claims under the plan, to be paid from the fund established under section 1322(f) of this title."

In addition, Section 330(a)(4)(B), title 11, United States Code, is amended as follows:

(1) by inserting "(i)" after "(B)"; and

(2) by adding at the end the following:

> "(ii) If the debtor's attorney in a Chapter 13 case in which the debtor is an individual has provided exemplary services throughout a Chapter 13 plan that is successfully completed, the court in its discretion may award bonus compensation, not to exceed an additional one percent of all payments on unsecured claims made under the plan, to be paid from the fund established under section 1322(f) of this title."

FUND FOR INCENTIVE PAYMENTS TO CHAPTER 13 TRUSTEES AND ATTORNEYS - Section 1322(a), title 11, United States Code, is amended as follows:

(1) by striking the period at the end of paragraph (3) and adding "; and"; and

(2) by adding at the end the following:

> "(4) provide for the retention by the trustee of money equal to 1% of the total payments on unsecured claims scheduled

> to be made under the plan, which shall be paid quarterly by the trustee into the Fund established pursuant to subsection (f) of this section."

In addition, Section 1322, title 11, United States Code, is amended by adding at the end the following:

> "(f) There is hereby established in the Treasury of the United States a special fund to be known as the "Chapter 13 Incentive Payments Fund" ("the Fund"), to be maintained in a separate interest-bearing account. Monies in the Fund shall be available to the bankruptcy courts in order to pay the fees authorized under sections 326(b)(2) and 330(a)(4)(B)(ii) of this title, and for no other purpose. The United States Trustee shall transmit to the Congress, not later than 120 days after the end of each fiscal year, a detailed report on the amounts deposited in the Fund and a description of expenditures made under this section."

III. Debtors Who Successfully Complete Chapter 13 Plans Should Be Rewarded by Enhancement of Their Credit Reports

A. Description of Proposal

Currently, the filing of a bankruptcy petition by a debtor is reflected on the debtor's credit report. That should not change, but debtors who successfully complete Chapter 13 plans should have that fact reflected on their credit reports. That will provide some incentive for debtors to complete their Chapter 13 plans. However, no reference to the debtor's bankruptcy, whether resulting in a successful Chapter 13 plan or not, should remain on the debtor's credit report for more than seven years after the filing of a petition.

B. Suggested Legislation to Enhance Credit Reports of Successful Chapter 13 Debtors

ENHANCEMENT OF CREDIT REPORTS OF SUCCESSFUL CHAPTER 13 DEBTORS - Section 1681c(d), title 15, is amended by adding the following:

"If (i) any case arising under Chapter 13 of title 11 has re-

> sulted in a successfully completed plan and (ii) the debtor provides the consumer reporting agency with documentation certifying successful completion, the consumer reporting agency shall include in the report a statement that the Chapter 13 plan was successfully completed; provided, however, that any such report of successful completion must be deleted from the report within the time period governing the deletion of the report of the initial filing of the petition under title 11."

CERTIFICATE OF SUCCESSFUL COMPLETION OF CHAPTER 13 PLAN - Section 1328, title 11, is amended to add the following:

> "(f) Upon successful completion of all payments under the plan, and upon request by the debtor, the trustee shall prepare, for the court's signature, a certificate of successful completion. A certified copy of that certificate may be presented by the debtor to any consumer credit reporting agency pursuant to 15 U.S.C. § 1681c(d)."

IV. THE CURRENT "ANTI-CRAMDOWN" PROVISIONS ARE OVERBROAD

A. Chapter 13 Should Remain More Attractive to Debtors than Chapter 7, but Broad "Anti-Cramdown" Provisions Are Counterproductive

If Chapter 13 becomes too burdensome, higher-income debtors will more strongly resist the gatekeepers' efforts to dismiss their Chapter 7 petitions. Also, provisions that make it harder to confirm Chapter 13 plans are counterproductive: failed Chapter 13 plans will convert to Chapter 7 liquidations. Some provisions in the current legislation may make many Chapter 13 plans unconfirmable or unattractive.

