

# Once Is Not Enough: Preserving Consumers' Rights to Bankruptcy Protection

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Once upon a time, it was understood that customers paid for their purchases and borrowers honored their debts. If you couldn't afford something, you didn't buy it. If you took out a loan, you found a way to pay it back. To go bankrupt was a humiliation; unless you were the victim of a natural disaster or were wiped out in a depression, you shunned bankruptcy at all costs.

That was then, this is now. Today . . . nearly anyone can walk away from his debts. The law makes it so easy to stiff creditors that nearly 1 million Americans do so annually. . . . [F]or tens of thousands . . . declaring bankruptcy is simply a maneuver for cheating creditors.<sup>1</sup>

Let's stop a minute to ask, who's complaining?

Is this the same mortgagee that loaned this poor gas station mechanic \$150,000 on a three bedroom townhouse that will historically lose value over the next ten year[s]?

Is this the same mortgagee that allowed the poor gas station mechanic to miss twelve months of mortgage payments, and then refused to accept anything other than payment in full?<sup>2</sup>

## INTRODUCTION

The rhetoric of consumer bankruptcy "reform" does not match the reality of the bankruptcy experience of American families. This Article analyzes the contrast between the rhetoric—casting consumers as stupid and lazy; unwilling to pay their debts but willing to abuse the bankruptcy laws to avoid meeting their economic obligations<sup>3</sup>—and the reality that every objective study shows that

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1. Jeff Jacoby, *Rewarding Deadbeats*, BOSTON GLOBE, June 10, 1997, at A27.

2. Survey Response of the Standing Chapter 13 Trustee from the Eastern District of Virginia (question 20) (on file with Author) [hereinafter Trustee, E.D. Va.]; see *infra* Part IV.

3. See, e.g., *Forgive Us Our Debts?*, DAILY OKLAHOMAN, Dec. 28, 1996, at 4, available in 1996 WL 12316335; Fred R. Bleakley, *Personal Bankruptcy Filings Are Soaring*, WALL ST. J., May 8, 1996, at A2; A Profile of Debt, Income and Expenses of Consumers in Bankruptcy 3-5 (Dec. 17, 1996) [hereinafter *Staten Testimony*] (testimony of Dr. Michael E. Staten, Director of the Credit Research Center at the Krannert Graduate School of Management, Purdue University, before the National Bankruptcy Review Commission) (unpublished testimony on file with author); James Carter, Editorial, *A Fresh Start or a Free Ride?*, ST. LOUIS POST-DISPATCH, Jan. 7, 1997, at 11B; LAWRENCE CHIMERINE, MASTERCARD INT'L,

bankrupt consumers are drowning in debt.<sup>4</sup> Armed with this rhetoric, the consumer credit industry is on the verge of persuading Congress to place enormous restrictions on the right of debt burdened individuals to seek bankruptcy protection.<sup>5</sup> Much attention has been paid to the credit industry's calls for means-tested Chapter 7<sup>6</sup>—the requirement that debtors whose income exceeds a set amount must file a Chapter 13 repayment plan instead of discharging their debts through Chapter 7.<sup>7</sup> However, the attack on access to Chapter 13 itself, while part of the same legislative package, has not been the focus of media or scholarly attention. This Article focuses on an aspect of the credit industry's attack that has received virtually no attention—the elimination of the debtor's

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AMERICANS IN DEBT: THE REALITY 24, 29 (1997); Robert L. Serton & Gary Galles, Editorial, *Why the Rise in Bankruptcy?*, *INV. BUS. DAILY*, Jan. 7, 1997, at A2, available in 1997 WL 4601028.

4. "Academicians have an obligation to be clear on one point: there are no data showing that the consumer bankruptcy system is shot through with abuse. Indeed, most data, including the consumer credit industry's own studies, show that the system is generally used by American families in desperate financial circumstances." Elizabeth Warren, *A Principled Approach to Consumer Bankruptcy*, 71 *AM. BANKR. L.J.* 483, 493 (1997) [hereinafter Warren, *Principled Approach*]; see also Jean Braucher, *Increasing Uniformity in Consumer Bankruptcy: Means Testing as a Distraction and the National Bankruptcy Review Commission's Proposals as a Starting Point*, 6 *AM. BANKR. INST. L. REV.* 1, 7-8 (1998); Elizabeth Warren, *The Bankruptcy Crisis*, 73 *IND. L.J.* 1079 (1998) [hereinafter Warren, *Bankruptcy Crisis*].

5. See the Bankruptcy Reform Act of 1998, which was passed by the House of Representatives on June 10, 1998. H.R. 3150, 105th Cong. (1998). A similar bill, originally the Consumer Bankruptcy Reform Act of 1997, passed the Senate on September 23, 1998 as an amendment to H.R. 3150. The conference version heavily favored H.R. 3150 and was passed by the House. In the face of a threatened filibuster and presidential veto, the conference bill was not brought to a vote in the Senate before it adjourned. See Caroline E. Mayer, *Negotiators Complete Bankruptcy Reform Bill*, *WASH. POST*, Oct. 8, 1998, at E1. Several other bills were introduced, including the Responsible Borrower Protection Bankruptcy Act, H.R. 2500, 105th Cong. (1997) (dropped in favor of House Bill 3150), and the Consumer Lenders and Borrowers Bankruptcy Responsibility Act of 1998, H.R. 3146, 105th Cong. (1998). The more balanced bill, House Bill 3146, was left dormant in committee. The bankruptcy "reform" effort will begin anew in the 106th Congress. See Michael Schroeder & Jacob M. Schlesinger, *Financial-Services Bills Appear Dead, For Now*, *WALL ST. J.*, Oct. 12, 1998, at A4. This legislative effort has been described as "the quest that is approached about every two decades—the search for a 'fair' consumer bankruptcy system." Henry E. Hildebrand, III, *The Hidden Costs of Bankruptcy Reform*, *AM. BANKR. INST. J.*, Apr. 1998, at 16; see also *Bankruptcy Law Revision: Hearings on H.R. 3150 Before the House Subcomm. on Commercial and Admin. Law*, 105th Cong. (1998) [hereinafter *Donald Testimony*] (statement of Hon. Bernice B. Donald, U.S. District Court Judge), available in 1998 WL 11515640 (detailing the history of the credit industry's legislative efforts to reduce access to bankruptcy relief). This Article analyzes H.R. 3150 as passed by the House of Representatives in June as the prime example of the credit industry's proposals concerning repeat bankruptcy filings.

6. For a helpful summary of the differences between the Chapter 7 liquidation bankruptcy and the Chapter 13 repayment plan bankruptcy, see HENRY J. SOMMER ET AL., *CONSUMER BANKRUPTCY LAW & PRACTICE* § 6.3 (5th ed. 1996).

7. See, e.g., Warren, *Principled Approach*, *supra* note 4, at 490; Gary Klein, *Consumer Bankruptcy in the Balance: The National Bankruptcy Review Commission's Recommendations Tilt Towards Creditors*, 5 *AM. BANKR. INST. L. REV.* 293, 295 n.13 (1997); Hildebrand, *supra* note 5, at 16; Braucher, *supra* note 4, at 1-2, 5.

right to refile under Chapter 13 after a first bankruptcy fails or after she receives a discharge. I conducted an empirical study to examine the nature of Chapter 13 refilings. This research, supported by the views and perceptions of the Chapter 13 standing trustees, and an examination of the reported cases addressing refilings, refutes the anti-consumer rhetoric. Rather than portraying Chapter 13 refilings as inherently abusive of a bankruptcy process that cannot cope with the problem,<sup>8</sup> these sources illustrate that the current system fairly and effectively copes with the limited abuse that actually exists.

Since 1978, the Bankruptcy Code ("Code") has allowed consumers to file for bankruptcy under Chapter 13 whenever their circumstances dictated such a filing, subject to certain specific limitations on abusive filings.<sup>9</sup> The credit industry proposals<sup>10</sup> currently pending in Congress virtually eliminate the debtor's right to refile if her first effort under Chapter 13 fails.<sup>11</sup> This change is part of the proposed legislation's enormous restriction of the consumer's right to seek Chapter 13 bankruptcy protection.<sup>12</sup> Although the restrictions on refiling are only one among many misguided proposals, they merit specific evaluation. The refiling prohibitions will encourage consumers to resort to liquidation bankruptcies under Chapter 7 instead of using Chapter 13 to repay their debts, even though the stated mission of the legislation is to reduce alleged abusive overuse of Chapter 7.<sup>13</sup> The practical elimination of the right to refile will also reduce Chapter 13's effectiveness as a means for mortgage debtors to save their homes, resulting in inevitable increases in foreclosure and loss of homes.<sup>14</sup> In essence, these "reforms" of bankruptcy will reduce consumer access to any form of bankruptcy protection, leaving the administration and collection of debt in the control of the creditors.