Sections 124 and 125 of the Conference Report,[23] the current "anti-cramdown" provisions, are so onerous that they may imperil the Chapter 13 process, to no one's advantage. For example, section 124 provides that if the secured party holds a purchase money secu-

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23. *See id.* at 24-25.

rity interest created within five years of the debtor's bankruptcy filing, the debtor must pay off the debt in full.[24] That is an impossible task that will defeat many, if not most, Chapter 13 plans. Unlike the current Bankruptcy Code, it will require full payment to creditors who hold minimal collateral and will protect "sub-prime" lenders at the expense of other creditors.[25]

Some creditors, such as automobile lenders and lessors, arguably should be protected by the anti-cramdown provision, because some Chapter 13 debtors purchase automobiles shortly before filing bankruptcy and then "cramdown" their lenders. However, a narrowly-crafted motor vehicle anti-cramdown rule should be sufficient to protect automobile lenders. As a matter of cold reality, any reform bill will have to protect the politically-powerful automobile finance lobby; but there is no reason to benefit all secured lenders at the expense of all unsecured creditors.

B. Suggested "Automobile Anti-Cramdown" Legislation

GIVING MOTOR VEHICLE FINANCIERS AND LESSORS FAIR TREATMENT IN CHAPTER 13 - Section 1325(a) of title 11, United States Code, is amended as follows:

(A) Paragraph (a)(6) is amended by striking "(6)" and inserting "(7);" and

(B) Paragraph (a)(6) is added as follows:

> "(6) with respect to each allowed claim provided for by the plan that is secured solely by a lease of or a security interest in the debtor's motor vehicle purchased or leased within 180 days of the filing of the petition,
>
> > (A) the holder of such claim has accepted the plan;
> >
> > (B) the plan provides (i) that the holder of such claim retain the lien or property interest securing such claim until the payment of the underlying debt determined under nonbankruptcy law, and (ii) that if the case under this chapter is dismissed or converted without completion of the plan, such lien or property interest shall also be retained by such holder to the extent recognized by

24. *See id.*
25. *See id.*

applicable nonbankruptcy law; or

(C) the debtor surrenders the property to such holder; and"

V. ASSETS MAINTAINED IN "ASSET PROTECTION TRUSTS" SHOULD BE PROPERTY OF THE ESTATE

A. Description of Proposal

Some higher-income debtors have hidden some of their assets in "asset protection trusts" in an effort to shield those assets from creditors and from the trustee in bankruptcy.[26] Those trusts are set up so that the settlor and the beneficiary are the same entity.[27] The Bankruptcy Code should be amended to make it clear that those assets are property of the estate and that the trustee has the right to seek recovery from those trusts, except for certain qualified pension or retirement trusts.

The proposed legislation (1) defines asset protection trusts, (2) invalidates restrictions on alienation in such trusts, and (3) denies a discharge to debtors who fail to turn over their property in such trusts to the trustee in bankruptcy.

B. Suggested Legislation Providing that Assets in Asset Protection Trusts Are Property of the Estate

ASSETS IN "ASSET PROTECTION TRUSTS" ARE PROPERTY OF THE ESTATE – First, Section 101, title 11, United States Code, is amended by adding subsection (3) as follows:

> "(3) "asset protection trust" means a trust governed by nonbankruptcy law, including foreign law, in which a settlor and a beneficiary of that trust are the same entity, but does not include any pension, profit-sharing, annuity, or similar

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26. *See* Norman H. Glickman, *Asset Protection Trusts and International Estate Planning*, *in* ESTATE PLANNING AND ADMINISTRATION 1993, at 585, 619 (PLI Tax L. & Est. Planning Course Handbook Series No. 228, 1993); Lynn M. Lopucki, *The Death of Liability*, 106 YALE L.J. 1, 32-38 & nn.140-70 (1996).

27. *See* Lopucki, *supra* note 26, at 33.

> retirement plan or arrangement (i) subject to the applicable provisions of the Employee Retirement Income Savings Act of 1974, or (ii) an Individual Retirement Account, to the extent protected by state law."

Second, Section 541(c)(2) of title 11, United States Code, is amended by inserting ", other than an asset protection trust," before "that is enforceable under applicable non-bankruptcy law."

Third, Section 727(a) of title 11, United States Code, is amended by adding at the end the following subsection:

> "(11) the debtor failed to deliver to an officer of the estate entitled to possession under this title any property of the debtor held in an asset protection trust."

VI. THE $100,000 "HOMESTEAD CAP" SHOULD BE RESTORED TO THE LEGISLATION

Earlier House drafts of the legislation contained a $100,000 limitation on the homestead exemption,[28] but that provision was unfortunately deleted in the most recent draft of the bill. Certain states, most notably Texas and Florida, have very liberal rules regarding homestead exemptions.[29] Wealthy debtors, well-aware of those loopholes, have often come from other states to purchase luxurious mansions, especially in Florida,[30] prior to filing bankruptcy. In essence, they use their homes as "safe harbors" for their wealth; after emerging from bankruptcy, they are free to sell their homes and recapture that value for themselves, rather than for their creditors.