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8. See *infra* Parts IV, V.

9. Under § 109(g), an individual or a family farmer is barred from filing any type of bankruptcy for 180 days after her prior bankruptcy was dismissed "for willful failure of the debtor to abide by orders of the courts, or to appear before the court in proper prosecution of the case," or if the debtor voluntarily dismissed her prior case after a creditor requested relief from the automatic stay. 11 U.S.C. § 109(g) (1994). Section 349(a) provides that dismissal of a bankruptcy case does not bar future filings or later discharge of dischargeable debts included in the dismissed case, except as provided in § 109(g) or unless the court "for cause, orders otherwise." *Id.* § 349(a). Section 1325(a)(3) directs the court to confirm Chapter 13 plans that, *inter alia*, are proposed in good faith. *Id.* § 1325(a).

10. House Bill 3150 can fairly be described as a credit industry bill. Credit industry representatives wrote key provisions of the legislation. See Jacob M. Schlesinger, *Card Games: As Bankruptcies Surge, Creditors Lobby Hard to Get Tougher Laws*, WALL ST. J., June 17, 1998, at A1. According to the *New York Times*, financial services companies collectively spent over \$40 million to promote House Bill 3150 and other banking legislation in 1997. Katharine Q. Seelye, *House to Vote Today on Legislation for Bankruptcy Overhaul*, N.Y. TIMES, June 10, 1998, at A18; see *Donald Testimony*, *supra* note 5; Klein, *supra* note 7, at 295 nn.11-14.

11. See *infra* text accompanying notes 73-82.

12. The credit industry bills restrict initial access to Chapter 13, making bankruptcy protection more difficult and more expensive to get. See *infra* Part II.C.

13. See *infra* Parts II, III; see also Eugene R. Wedoff, *An Analysis of the Consumer Bankruptcy Provisions of H.R. 3150, Proposed Bankruptcy Reform Legislation* (visited Jan. 18, 1999) <<http://www.abiworld.org/legis/bills/revwedofmar98.html>>.

14. See Wedoff, *supra* note 13; see also *infra* Part VI.

Part II of this Article reviews the background and purpose of Chapter 13's refiling provisions and explores the genesis of the attack on access to Chapter 13. Part III examines the role of the National Bankruptcy Review Commission and its relationship to the repeat filing issue. Part IV analyzes the responses received from Chapter 13 standing trustees throughout the country to questions about the level of abuse and the repeat filing proposals then pending before the Commission. As objective players in the system, the trustees are uniquely qualified to identify levels of abuse and to evaluate proposals for change. The trustees' voice, almost unanimously, supports keeping the flexibility the Code currently has. Part V examines the case law in the area of serial filings, which shows that courts are making effective use of the currently available tools to curb abusive serial filings. The number of reported opinions is modest compared to the number of bankruptcies filed; the paucity of cases alone refutes the claims that the court system is choked with meritless filings. Chapter 13 is imperfect but not fatally flawed. It can be abused, but courts can spot and redress that abuse through existing mechanisms. In Part VI, this Article analyzes the crucial relationship of Chapter 13 bankruptcy to the rights of homeowners and the importance of continuing to foster those rights. Chapter 13 provides a key opportunity for consumers to hold onto their homes and hold onto a stronger stake in their communities and neighborhoods.<sup>15</sup> The bankruptcy system should continue to foster home ownership, not impede it. The Article concludes with a defense of the current Code system allowing reasonable access to Chapter 13 relief.

## II. HISTORY OF CHAPTER 13 AND THE GENESIS OF THE ATTACK

### *A. The 1978 Code Fulfilled Its Conscious Intention to Promote Chapter 13 over Chapter 7*

The modern Bankruptcy Code, enacted in 1978, embodied numerous legislative goals. For consumers, the primary goals were to enable debtors to obtain a fresh start in their financial lives, unencumbered by the mountain of debt discharged in the bankruptcy, while concomitantly providing fair and equal treatment for the creditors. The Code was crafted to encourage consumer debtors to attempt repayment through a Chapter 13 filing instead of choosing immediate liquidation under Chapter 7.<sup>16</sup> Chapter 13 is entitled "Adjustment of Debts of an Individual with Regular Income."<sup>17</sup> A Chapter 13 bankruptcy is best envisioned as a

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15. See Julia Patterson Forrester, *Mortgaging the American Dream: A Critical Evaluation of the Federal Government's Promotion of Home Equity Financing*, 69 TUL. L. REV. 373, 406 (1994). See generally Anne B. Schlay, *Housing in the Broader Context in the United States*, 6 HOUSING POL'Y DEBATE 695 (1995).

16. See S. REP. NO. 95-989, at 141 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5927; H.R. REP. NO. 95-595, at 118 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6079; Warren, *Principled Approach*, supra note 4, at 495; Braucher, supra note 4, at 12 & n.65.

17. 11 U.S.C. §§ 1301-1330 (1994).

repayment plan organized through the bankruptcy court.<sup>18</sup> In contrast to Chapter 7, which requires a debtor to give up her non-exempt assets in return for a discharge of debts, a Chapter 13 debtor proposes a repayment plan to the court.<sup>19</sup> Chapter 13 is highly flexible with few absolute requirements.<sup>20</sup> The plan must provide adequate funding to pay the claims provided for in the plan.<sup>21</sup> The plan must provide for full payment of priority claims, which include the trustee's administrative fee, attorney's fees and some tax claims.<sup>22</sup> If claims are classified, the plan must provide the same treatment for each claim in a class.<sup>23</sup> Creditors of the trustee can block confirmation of a plan that provides unsecured creditors with less than they would receive in a Chapter 7 liquidation;<sup>24</sup> that does not provide for the present value of any allowed secured claim;<sup>25</sup> or that was not proposed in good faith.<sup>26</sup> The debtor must devote her disposable income to fund the plan for a minimum of three years.<sup>27</sup> And the debtor must be able, realistically, to make the payments proposed in the plan, commonly referred to as the feasibility test.<sup>28</sup> A Chapter 13 debtor must be able to commit to making payments to the trustee for a minimum of three years up to a maximum of five years.<sup>29</sup> Congress recognized the value of the Chapter 13 bankruptcy to debtors as well as to creditors—it allowed debtors an increased sense of self-worth and provided at least some payment to creditors. Congress also recognized the need for a voluntary system.<sup>30</sup> Chapter 13 was deliberately designed to provide greater advantages to consumer debtors than a Chapter 7 filing in order to encourage them to use Chapter 13 to repay to the extent possible.<sup>31</sup> Only Chapter 13 provides consumer debtors with the tools to repay secured debts<sup>32</sup> to save their

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18. See LAWRENCE P. KING, ET AL., 8 COLLIER ON BANKRUPTCY, ¶ 1300.01-02 (15th ed. revised, 1998).

19. See *id.*

20. See *id.* at ¶ 1322.01.

21. See 11 U.S.C. § 1322(a)(1).

22. See *id.* § 1322(a)(2).

23. See *id.* § 1322(a)(3).

24. See *id.* § 1325(a)(4). Section 1325(a)(4) allows a debtor to retain non-exempt property in a Chapter 13 bankruptcy so long as she pays her creditors the value of what they would have received if that property had been sold in a Chapter 7 liquidation. *Id.*

25. See *id.* § 1325(b)(1)(A).

26. See *id.* § 1325(a)(3).

27. See *id.* § 1325(c).

28. See *id.* § 1325(a)(6).

29. See *id.* § 1322(d).

30. See Klein, *supra* note 7, at 322 nn.177-78.

31. The Chapter 13 "superdischarge" discharges a broader range of debts than can be discharged under Chapter 7, including older tax obligations and debts resulting from fraud or malicious and willful injury. Compare 11 U.S.C. § 1328(a) (1994), with 11 U.S.C. § 523(a) (1994). This incentive to choose Chapter 13 is also under legislative attack. See *supra* note 5.

32. Secured claims, a mortgage for example, are typically treated in one of four ways in a Chapter 13 plan. The plan can not provide for the claim at all. Such a claim rides through the bankruptcy unaffected and is not discharged. The holder of the claim must still seek relief from the automatic stay before enforcing the claim outside of the bankruptcy but relief is usually easily obtained. The plan may provide for cure and reinstatement of the claim. In this situation the debtor must resume making her ongoing installment payments on the debt directly to the

homes and cars. Chapter 13 was consciously promoted by making the Chapter 13 discharge broader and by leaving the choice of filing under Chapter 13 solely the choice of the debtor.<sup>33</sup> As part of the effort to encourage use of Chapter 13, the Code allows much broader access to it than to Chapter 7. A debtor can seek Chapter 13 relief any time she qualifies for relief, even if she has previously received a bankruptcy discharge or has been unable to complete a previous plan. She qualifies for relief by meeting the good faith standards and other requirements of §§ 1322 and 1325.<sup>34</sup> In contrast, a consumer can receive only one Chapter 7 discharge every six years.<sup>35</sup> But now the very incentives for use of Chapter 13 are under attack by those who complain that too few debtors choose Chapter 13 over Chapter 7.

The Chapter 13 system was designed to allow the court, the debtor, and the creditors maximum flexibility to achieve the goals of fairness to creditors and a realistic fresh start for the debtor.<sup>36</sup> Chapter 13 is not an easy process as it currently exists. It requires the financially distressed debtor to resume monthly payments on secured debt, to pay the total delinquent amount owed on all secured debts and the total owed on priority debts,<sup>37</sup> and to devote her disposable income to payments of her debts for a minimum of three years.<sup>38</sup> Although a high

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creditor but, through her plan payments, the creditor receives distributions sufficient to cover the present value of the amount necessary to cure as of the filing date for the bankruptcy. When the plan is consummated and the debtor receives a discharge, she should be reinstated and be current on the mortgage as if the delinquency and the bankruptcy never existed. Where the collateral is worth less than the amount of the debt, the debtor may bifurcate the claim into secured and unsecured claims, pay the secured claim in full and provide for the unsecured portion as she does for all other unsecured claims. In this situation, the debtor will pay off the entire secured claim and the mortgage should be satisfied once she achieves discharge. Finally, the debtor has the option of paying the secured claim in full—in other words, the entire remaining balance can be provided for in the plan. Again, this treatment should result in satisfaction of the mortgage once discharge is achieved. *See SOMMER ET AL., supra* note 6, at 235-63.

33. *See Klein, supra* note 7, at 322 & n.179.

34. Section 1322 requires that Chapter 13 plans be adequately funded to provide for the claims, to provide for full payment of priority claims, and to treat claims within each class equally. 11 U.S.C. § 1322(a)(1)-(3). Section 1325 directs the court to confirm a plan if it complies with the Code, fees have been paid, the plan is proposed in good faith, the creditors receive no less than what they would get in a Chapter 7 liquidation, the plan provides for the present value of the provided for secured claims, and the debtor will be able to make the payments. *Id.* § 1325(a) (1994). If the trustee or an unsecured claimant objects to confirmation, the court cannot confirm a plan unless the value of property to be distributed under the plan is not less than the amount of the claims, and the plan requires the debtor to submit all of her disposable income for three years to fund the plan. *See id.* § 1325(b).

35. *See id.* § 727(a)(8).

36. *See Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934); H.R. REP. NO. 95-595, at 117 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6078; Warren, *Principled Approach, supra* note 4, at 491.

37. Priority debts are defined in § 507 and include the administrative expenses of the bankruptcy, certain tax debts, wage and pension claims of the debtor's employees, consumer deposits, alimony, and child support. 11 U.S.C. § 507 (1994).

38. *See id.* § 1322 for required plan provisions.

percentage of Chapter 13 debtors fail to reach discharge,<sup>39</sup> only Chapter 13 offers the debtor the chance to save a home from foreclosure, to pay unsecured debts to the extent possible, and to discharge debts that cannot be discharged in Chapter 7.<sup>40</sup>

One key component of the flexibility of Chapter 13 is the consumer's right to refile, limited only by good faith and by the specific provisions of 109(g), which bar refiling for six months if the debtor voluntarily dismisses the bankruptcy after a creditor asks for relief from the automatic stay to resume collection activity.<sup>41</sup> This flexibility is crucial to the effectiveness of bankruptcy as a consumer remedy. It is critically important to allow debtors to seek the protection of Chapter 13 again, even if a first attempt was thwarted by job loss, marital discord, or other life events. The Code provides ample means to police abuse by repeat filers.<sup>42</sup> There is no need to impose new arbitrary limits on the right to refile, and real harm will result if debtors are denied the right to use Chapter 13 to save their homes.

*B. The Rhetoric—The Increase in Bankruptcy Filings Is  
the Result of Moral Decay, Not Increased Lending by  
Creditors*

The main factor fueling the move toward limiting the right to use Chapter 13 is the great increase in bankruptcy filings over the last twenty years.<sup>43</sup> Representatives of the consumer credit industry have attributed that increase, in large part, to the alleged moral decay and unwillingness of modern consumers to

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39. See NAT'L BANKR. REV. COMM'N, *BANKRUPTCY: THE NEXT TWENTY YEARS* 233-34 (1997) [hereinafter *COMMISSION REPORT*].

40. Only Chapter 13 offers the debtor the opportunity to reinstate delinquent secured debts, most important a mortgage debt, by allowing her to resume making her ongoing payments and, through her Chapter 13 plan, paying the secured creditor the entire delinquent amount over the life of the plan. Because mortgage lenders are loathe to accept any payment agreement that exceeds six months, repayment through Chapter 13 is the ordinary debtor's only effective way of catching up on a delinquent mortgage to retain ownership of her home. See Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 *AM. BANKR. L.J.* 501, 526 (1993).

41. 11 U.S.C. § 109(g) (1994). This provision was added to the Code to preclude bad faith debtors from filing on the eve of foreclosure, failing to comply with any Code obligations, dismissing the bankruptcy once the creditor gets relief from the stay, and then refiling on the eve of the new foreclosure. See *In re Narod*, 138 B.R. 478, 483 (Bankr. E.D. Pa. 1992).

42. See *infra* Part V. Chapter 13 plans must apply the debtor's disposable income for distribution under the plan and must be proposed in good faith. See 11 U.S.C. § 1325(a)(3), (b)(1)(B) (1994). Some circuits explicitly impose the additional requirement that the debtor file the petition itself in good faith; lack of good faith is grounds for dismissal of the bankruptcy. See *In re Lilley*, 91 F.3d 491, 496 (3d Cir. 1996).

43. Bankruptcy filings increased to 1.3 million in 1997, an increase over the 1.1 million filed in 1996. See Braucher, *supra* note 4, at 4 n.21 (citing *Consumer Bankruptcy Filings Up 20 Percent in 1997*, *CONSUMER BANKR. NEWS*, Mar. 26, 1998, at 1). The vast majority of bankruptcy filings are consumer filings under Chapters 7 and 13. See Warren, *Principled Approach*, *supra* note 4, at 488 n.12.

make a good faith effort to pay debts that they actually can afford to pay.<sup>44</sup> One witness at the Congressional hearings on bankruptcy stated this theme:

It appears that individuals may not be using bankruptcy as it was intended, as a method of getting back on one's feet after hard times. Instead, many individuals may be seeking bankruptcy protection to obtain a free ride, a method of having one's debt forgiven without having to demonstrate need.<sup>45</sup>

The specter of the "serial filer," a debtor who has developed the bankruptcy strategy to a high art, is blamed for abusing the bankruptcy system.<sup>46</sup> These abuses are claimed to be choking the system with cases filed solely for delay, with

44. See *Staten Testimony*, *supra* note 3, at 3-5; Chimerine, *supra* note 3, at 19; see also *Hearings on H.R. 3150 Before the Subcomm. on Financial Insts. and Regulatory Relief of the Senate Comm. on Banking, Housing, and Urban Affairs*, 105th Cong. (1998), available in 1998 WL 8991929 [hereinafter *Smith Testimony*] (testimony of James E. Smith, Chairman, Am. Bankers Assoc.'s Gov't Relations Council); *Hearings on H.R. 3150 Before the Subcomm. on Admin. Oversight and the Senate Comm. on the Judiciary*, 105th Cong. (1998), available in 1998 WL 8993075 [hereinafter *McDonnell Testimony*] (testimony of Brian L. McDonnell, Nat'l Assoc. of Federal Credit Unions); *The Financial Costs of Personal Bankruptcy*, *Hearings on H.R. 3150 Before the Subcomm. on Financial Insts. and Regulatory Relief of the Senate Banking Comm.*, 105th Cong. (1998), available in 1998 WL 18090108 [hereinafter *Lauritano Testimony*] (testimony of Mark Lauritano, Senior Vice Pres., WEFA, Inc.); *Personal Bankruptcy Consumer Credit Crisis*, *Hearings on H.R. 3150 Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 105th Cong. (1997), available in 1997 WL 10569500 [hereinafter *Crone Testimony*] (testimony of Kenneth R. Crone, Senior Vice Pres., Visa U.S.A., Inc.); *Bankruptcy Revision*, *Hearings on H.R. 3150 Before the Subcomm. on Commercial and Admin. Law of the House of Representatives' Comm. on the Judiciary*, 105th Cong. (1998), available in 1998 WL 8992756 [hereinafter *Hammonds Testimony*] (testimony of Bruce L. Hammonds, Senior Vice Chairman and Chief Operating Officer, MBNA Corp.); *id.*, available in 1998 WL 8993085 [hereinafter *Wallace Testimony*] (statement of George J. Wallace, member, Eckert, Seamans, Cherin & Mellott, LCC). But see *Bankruptcy Revision: Hearings on H.R. 3150 Before the Subcomm. on Financial Insts. and Regulatory Relief of the Senate Comm. on Banking, Housing, and Urban Affairs*, 105th Cong. (1998), available in 1998 WL 8991931 [hereinafter *Brewer Testimony*] (testimony of William E. Brewer, Jr., National Association of Consumer Bankruptcy Attorneys). Mr. Brewer attributes the increase in consumer bankruptcy filings to the 238% increase in outstanding revolving consumer credit from 1986 to 1996. The increase in bankruptcy filings in the same period was only 122%—half of the increase in outstanding credit. He attributes the increase in bankruptcy to the enormous increase in outstanding credit at a time when disposable household income has not increased for much of the population, resulting in increased debt-to-income ratios in household and increased bankruptcy filings. See *id.*; see also Warren, *Bankruptcy Crisis*, *supra* note 4, at 1080-81 (arguing that consumer bankruptcies are increasing because consumers' debts are rising faster than their incomes).