There is no reason that those debtors should get away with this trick. The "homestead cap," which would have sharply limited that unsavory practice, should be restored to the pending bills. Although section 126 of the Conference Report[31] includes a two-year residency requirement, that may not be sufficient to prevent abuse. Many, and perhaps most, of the people who currently take advantage of the un-

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28. *See* S. 1301, 105th Cong. § 320 (1998); H.R. 3150, 105th Cong. § 182 (1998).

29. *See* TEX. PROB. CODE ANN. § 280 (West 1980); FLA. STAT. ANN. § 222.201 (West 1998).

30. *See* Sommer, *supra* note 13, at 51 & nn.140-43.

31. *See* H.R. CONF. REP. NO. 105-794, at 25 (1998).

unlimited homestead exemption are very wealthy and sophisticated; a one-year reachback will simply encourage them to begin insolvency planning a little earlier.

VII. THE CHAPTER 7 ESTATE SHOULD SUCCEED TO THE DEBTOR'S RIGHT TO EXCLUDE CAPITAL GAINS ON THE SALE OF A RESIDENCE

A. Description of Proposal

Under current law, the trustee may or may not be able to succeed to the debtor's right to exclude from income taxation the capital gains realized on the sale of a personal residence. The cases on point are in conflict. For example, the court in *In re Barden*[32] construed § 1398 and held that the trustee did not succeed to the debtor's rights under § 121, the capital gains exclusion.[33] At that time, however, the capital gains exclusion applied only to senior citizens.

By contrast, the court in *In re Popa*[34] has recently declined to follow *Barden*, in part because § 121 was recently amended to apply to taxpayers of all ages.[35] In any event, the court in *Popa* felt that the broad language of current § 1398 was sufficient to empower the trustee to assert the capital gains exclusion.[36]

As a result of this confusion, the trustee frequently is forced to abandon the residence to the debtor, since the capital gains liability outweighs any economic advantage to the creditors.[37] In other words, this is a de facto exemption in excess of the homestead exemption: the property is returned to the debtor, who can now sell the property and invoke the capital gains exclusion.[38]

Empowering the trustee to assert the debtor's capital gains exclusion would not result in any reduction of revenue to the IRS in most, and perhaps all, cases. As matters now stand, the trustee's abandonment means that the debtor gets the benefit of the capital

32. 205 B.R. 451 (E.D.N.Y. 1996), *aff'd*, 105 F.3d 821 (2d Cir. 1997).
33. *See id.* at 455.
34. 218 B.R. 420 (Bankr. N.D. Ill. 1998).
35. *See id.* at 426.
36. *See id.* at 428.
37. *See* David M. Warren, *On the Edge:* Popa *Disciplines the Capital Gains Tax*, 17 AM. BANKR. INST. J. 20 (1998).
38. *See Popa*, 218 B.R. at 427-28.

gains exclusion, and no tax revenue is generated. Transferring the benefit of that capital gains exclusion to the trustee in bankruptcy would not alter the net tax revenue realized by the IRS. Instead, it would increase the bankruptcy dividend ultimately received by the debtor's creditors; to the extent that those dividends generate taxable income directly or indirectly, this proposal may even result in a slight net increase in tax revenue.

B. Legislation Transferring Debtor's Capital Gains Exclusion to Chapter 7 Estate

CHAPTER 7 ESTATE SUCCEEDS TO DEBTOR'S CAPITAL GAINS EXCLUSION FOR SALE OF PERSONAL RESIDENCE - Section 1398(f)(1), title 26, United States Code, is amended as follows:

(1) by striking the period at the end and adding a comma, and

(2) by adding at the end the following language:

"including, without limitation, the capital gains exclusion, if any, available to the debtor upon the sale of property which was the debtor's primary residence pursuant to 26 U.S.C. § 121."

In addition, Section 1398(g)(6), title 26, is amended as follows:

(1) by striking the period at the end and adding a comma, and

(2) by adding at the end the following language:

"including, without limitation, the capital gains exclusion, if any, available to the debtor upon the sale of property which was the debtor's primary residence pursuant to 26 U.S.C. § 121."