45. *Lauritano Testimony*, *supra* note 44.

46. See *Smith Testimony*, *supra* note 44; see also *Bankruptcy Revision*, *Hearings on H.R. 3150 Before the Subcomm. on Commercial and Admin. Law Judiciary Comm. of the House of Representatives*, 105th Cong. (1998), available in 1998 WL 8992757 [hereinafter *Kosturko Testimony*] (testimony of William T. Kosturko, America's Community Bankers on Consumer Bankruptcy); *Judicial Revision*, *Hearings on H.R. 3150 Before the Judiciary Subcomm. on Admin. Oversight and the Courts of the Senate*, 105th Cong. (1998), available in 1998 WL 8993334 [hereinafter *AMSA Testimony*] (testimony of the American Financial Services Assoc.); *Wallace Testimony*, *supra* note 44.



no intent to fulfill a plan for reorganization.<sup>47</sup> Both popular and academic literature have deemed repeat filers as inherent abusers of the system.<sup>48</sup> Both are wrong. The system is working well and does not require major revisions; it is certainly not in need of wholesale destruction.

The outcry over the increase in bankruptcy filings with the serial filer emphasized as a special villain is an old story. The credit industry has been complaining since before the enactment of the Code that debtors abuse the system by repeatedly filing for bankruptcy, and by resorting to bankruptcy too quickly instead of making legitimate efforts to pay their debts.<sup>49</sup> The landmark empirical study of consumer bankruptcy published in 1989 and updated in 1994 by Elizabeth Warren, Teresa Sullivan, and Jay Westbrook<sup>50</sup> debunked many of the credit industry myths about abusive filings—or so one might have thought. They concluded that bankruptcy is a function of debt.<sup>51</sup> Their study established that the typical debtor is drowning in consumer debt, not a “sharpie” who finagled a bankruptcy filing to deliberately stiff her creditors.<sup>52</sup> The 1994 update evaluated the consumer bankruptcies filed in the decade following publication of *As We Forgive* and concluded, “the startling aspect of these data is that they demonstrate how little the bankrupt debtors of 1991 differ from their counterparts in 1981. With some qualifications, the debtors in 1991 look substantially like the debtors in 1981; there are just three times more of them.”<sup>53</sup> These findings were more recently confirmed by a 1997 study showing that the rate of bankruptcy filings closely correlates with the rate of household debt, which has increased enormously in the past two decades.<sup>54</sup> The Ausubel study notes that deregulation

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47. See *Smith Testimony*, *supra* note 44.

48. See, e.g., Spencer Zane Baretz, Note, *Combating the Chapter 13 Serial Filer: An Argument for Orders Containing Prospective Relief from the Automatic Stay Provision*, 25 HOFSTRA L. REV. 1315, 1315-17 (1997) (referring to the “increasingly common problem” of Chapter 13 serial filers without any supporting citation to Chapter 13 cases).

49. See *infra* note 59.

50. TERESA A. SULLIVAN ET AL., *AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA* (1989) [hereinafter SULLIVAN ET AL., *AS WE FORGIVE*]; Teresa A. Sullivan et al., *Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981-1991*, 68 AM. BANKR. L.J. 121, 122 (1994) [hereinafter Sullivan et al., *Consumer Debtors*].

51. See SULLIVAN ET AL., *AS WE FORGIVE*, *supra* note 50, at 331; see also Lawrence M. Ausubel, *Credit Card Defaults, Credit Card Profits, and Bankruptcy*, 71 AM. BANKR. L.J. 249, 256-58 (1997); Klein, *supra* note 7, at 294-95 & nn.6-9.

52. The authors described the conclusions of their study resulting in *As We Forgive*:

The debtors who filed for bankruptcy were, with few exceptions, mired in debt. Only a small fraction had any hope of repaying. Even those debtors who voluntarily attempted repayment in chapter 13 were in terrible shape: at most, only about a third were able to complete their repayment plans, and a significant portion of those debtors were making only minimal repayments. We concluded that the loudly heralded cases of abuse made good newspaper copy or were effective for lobbying Congress, but that they simply did not describe the typical experiences of consumer debtors in bankruptcy.

Sullivan et al., *Consumer Debtors*, *supra* note 50, at 123.

53. *Id.* at 124.

54. See Ausubel, *supra* note 51, at 251-54; see also *Brewer Testimony*, *supra* note 44.

of the credit industry has greatly increased profits while it has encouraged lending to marginal customers, which in turn has increased the default rates.<sup>55</sup> Ausubel concludes that the credit industry bankruptcy proposals “are substantially misdirected. If adopted, they would most likely lead to an increase in the level of credit card debt among persons least able to afford it and would possibly result in a worsened social outcome.”<sup>56</sup> Without the restraint of bankruptcy discharges of defaulting consumers, the credit industry will be more, not less, inclined to increase its most risky but highly profitable lending to consumers teetering on the edge of delinquency.<sup>57</sup>

The specter of the abusive serial filer is also an old ghost. *As We Forgive*, which devoted a chapter to the serial filer, noted that soon after its enactment, the 1898 Bankruptcy Act became the focus of “bitter complaints” from the creditors that debtors were abusing the system by repeatedly filing for bankruptcy.<sup>58</sup> The study concluded that the concern about abusive repeaters was overblown.<sup>59</sup> *As We Forgive* focused on the “true repeaters”—those who obtain a second discharge—and concluded that those who file more than once to obtain a single discharge are not true repeaters.<sup>60</sup>

*As We Forgive* seriously challenged a 1982 study performed by researchers at Purdue University that concluded that a third of Chapter 7 debtors could have repaid a major portion of their debts.<sup>61</sup> The main focus of the 1982 study and of *As We Forgive* was whether Chapter 7 debtors abuse the system. Yet, in 1997, fifteen years later, the credit industry again cited studies that “prove” consumer bankruptcy filings are costing the average household \$400 per year because of allegedly deadbeat and repeat bankruptcy customers who could afford to pay on their debts.<sup>62</sup> One such study, like the 1982 Purdue study, again concludes that 22.5% of Chapter 7 debtors could pay 20% or more on their debts over three

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55. See Ausubel, *supra* note 51, at 263-64. Ausubel cites estimates that in 1995, credit card issuers sent more than 2.7 billion direct mail card solicitations, in addition to huge numbers of telephone solicitations.

56. *Id.* at 264-65.

57. See *id.* at 269. For an example of the industry's disposition toward offering credit to consumers who are unlikely to be able to repay, see *infra* note 68.

58. SULLIVAN ET AL., *AS WE FORGIVE*, *supra* note 50, at 191.

59. “The image of clever debtors who declare bankruptcy when their six-year waiting period has ended and their debts have peaked is a vision from policymakers' nightmares more than it is a reality in the bankruptcy system.” *Id.* at 196-97.

60. *Id.* at 193.

61. *Id.* at 5-7; see also Teresa A. Sullivan et al., *Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data*, 1983 WIS. L. REV. 1091 (rebutting 1 CREDIT RESEARCH CTR., PURDUE UNIV., CONSUMER BANKRUPTCY STUDY 88-91 (1982)).

62. See, e.g., John M. Barron & Micheal E. Staten, *Personal Bankruptcy: A Report on Petitioners' Ability-to-Pay* 26 (Oct. 6, 1997) (on file with author); *Lauritano Testimony*, *supra* note 44; *Kosturko Testimony*, *supra* note 46; Schlesinger, *supra* note 10, at A1.

years; and 32.8% over five years.<sup>63</sup> This has a familiar ring to it. As with the 1982 study, analysis has shown the more recent studies to be seriously flawed.<sup>64</sup>

The 20% figure is highly suspect.<sup>65</sup> The “cost to society” figure is divorced from reality. This calculation assumes that all debt discharged in bankruptcy would, without bankruptcy, have been paid. A look at a few recent representative cases shows the futility of this assumption. Take Mr. and Mrs. Ellingsworth for example.<sup>66</sup> When they filed under Chapter 7 in November 1996, the Ellingsworths had a total of \$70,445 in unsecured debt, mostly on eighteen different credit cards.<sup>67</sup> Mrs. Ellingsworth, a special education teacher for eighteen years, and her husband, recently demoted from buyer to assistant manager, netted \$4180 per month with minimum living expenses of \$3383. The family’s remaining disposable income of \$797 was slightly more than half of the amount necessary to make the minimum monthly payments on their credit cards—\$1495. The credit counseling agency they consulted before resorting to bankruptcy advised them that they could not reduce expenses enough to service the debt and recommended bankruptcy. The Ellingsworths’ total unsecured debt was 1.4 times their annual net income.<sup>68</sup>

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63. See *Staten Testimony*, *supra* note 3, at 4.

64. Professor Staten’s study was critiqued by the General Accounting Office, which noted five “areas of concern”:

- (1) the report’s assumptions about the information debtors provide at the time of filing bankruptcy regarding their income, expenses, and debts and the stability of their income and expenses over a 5-year period were not validated;
- (2) the report did not clearly define the universe of debts for which it estimated debtors’ ability to pay;
- (3) payments on nonhousing debts that debtors state they intended to reaffirm—voluntarily agree to repay—were not included in debtor expenses in determining the net income debtors had available to pay their nonpriority, nonhousing debts;
- (4) the report presented results based on data from all 13 locations combined and provided little discussion of the considerable variation among the 13 locations used in the analysis; and
- (5) a scientific, random sampling methodology was not used to select the 13 bankruptcy locations or the bankruptcy petitions used in the analysis.

U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-98-47, PERSONAL BANKRUPTCY: THE CREDIT RESEARCH CENTER REPORT ON DEBTORS’ ABILITY TO PAY 2-3 (1998) [hereinafter GAO REPORT]; see also Warren, *Bankruptcy Crisis*, *supra* note 4, at 1088-93.

65. See GAO REPORT, *supra* note 64, at 2; Warren, *Bankruptcy Crisis*, *supra* note 4, at 1089; Klein, *supra* note 7, at 294-95 & n.7. “The one study which suggested that some debtors in Chapter 7 have the ability to pay their debts was exposed as fundamentally flawed. The study neglected to account for a debtor’s need to make ongoing payments on car loans and other nondischargeable debts irrespective of the bankruptcy.” *Id.* at 294 (referring to a study, cited *supra* note 62, conducted by Dr. John M. Barron & Dr. Michael Staten). “The ability to make partial payments on the balance of the debts is substantially lower than Barron and Staten calculate after these debts are separated out.” *Id.* at 294 n.7.

66. See *AT & T Universal Card Servs. v. Ellingsworth (In re Ellingsworth)*, 212 B.R. 326 (Bankr. W.D. Mo. 1997).

67. See *id.* at 328.

68. Despite this bleak picture, one creditor solicited Mrs. Ellingsworth over the telephone for a \$4000 limit card based on her Fair, Issacs Credit Bureau Score (“FICO”), which focuses primarily on the borrower’s history of payment, not on any other form of credit worthiness. See *id.* at 328. The *Ellingsworth* court noted, “[u]nfortunately this tactic guarantees that borrowers

Constance Mercer filed a Chapter 7 petition on April 23, 1996.<sup>69</sup> She owed nine credit card issuers \$31,504.50 with an annual income of \$23,931.66. She lost over \$35,000 gambling in the two years preceding her bankruptcy.<sup>70</sup> A substantial chunk of her credit card debt resulted from cash advances she obtained at an ATM located in a casino. Despite her use of that machine at a time when she was overextended, the creditor did not restrict her access to credit. The Ellingsworths and Ms. Mercer may have been well or evil intentioned, but there is little doubt that they lacked the resources to pay their creditors. Perhaps one or two aggressive creditors could garnish their wages, if allowed, making it even less likely that they could pay anyone else. No matter who is blamed for this circumstance—the improvident lender or the unwise borrower—repayment of the debt is a fantasy. If the bad debt cannot be repaid and will not be recovered absent bankruptcy, then the discharge of that debt in bankruptcy is not adding to the cost of credit.<sup>71</sup> The claim that bankruptcy filings are costing nonbankrupt borrowers \$400 annually has been accurately described as specious.<sup>72</sup> More important, the propaganda about morally decadent consumers willfully evading their debt obligations in Chapter 7 does not in any way justify the credit industry attack on access to Chapter 13 repayment bankruptcies.

*C. The Proposals Attack and Restrict Chapter 13  
Access in Contradiction to the Stated Goal  
of Encouraging Its Use*

The proponents of restricting access pay lip service to encouraging use of Chapter 13 but in reality discourage it.<sup>73</sup> The credit industry proposals will make it much more difficult for a consumer to file for Chapter 13 protection.<sup>74</sup> The

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who are encouraged to use credit cards until they acquire unsecured debt that far exceeds their income will ultimately not be able to pay their bills on time." *Id.* at 331.

69. See *AT & T Universal Card Servs. v. Mercer (In re Mercer)*, 220 B.R. 315, 317 (Bankr. S.D. Miss. 1998).

70. In both *Ellingsworth* and *Mercer*, the credit issuer—AT & T Universal Card Services—was denied its request to make the debt non-dischargeable. AT & T argued, unsuccessfully, in each case that the debtors' dire circumstances showed a lack of intent to pay the debt. The courts each determined that AT & T failed to show it relied on any intent to pay given the woeful financial state of each debtor at the time the company solicited the debtor for credit. See *In re Ellingsworth*, 212 B.R. at 339; *In re Mercer*, 220 B.R. at 316, 328.

71. See Klein, *supra* note 7, at 318 ("There is no evidence that abusive use of bankruptcy has any effect on credit card interest rates."); Ausubel, *supra* note 51, at 261.

72. See Klein, *supra* note 7, at 304 n.71.

73. See Wedoff, *supra* note 13; Braucher, *supra* note 4, at 11; Klein, *supra* note 7, at 323-24; Warren, *Principled Approach*, *supra* note 4, at 504-06.

74. The Bankruptcy Reform Act of 1998 requires the prospective debtor to try to repay her debts through a registered credit counseling service before she files for bankruptcy. H.R. 3150, 105th Cong. § 406 (1998). With her bankruptcy filing, the debtor will have to provide financial statements including copies of her last three years of federal tax returns. See *id.* She will have to provide copies of all of her bankruptcy papers to any creditor upon request. See *id.*

proposal will also make it harder for the debtor to maintain a Chapter 13 plan.<sup>75</sup> Her discharge, should she manage to obtain one, will be worth much less under these proposals.<sup>76</sup> These new burdens will increase the debtor's payment obligations significantly and will force debtors' attorneys to increase their fees to cover the additional work required of the lawyer, further limiting bankruptcy access for low and moderate income families. The administrative burden on the court and the trustee to evaluate the newly required information will also be costly.<sup>77</sup>

The credit industry proposals virtually eliminate the honest debtor's right to refile and, as a practical matter, will make it prohibitively expensive for a debtor struggling to save her home to return to Chapter 13 if her first case is dismissed. The proposals would give the debtor only a thirty-day stay if the debtor had a previous consumer bankruptcy filing within the past year.<sup>78</sup> To extend the stay, the debtor would have to petition the court and complete a hearing within the thirty-day period at which the debtor would have to demonstrate that the

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75. If her income exceeds the national median for a family of her size or smaller, the debtor will have to remain in Chapter 13 for five years, rather than the current three. *See id.* §§ 102, 409. Judge Wedoff notes the anomaly of using the median family income as a bench mark. The median shrinks relative to increases in family size. Instead of providing greater access to Chapter 13 protection for big and presumably more financially distressed families, the use of the national median as a cut-off means that the bigger family is at a higher risk of exceeding it and being forced into a five-year Chapter 13 subject to higher payments. *See Wedoff, supra* note 13. She will have to pay a minimum of \$50 per month to her noninsider unsecured creditors regardless of her ability to pay these claims; and must pay her "monthly net income," not just her disposable income, to her unsecured nonpriority creditors. *See H.R. 3150, § 102.* The debtor will have to make "adequate protection" payments to any secured creditor until that creditor begins receiving distributions under the plan. Distribution does not begin until confirmation which normally takes several months. During this interval, however, the debtor will have to make the proposed plan payments to the trustee under current law. The proposal would increase the burden on the debtor to make not only the ongoing mortgage payments and the trustee payments but also any ongoing payments on allegedly secured debts, for example, towels subject to a security interest, in order to avoid loss of the property. *See id.* § 162. It is becoming quite common for credit card companies to take security interests in every item purchased with the card. I have in the past year signed credit card receipts which purported to take security interests in sheets and towels, shoes, and other items of dubious value if repossessed. (The receipts are on file with the author.) She will be required to provide updated financial information including tax returns every year she is in bankruptcy. *See id.* § 406. She will be subject to random audits that may require much more extensive investigation and proof of her financial situation. *See id.* § 404. She will have to pay her unsecured claims pro rata with her secured claims. *See id.* § 102. She will have to remain current on her child support obligations. *See id.* § 146. She will have to pay support obligations as a first priority before administrative fees, including her attorney's fees. *See id.*