VIII. THE AUDIT PROCEDURES CONTAINED IN THE CONFERENCE REPORT ARE UNREALISTICALLY BURDENSOME

A. Description of Proposal

Section 602 of the Conference Report requires the United States

Trustee to conduct audits of a certain percentage of all individual filings, for purposes of statistical sampling and error detection.[39] The House bill also requires "audits for schedules of income and expenses which reflect greater than average variances from the statistical norm . . . ."[40]

Taking the second requirement first, a literal reading of that language would require half of all filings to be reviewed, since, by definition, half of them will be above-average. That is not practicable. It may be more cost-effective to focus on those debtors most likely to understate income and overstate expenses.

Under the gatekeeper proposal advanced above, debtors whose incomes are at or near the benchmark level, that is, five times the applicable federal poverty guidelines, are most likely to falsify their data, since they may wish to escape the trustee's scrutiny in order to take advantage of Chapter 7. The United States Trustee should therefore review the reports filed by the Chapter 7 trustees pursuant to proposed section 704(10)(c),[41] under which the Chapter 7 trustee is required to report the debtor's income as a percentage of the federal poverty guidelines. If the report indicates an income level more than three times the applicable federal poverty level, the debtor will be eligible for an audit. The United States Trustee will then randomly audit five percent of those eligible. That rate is high enough to discourage inaccurate filings without imposing an undue administrative cost.

Assume for the sake of argument that each audit will cost at least $500. Assuming also that Congress does not intend to use general tax revenue to pay for those audits, the only other logical source would be bankruptcy filing fees. If the sampling technique outlined above results in a estimated audit rate of one percent of all filings, and if the average audit costs $500, filing fees would have to be increased by $5, in addition to any increase resulting from the adoption of the gatekeeper proposal articulated above. If the gatekeeper proposals are adopted along with the audit proposals, the increases in the

39. *See* H.R. CONF. REP. NO. 105-794, at 57-58 (1998).
40. *Id.* at 58.
41. *See id.*

fees will have to be cumulative. However, the United States Trustee's percentage share will not increase at the same rate.

The current filing fee for Chapter 7 and Chapter 13 petitions is $130 under 28 U.S.C. § 1930(a)(1).[42] Under current 28 U.S.C. § 589a(b)(1), the United States Trustee currently gets 23.08%, or $30.[43] If filing fees are increased to $135, the United States Trustee's share must be increased to 25.93% to cover the cost of the audits.

B. Suggested Legislation for Cost-Effective, Fully-Funded Audit Procedures

AUDIT PROCEDURES - Section 586 of title 28, United States Code is amended as follows:

(1) by amending subsection (a)(6) to read as follows:

"(6) make such reports as the Attorney General directs, including the results of audits performed under subsection (f),";

(2) by inserting at the end the following:

"(f)(1) The Attorney General shall establish procedures for the auditing of the accuracy and completeness of petitions, schedules, and other information which the debtor is required to provide under sections 521 and 1322 of title 11 in individual cases filed under Chapter 7 or 13 of such title. Such audits shall be in accordance with generally accepted auditing standards and performed by independent certified public accountants or independent licensed public accountants. Such procedures shall

(A) establish a method of selecting appropriate qualified persons to contract with the United States Trustee to perform such audits;

(B) establish a method of randomly selecting cases to be audited according to generally accepted audit standards, provided that no less than 1 out of every 20 eligible cases in each Federal judicial district shall be se-

42. *See* 28 U.S.C. § 1930(a)(1) (1994).
43. *See* 28 U.S.C. § 589a(b)(1) (1994).

lected for audit;

(C) establish procedures for reporting the results of such audits and any material misstatement of income, expenditures or assets of a debtor to the Attorney General, the United States Attorney and the court, as appropriate, and for providing public information no less than annually on the aggregate results of such audits including the percentage of cases, by district, in which a material misstatement of income or expenditures is reported; and

(D) establish procedures for fully funding such audits.

(2) The United States Trustee for each district is authorized to contract with auditors to perform audits in cases designated by the United States Trustee according to the procedures established under paragraph (1) of this subsection.

(3) According to procedures established under paragraph (1), upon request of a duly appointed auditor, the debtor shall cause the accounts, papers, documents, financial records, files and all other papers, things or property belonging to the debtor as the auditor requests and which are reasonably necessary to facilitate an audit to be made available for inspection and copying.