76. The debtor will not be able to discharge any debt incurred within 90 days of her filing in excess of \$250 to any one creditor for necessities. *See H.R. 3150, § 142.* Her discharge will not cover any debts incurred by fraud or willful and malicious injury, or nonsupport property debts arising from divorce; or interest owed to governmental units for support debts or tax debts that are now dischargeable under current law. *See id.* §§ 143, 145-146, 508.

77. *See Hildebrand, supra* note 5, at 16-17.

78. *See S. 1301, 105th Cong. § 303 (1997); H.R. 3150, § 121.*

bankruptcy was filed in good faith.<sup>79</sup> Absence of good faith is presumed, rebuttable only by clear and convincing evidence, for any debtor who was a debtor in more than one previous consumer bankruptcy pending within the past year; or whose previous consumer bankruptcy was dismissed after the debtor failed to file a document or amend a document on the request of the court or failed to perform in accord with a confirmed plan without substantial excuse; or for whom there has been no substantial change in circumstances; or for whom there is “no reason to conclude that the later case will be concluded with a discharge” or “there is not a confirmed plan that will be fully performed.”<sup>80</sup> The Bankruptcy Reform Act of 1998 proposal specifies that negligence or inadvertence do not meet the “substantial excuse” standard.<sup>81</sup> It is not precisely clear whether the presumption applies to all creditors or only to those who sought relief in the previous case. The proposals also give the courts discretion to grant relief in rem as to a particular item of property for an indeterminate length of time, quite possibly forever.<sup>82</sup>

Debtors who successfully complete Chapter 13 plans will also face new and serious restrictions on their access to bankruptcy protection. The proposals significantly extend the waiting period between successful bankruptcies.<sup>83</sup> Under the current Code, an individual may obtain a discharge under Chapter 7 only once in a six-year period.<sup>84</sup> The proposal would increase that time period to ten years.<sup>85</sup> Currently there is no waiting period imposed between Chapter 13 discharges.<sup>86</sup> The credit industry proposals would preclude an individual who obtains a Chapter 13 discharge from obtaining a second Chapter 13 discharge in any case filed within five years of the first filing.<sup>87</sup> This truly punishes the successful—a debtor who successfully completes a three-year plan is barred from further bankruptcy relief for years,<sup>88</sup> no matter what the circumstances, while a debtor who truly abuses the system by repetitive abusive filings suffers only a quick dismissal of the petition.

The “reform” proposals are really intended to undermine any kind of bankruptcy relief for consumer debtors. In attacking the fundamental theories of the 1978 Code, the propaganda fight against consumer debtor use of the bankruptcy laws melds and disingenuously confuses three separate issues—whether there is overuse of Chapter 7 by debtors who could fund Chapter 13 plans; whether debtors should be able to receive more than one bankruptcy

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79. See S. 1301, § 303; H.R. 3150, § 121.

80. S. 1301, § 303; see also H.R. 3150, § 121.

81. H.R. 3150, § 121.

82. See *id.*

83. See *id.* § 171.

84. See 11 U.S.C. § 727(a)(8) (1994).

85. See H.R. 3150, § 171.

86. See 11 U.S.C. § 1328 (1994).

87. See H.R. 3150, § 171.

88. Section 171 of H.R. 3150 provides that “the court shall not grant a discharge . . . if the debtor has received a discharge in any case filed under this title within 5 years of the order for relief under this chapter.” It is unclear whether the five years runs from the date of the first filing, or the entry of discharge in the first case.

discharge; and whether the Code needs to more effectively deal with repeat Chapter 13 filers who allegedly file to delay creditors without any legitimate intent to fund a plan.<sup>89</sup> This fusing of discrete issues results from the alliance between unsecured and secured creditors in their mutual fight to restrict all consumer access to bankruptcy protection.<sup>90</sup> In the commission process and continuing in the legislative debate, the different constituents of the credit industry have insisted, “Borg-like,”<sup>91</sup> that they speak as one. Different classes of creditors are advocating proposals against their own interests in a united effort to gut all consumer access to bankruptcy. For example, the secured creditors have strongly supported the means testing restrictions on Chapter 7 access—which benefit only unsecured creditors, if anyone, while the unsecured creditors have supported restrictions on Chapter 13 access which will directly reduce the chance that those creditors will get paid in Chapter 13 plans.<sup>92</sup> The secured creditors even supported a proposal requiring debtors to pay unsecured claims concomitantly with secured debt through their plans, a requirement that directly delays the secured creditor’s receipt of payments and reduces the success rate of the Chapter 13 bankruptcy.<sup>93</sup>

The cry for “means tested” Chapter 7 is premised on the idea that many Chapter 7 debtors should be in Chapter 13 instead—but in restricting access to Chapter 13, the credit industry proposal renders Chapter 13 a much less effective and

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89. The trustees’ responses repeatedly express frustration with the lumping together of these discrete issues.

You’ve got to distinguish between a serial filing and a repeat filing[.] Serial filing is where the code is being abused, i.e., the filing is for the sole purpose of invoking the automatic stay, with no intent to proceed with the Chapter 13 case.

Quite honestly, very few of these individual Debtor(s) have any idea they are abusing the Code. Most are doing it at the instance of “professional” advice.

Trustee, E.D. Va., *supra* note 2 (question 11). “The problem is not *serial* filings, it is *abusive* filings. The *first* filing—if abusive—should be dealt with firmly. Serial filings are a symptom of sloppy administration.” Survey Response of Trustee of the District of Maine (each emphasis in original) (on file with author). “I do not believe that there is a problem with the Bankruptcy Code or the Bankruptcy system which such surveys as this seem to imply.” Survey Response of a Trustee of the Western District of Tennessee (question 21) (on file with author). “First, serial filings are not the problem; abusive filings are the problem. A distinction must be made.” *Id.*

90. See Warren, *Principled Approach*, *supra* note 4, at 485-86.

The lobbyists worked to get out their messages—or, as a representative of the consumer credit industry stressed at the December 1996 meeting, their “message” (with the emphasis on the singular), since, he explained, they all felt exactly the same way and supported exactly the same approach to the consumer bankruptcy system, and they wanted to know if anyone in the credit industry stepped out of line.

*Id.* at 486 (parenthetical in original); see also Klein, *supra* note 7, at 293.

91. See Michael P. Scharf & Lawrence D. Roberts, *The Interstellar Relations of the Federation: International Law and “Star Trek: The Next Generation,”* 25 U. TOL. L. REV. 577, 602 n.158 (1994) (“The Borg are a hostile race with one collective mind and are committed to the forcible assimilation of all other races.”).

92. See Warren, *Principled Approach*, *supra* note 4, at 504-06.

93. See *id.* at 499.

attractive tool for consumers. The proposals greatly extend the time a consumer must wait to seek a second discharge—but without any analysis of whether such delay is wise or good, given that discharge has always been viewed as a successful resolution of a Chapter 13 bankruptcy. The Chapter 13 restrictions are claimed to be warranted by the anecdotal evidence of serial filer abuse that cannot be addressed by the current Chapter 13 system.<sup>94</sup> Presuming a problem does not prove it exists.<sup>95</sup> We should not be creating “solutions” to fix a problem whose existence is in doubt. The Code structures that deal with real abuse work now.<sup>96</sup> The most effective improvement would be to allow the courts greater discretion to fashion appropriate remedies on a case-by-case basis—that is, to do their jobs more effectively; not to place uniform bars to relief for the vast majority of consumers who are “honest debtors in need of a fresh start,” some of whom need more than one try to complete a Chapter 13 plan.