(4) The report of each such audit shall be filed with the court, the Attorney General, and the United States Attorney, as required under procedures established by the Attorney General under paragraph (1). If a material misstatement of income or expenditures or of assets is reported, a statement specifying such misstatement shall be filed with the court and the United States Trustee shall give notice thereof to the creditors in the case and, in an appropriate case, in the opinion of the United States Trustee, requires investigation with respect to possible criminal violations, the United States Attorney for the district.

(5) For purposes of this section, "eligible cases" shall include, without limitation, those cases in which the trustee has filed a report pursuant to 11 U.S.C. § 704(10)(c) indicating that the debtor's income is at least three times the

> most recently published applicable poverty level, in conformity with the definitions contained in the poverty guidelines updated annually in the Federal Register by the U.S. Department of Health and Human Services under authority of section 673(2) of the Omnibus Budget Reconciliation Act of 1981."

In addition, Section 589a, title 28, United States Code, is amended as follows:

(1) by adding the following language to subsection (a)(5) after the word "audits": "including, without limitation, audits required under 11 U.S.C. § 586(f)"; and

(2) by striking "23.08" from subsection (b)(1) and inserting "25.93."

Finally, Section 1930(a)(1), title 28, United States Code, is amended by striking "$130" and inserting "$135."

EFFECTIVE DATE - The amendments made by this section shall take effect 18 months after the enactment date of this Act.

IX. THE NOTICE PROVISIONS IN SECTION 603 NEED TO BE CLARIFIED

Although the substantive content of section 603 of the Conference Report, which deals with notice to creditors,[44] is sound, the language of that section may benefit from some clarification. The following suggested language may accomplish that result:

SEC. 603. GIVING CREDITORS FAIR NOTICE IN CHAPTER 7 AND 13 CASES - Section 342 of title 11, United States Code, is amended as follows:

(1) in subsection (c) by striking ", but the failure of such notice to contain such information shall not invalidate the legal effect of such notice"; and

(2) by adding at the end the following:

> "(d) If the current account number of the debtor is stated on either (i) the credit agreement between the debtor and the creditor or (ii) the last communication from the creditor to an individual debtor before the filing of a voluntary peti-

44. *See* H.R. CONF. REP. NO. 105-794, at 59.

tion, then the debtor shall include that account number in any notice to the creditor required to be given under this title.

(e) If the creditor has given the debtor written notice before the filing of the petition that the creditor wants to receive correspondence regarding the debtor's account at a specific address, then the debtor shall give all notices required by title 11 to the creditor at that address.

(f) At any time, a creditor, in a case of an individual debtor under chapter 7 or 13, may file with the court and serve on the debtor a notice of the address to be used to notify the creditor in that case. That notice will be effective five days after it is filed and served. Any notice given after that date to the creditor by the court or the debtor shall be sent to that address.

(g) Any entity may file with the court a general notice stating its address for notice in all cases under chapters 7 and 13. That notice will be effective 30 days after it is filed. Any notice given by the court after that date to that entity in any chapter 7 or 13 case shall be sent to that address, unless the entity requests a different address under subsection (f) with respect to a particular case.

(h) If a debtor or the court gives notice to a creditor without complying with this section, that notice shall not be effective until it has been actually brought to the attention of the creditor. If the creditor has designated a person or department to be responsible for receiving notices concerning bankruptcy cases and has established reasonable procedures so that bankruptcy notices received by the creditor will be delivered to that department or person, a notice will not be deemed to have been brought to the attention of the creditor until it is received by that person or department.

(i) Until a creditor has received effective notice of the commencement of the case under this section, the court shall not impose any sanction on that creditor under sections 362, 542, or 543 of this title on account of the creditor's violation of the stay or failure to comply with those

sections."

X. THE PROPOSAL TO PROHIBIT "INSTALLMENT REDEMPTIONS" WILL RESOLVE AMBIGUITIES AND CONFLICTS IN THE CURRENT LAW

Some courts have interpreted § 521(2)(A)[45] to permit debtors to retain collateral without either redeeming it or reaffirming the underlying debt.[46] Instead, the debtors are permitted to make installment payments over time without reaffirmation, while still keeping and using the collateral. Other courts have held that the Bankruptcy Code prohibits this option.[47]

To permit a debtor to retain collateral while simply making installment payments without a reaffirmation of the underlying debt allows the debtor to force a new arrangement on the secured creditor unilaterally. Further, the availability of this option means that few debtors will ever elect to reaffirm secured obligations: why would a debtor want to reaffirm, when he can get the benefit of reaffirmation, i.e., retention of the collateral, without a long-term commitment?