Under the current Code, the unwise borrowers, like Ellingsworth and Mercer, can get relief under Chapter 7—but only once every six years and only if their bankruptcy filings are not “substantial abuses” of the Code.<sup>97</sup> Mrs. Ellingsworth

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94. Even scholars refer to the “abusive, serial filer” as extant without any empirical or other support. *See, e.g., supra* text accompanying note 48 (explaining that both the popular and academic press have deemed repeat filing as inherently abusive of the bankruptcy system); Richard S. Bell, *The Effect of the Disposable Income Test of Section 1325(b)(1)(B) upon the Good Faith Inquiry of Section 1325(a)(3)*, 5 BANKR. DEV. J. 267, 269 (1987) (concluding that “extreme cases of multiple filing . . . constitute abuse” without any supporting citation to Chapter 13 cases); John F. Murphy, *The Automatic Stay in Bankruptcy*, 34 CLEV. ST. L. REV. 567, 622 (1986) (noting that “the filing of multiple petitions by debtors has been a continual source of dismay to many creditors who seek relief from the automatic stay . . . frequently the only substantial goal sought by a debtor” without any supporting citations); Richard T. Nimmer, *Consumer Bankruptcy Abuse*, 50 LAW & CONTEMP. PROBS. 89, 116 (1987) (claiming that “multiple filings over a brief time period in the face of impending foreclosure creates a presumption of abuse” without any supporting citation to Chapter 13 cases).

95. Indeed the speed and lack of debate and consideration in the current legislative process of bankruptcy reform has come under heavy criticism. *See, e.g., Letter from Bruce A. Markell et al., Professors of Law, to the United States Congressional Judiciary Committees* (last modified Apr. 3, 1998) <<http://www.law.indiana.edu/~bmarkell/slowdown.html>>; *Letter from 110 Bankruptcy Judges to the United States Congress* (visited Oct. 1, 1998) <<http://www.abiworld.org/headlines/98apr16.html>>.

96. *See infra* Part IV; *see also Donald Testimony, supra* note 5. A recent study of serial filings in the Central District of California concluded that the vast majority of abusive serial Chapter 13 filings were instigated not by the debtors but by unscrupulous individuals who marketed themselves as foreclosure specialists or mortgage consultants. The Task Force Report recommends targeting the scam operators rather than eliminating the honest debtors’ right to refile in good faith. *See United States Bankruptcy Court, Central District of California, Final Report of the Bankruptcy Foreclosure Scam Task Force* (May 1998) (visited July 8, 1998) <[http://www.abiworld.org/research/finalreport\\_cdcalif\\_6\\_98.html](http://www.abiworld.org/research/finalreport_cdcalif_6_98.html)> [hereinafter *Task Force Report*].

97. “Substantial abuse” is not defined in the Code but most circuits define it as a debtor’s effort to take unfair advantage of her creditors based on a totality of the circumstances. *See, e.g., Green v. Staples (In re Green)*, 934 F.2d 568, 572 (4th Cir. 1991). The relevant circumstances include whether the debtor filed due to a sudden illness, disability or unemployment; whether the debtor incurred cash advances or made purchases beyond her ability to repay; whether the debtor’s budget includes excessive or unreasonable expenses; and



and Ms. Mercer got their discharges. They can devote their future resources to caring for their families instead of trying to service their vast debt loads. Under the theory of the 1978 Code, this result is entirely appropriate and desirable. But if either woman had wanted instead to try a repayment plan under Chapter 13, under the present Code she could have done so with little risk to her ultimate right to bankruptcy relief. If her Chapter 13 plan had failed, she still could have looked to Chapter 7 to ease the weight of her unsecured debt, or, if changed circumstances warranted, she could refile under Chapter 13. The creditor currently is protected by its ability to contest confirmation or even seek dismissal if a debtor refiles under Chapter 13 without any change of circumstances.<sup>98</sup> But there is no overwhelming presumption against the debtor. The court will exercise its discretion and evaluate the debtor's filing individually.

Under the credit industry proposals, debtors like Ellingsworth and Mercer will be discouraged, not encouraged, from filing under Chapter 13. The proposals enormously reduce the benefits of bankruptcy for any debtor who does not succeed in her first attempt at Chapter 13. Under the new proposal, if Mrs. Ellingsworth's Chapter 13 was dismissed and she refiled under Chapter 7 within one year of the dismissal, she would lose the protection of the automatic stay after only thirty days unless she could prove, at a hearing completed within the thirty-day period, that her Chapter 7 was filed in good faith.<sup>99</sup> The new provision presumes that her second filing was not made in good faith if (1) she had more than one bankruptcy pending within the previous year; or (2) if her earlier case was dismissed because she failed to file or amend the petition or other documents without substantial excuse other than inadvertence or negligence, or failed to provide adequate protection, or failed to perform the terms of the confirmed plan; or (3) there has been no substantial change of circumstances or any other reason to conclude she will not reach discharge in her Chapter 7.<sup>100</sup> Lack of good faith is presumed as to any creditor who filed for relief from the stay in the previous case whose request was pending as of dismissal, or whose request was granted.<sup>101</sup>

If Mrs. Ellingsworth had tried twice to pay under Chapter 13, the credit industry proposal would have deprived her of the benefit of the stay in her third case within a year unless she overcame the presumption of bad faith by clear and convincing evidence.<sup>102</sup> Again, bad faith is presumed from an inability to comply with the plan or negligence in filing amended documents.<sup>103</sup> These presumptions

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whether the schedules accurately reflect the debtor's true financial condition. *See id.* But *see* *United States Trustee v. Harris*, 960 F.2d 74, 77 (8th Cir. 1992) (holding that the debtor's ability to pay a substantial portion of his unsecured debts through a Chapter 13 plan was the primary determinant of "substantial abuse").

98. *See* 11 U.S.C. § 1325(a)(3) (1994); *Downey Sav. & Loan Ass'n v. Metz (In re Metz)*, 820 F.2d 1495, 1496-97 (9th Cir. 1987).

99. *See* Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. § 121 (1998). Ironically, the big victim of the prompt loss of the stay in the Chapter 7 may not be the debtor at all. The Chapter 7 trustee will lose the chance to liquidate the property for the benefit of all creditors. *See* Wedoff, *supra* note 13.

100. *See* H.R. 3150, § 121.

101. *See id.*

102. *See id.*

103. *See id.*

will prevent honest but unfortunate debtors from filing repeat bankruptcies even where their circumstances, including job interruption, medical emergencies and family problems, do warrant refiling. These additional burdens greatly increase the cost of refiling as the debtor will have to shoulder the expense of proving her good faith. Inevitably many marginal families will not be able to afford these increased costs and will lose their homes.<sup>104</sup>

The proposed legislation also gives the court the power to make a relief from the stay order as to any real or personal property permanent in any later filed case without any reference to time between filing.<sup>105</sup> One failed bankruptcy could permanently eliminate effective bankruptcy relief as a means for a family to save a home. All of these restrictions will lead to reduced use of Chapter 13 instead of Chapter 7, contrary to the stated purpose of the bill's promoters. The proposed draconian restrictions on Chapter 13 effectively give a consumer only one real opportunity in any five-year period to file under Chapter 13. If the effort fails, the consumer will face nearly insurmountable obstacles in obtaining Chapter 13 relief again. Debtors should be counseled not to take chances with the Chapter 13 option. A debtor who qualifies for and will benefit from Chapter 7 should not risk loss of the protection of the stay in a subsequent case by making a risky attempt at a Chapter 13 plan.

The debtor's one chance is also at the mercy of relatively poor quality of lawyering<sup>106</sup> and existence of bankruptcy mills<sup>107</sup> which weaken the debtor's chance of successful initial Chapter 13 filings.<sup>108</sup> The effect will inevitably be that better-off and better-counseled (usually the same people) debtors will be encouraged to plan for bankruptcy and to position themselves for Chapter 7 by reducing their income through charitable contributions; and reducing their

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104. See discussion *infra* Part VII.

105. See H.R. 3150, § 121.

106. See, e.g., Jean Braucher, *Counseling Consumer Debtors to Make Their Own Informed Choices—A Question of Professional Responsibility*, 5 AM. BANKR. INST. L. REV. 165 (1997).

107. See, e.g., *Task Force Report*, *supra* note 96, pt. II (concluding that the vast majority of abusive filings in the Central District of California resulted from the activities of self-designated "foreclosure" specialists who, often without the understanding and even without the knowledge of the debtor, schemed to manipulate the Code to thwart foreclosure efforts). The scammers developed several techniques, including the transfer of partial interests in property subject to foreclosure; tag team filings by relatives and others who were recipients of the partial interests; deliberate nondisclosure of real estate assets on the schedules. See *id.* These scammers prey on the financially distressed, offering to save homes for an attractive but deceptively small fee. The offers are essentially worthless. The Task Force Report recommends reforms aimed at eliminating the abusive scammers rather than their victims. See *id.* at pt. V.