If debtors have the option of "installment redemption," secured creditors cannot obtain genuine reaffirmation agreements unless they offer huge discounts on the underlying debt. That type of "back door cramdown" in Chapter 7 is not what Congress had in mind when it drafted the reaffirmation provisions of the 1978 Code. This also serves as a disincentive to file for Chapter 13 relief. The proposed legislation, reflected in section 121 of the Conference Report,[48] resolves the ambiguity in § 521, settles the split among the circuits, and restores a level playing field with respect to reaffirmation agreements.

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45. 11 U.S.C. § 521(2)(A) (1994).

46. *See* McClellan Fed. Credit Union v. Parker (*In re* Parker), 139 F.3d 668, 672-73 (9th Cir. 1998) (permitting "installment redemption" but recognizing a sharp split among the circuits on this issue); Lowry Fed. Credit Union v. West (*In re* Lowry), 882 F.2d 1543, 1546 (10th Cir. 1989) (holding that debtor's failure to redeem or reaffirm debt did not give secured creditor automatic right to repossess collateral).

47. *See* Johnson v. Sun Fin. Co. (*In re* Johnson), 89 F.3d 249, 252 (5th Cir. 1996); Taylor v. AGE Fed. Credit Union (*In re* Taylor), 3 F.3d 1512, 1516-17 (11th Cir. 1993).

48. *See* H.R. CONF. REP. NO. 105-794, at 23.

XI. THE PROVISIONS TO DISCOURAGE BAD FAITH REPEAT FILINGS ARE SIMPLE, STRONG, AND EASY TO ADMINISTER

Section 120 of the Conference Report contains provisions designed to address the problem of "bad faith repeat filings," which are often undertaken in an effort to forestall real property foreclosures.[49] As a secured creditor is about to foreclose, the debtor often transfers the property, or a fractional interest in it, to a third party, who then files a new bankruptcy petition. Sometimes, the original owner of the property becomes the victim of the transferee, who files repeated petitions and rents out the property to unsuspecting tenants while pocketing the rent. Statistical studies indicate that many millions of dollars in real property are tied up every year as the result of bankruptcy foreclosure fraud.

Section 121 of H.R. 3150[50] and section 303 of S. 1301[51] contained similar, but much more complex, provisions. A simpler, stronger, and easier alternative was developed by the Bankruptcy Foreclosure Scam Task Force of the United States Bankruptcy Court, Central District of California, chaired by Judge Lisa Hill Fenning.[52] That Task Force included bankruptcy judges, representatives of consumer groups, representatives of the United States Trustee's office, the office of the United States Attorney, the Federal Bureau of Investigation, and representatives of mortgage lenders.[53] Section 120 of the Conference Report appears to have adopted the recommendations of the Task Force virtually verbatim; not surprisingly, I endorse that approach. I do not want to repeat the material contained in the Task Force Report, since it is published in this Symposium. To summarize, though, section 120 authorizes relief from the stay based upon a showing of fraud.[54] The resulting order, if recorded, would mean

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49. *See id.* at 22-23.

50. Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. § 121.

51. Consumer Bankruptcy Reform Act of 1997, S. 1301, 105th Cong. § 303.

52. *See* Honorable Lisa Hill Fenning et al., *Final Report of the Bankruptcy Foreclosure Scam Task Force* (last modified June 25, 1998) <http://www.abiworld.org/research/finalreport_cdcalif_6_98.html>.

53. *See id.* The author of this article served as the Legislative Reporter for that Task Force, but the report that ultimately emerged was primarily the work of Judge Fenning.

54. *See* H.R. CONF. REP. NO. 105-794, at 22.

that the filing of future bankruptcies within two years involving the property would not give rise to an automatic stay of foreclosure. The debtor in the subsequent case or any other party to that case, however, would have the right to seek the imposition of a stay for cause shown.

XII. CONCLUSION

Like it or not, bankruptcy reform is on its way, in some form or another. It will almost certainly include needs-based access to Chapter 7. Practitioners, creditors, and the courts have a strong incentive to work together now to make sure that whatever emerges from Washington will be practicable, fair, and sensible. Otherwise, we are doomed to endure a time of chaos, followed by the inevitable "technical amendments."