108. See Teresa Sullivan et al., *Consumer Debtors*, *supra* note 50, at 131-32 (noting that the existence of an effective legal services program greatly affected the use of bankruptcy by low income debtors in the Philadelphia area). Bankruptcy is one of the rare areas of the law where no waiver of court filing fees is permitted, further burdening low income families who need bankruptcy protection. See Klein, *supra* note 7, at 338. The attitude of the local legal community has an enormous effect on the choice of chapter and the results of bankruptcy filings, and the quality of lawyer counseling is too often compromised by the lawyer's need to fit into that culture or need to generate and protect her fees. See Braucher, *supra* note 106, at 166 & n.5, 174, 185-86, 198. See generally Braucher, *supra* note 40; *Task Force Report*, *supra* note 96, pt. II.

nonexempt assets through transfers to pension accounts to avoid Chapter 13.<sup>109</sup> Those who need Chapter 13 protection the most—the debtors struggling to keep a roof over their families—will be hard-pressed to pay the increased attorneys fees and to produce the necessary papers and to keep up with these new onerous requirements.<sup>110</sup>

### III. THE ROLE OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION AND THE IMPETUS OF THE CREDIT INDUSTRY PROPOSALS

The Bankruptcy Reform Act of 1994 established the National Bankruptcy Review Commission (“Commission”) to investigate and evaluate problems with the bankruptcy process and to recommend proposals for changing the Code to Congress, the Chief Justice of the U.S. Supreme Court, and the President.<sup>111</sup> The Commission performed exhaustive work and heard hours of testimony<sup>112</sup>—but the process exhibited hostility to the idea of legitimate serial filings from its inception. In the early Commission notices and minutes, there are repeated references to “abusive serial filings,” again betraying an assumption that repeat filings are inevitably abusive.<sup>113</sup> However, the Commission’s final report demonstrates an evolution to recognizing that serial filing is not the beast it was portrayed to be. The report recommends only modest restrictions on repeat filings. The final Commission report recommends revising the automatic stay provision so that after two bankruptcy filings within six years, including one within the preceding six months, the debtor will get the benefit of the stay for only thirty days and must, within that time, establish the need for the new bankruptcy filing.<sup>114</sup> The Commission’s report further recommends modifying the Code so that the stay will not apply to property that the debtor obtained within six

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109. House Bill 3150 would allow exemption of all tax exempt retirement funds. H.R. 3150, § 119. The Religious Liberty and Charitable Donation Protection Act of 1998 amends the Code to allow a debtor to contribute up to 15% of her annual income to religious or charitable entities and to protect such donations from avoidance by the trustee. Pub. L. No. 105-183, 111 Stat. 517 (1998) (codified as 11 U.S.C.A. § 548(a) (West 1998)).

110. See Wedoff, *supra* note 13; Warren, *Principled Approach*, *supra* note 4, at 495; Braucher, *supra* note 4, at 10.

111. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 603, 108 Stat. 4106, 4147.

112. See generally COMMISSION REPORT, *supra* note 39; Warren, *Principled Approach*, *supra* note 4, at 486.

113. Again there is a threat of assuming that multiple filings by one debtor are inherently abusive despite the Code’s explicit allowance of such filings if they meet the good faith standard. See, e.g., Minutes of the National Bankruptcy Review Commission Meeting 5 (Nov. 1, 1995), available at <<http://bankrupt.com/clla/11-1-95.html>> (“The third problem area was that of fraud which included debtors giving false names, false addresses, lack of truthfulness about assets and serial filings.”); Minutes of the National Bankruptcy Review Commission Meeting 9 (Apr. 19, 1996), available at <<http://bankrupt.com/clla/4-19br.html>>; National Bankr. Review Comm’n, *Consumer Bankruptcy Issues List* (revised Dec. 16, 1996) (on file with author) (listing “Repeat Filings/Abuse” as a topic and suggesting consideration of a six-year bar on refiling after dismissal and/or the imposition of a show cause requirement to obtain a stay in a second filing).

114. See COMMISSION REPORT, *supra* note 39, at 102.

months of the bankruptcy filing from another person who had been in bankruptcy.<sup>115</sup> The Commission also recommended amending the Code to explicitly allow courts to issue relief from stay orders against specific property so that relief would remain in effect for up to six years against that specific property where such relief was necessary to block abusive practices.<sup>116</sup> These recommendations include the right of the debtor to request imposition of the stay where warranted by changed circumstances or good faith, without the restrictive definition of good faith contained in the credit industry bills.<sup>117</sup>

The Commission's report has been attacked from all sides.<sup>118</sup> The recommendations on consumer bankruptcy represent a compromise, an effort to increase the fairness of the bankruptcy process for creditors and for debtors.<sup>119</sup> The report is informed by a clear vision that Chapter 13 should continue to be encouraged but that debtors should not suffer from making honest attempts to repay their debts. The Commission recommended that the benefits of Chapter 13 be enhanced, not reduced, so that debtors would be encouraged to try to repay.<sup>120</sup> Although the recommendations are far from the debtors' wish list, the credit industry attacked them before the Commission even finalized them.<sup>121</sup> They are not seeing the light of day in the current legislative process. Instead the credit industry has attacked the report and has pushed forward with its agenda to restrict access to Chapter 13 instead of encouraging consumers to choose it.

#### IV. THE VIEWS OF THE CHAPTER 13 TRUSTEES

##### *A. Role of the Chapter 13 Standing Trustee*

There are 184 individuals currently appointed as Chapter 13 standing trustees in the United States. The trustees are appointed by the United States Trustees of their districts and serve under the supervision of the appointing Trustee.<sup>122</sup> The Chapter 13 standing trustee is responsible for the administration of the Chapter 13 bankruptcies assigned to his or her office. The trustee collects the funds, pays the claims, schedules and conducts the meetings of creditors, evaluates the plans

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115. *See id.*

116. *See id.*

117. *See Klein, supra note 7, at 334. Compare COMMISSION REPORT, supra note 39 (the Commission's recommendations), with Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. (1998) (the credit industry's bill).*

118. *See Klein, supra note 7, at 293, 297; Warren, Principled Approach, supra note 4, at 496; Wallace Testimony, supra note 44.*

119. *See Braucher, supra note 4, at 17-23; Warren, Principled Approach, supra note 4, at 492-93, 496.*

120. *See Klein, supra note 7, at 335; Warren, Principled Approach, supra note 4, at 491 n.13.*

121. *See Klein, supra note 7, at 335-36.*

122. *See 11 U.S.C. § 1302 (1994); 28 U.S.C. § 586 (1994).* The trustee is appointed by the court in the districts in Alabama and North Carolina which are not part of the United States Trustee system.

filed, and recommends whether proposed plans should be confirmed or not.<sup>123</sup> The trustee monitors payments and seeks dismissal where a debtor is out of compliance with the terms of the filed plan. The trustee acts as a fiduciary for the holders of unsecured claims and is responsible for challenging plans that do not meet Code requirements for the treatment of these claims.<sup>124</sup>

Trustees have a variety of approaches to their jobs.<sup>125</sup> Fundamentally though, they are in the trenches of the bankruptcy wars. They see all Chapter 13 filings and are intimately familiar with the realities of the Chapter 13 world from a position not aligned with creditors or debtors. The trustees, by design and by the nature of their work, are much more familiar with the details of the individual bankruptcies than are the judges handling the cases. The judges resolve disputes that arise; the trustees evaluate every single case that is filed.

### *B. Purpose of the Survey*

I solicited the views of the Chapter 13 standing trustees to get information about the trustees' experiences with repeat Chapter 13 filings. Because this issue has so often been articulated as the problem of "abusive, serial filings" with that definition presuming that serial filings are inherently suspect and abusive,<sup>126</sup> I wanted to test whether the trustees perceive such filings as a particular source of abuse that needs to be remedied by specific measures precluding repeat filings. The trustees have a unique role in the bankruptcy process which gives them insight into these issues. They have greater access to detailed information about individual cases than do the judges because of their responsibility for conducting the meeting of creditors prescribed by § 341 of the Code and for reviewing the plan and making recommendations about confirmation. The trustee also occupies a more neutral role than do the creditors or the debtors whose representatives have been quite vocal on these issues. The debate over the desirability of restricting Chapter 13 filings has not yet included the perspective of the Chapter 13 trustees as a group beyond the testimony of a few representative trustees. This "Survey" provides important information about the reality of Chapter 13 debtors as seen by the trustees.

The trustees' responses show confidence in the ability of the courts and the trustees to appropriately resolve disputes about abusive filings with the tools available in the current Code. There is support for tinkering—including creation of a show-cause process or other fast track mechanisms for allowing quicker resolution of dismissal and relief from stay motions in repeat filings. But there was equal support for leaving the Code as it is. The Chapter 13 trustees, as represented in this Survey, do not identify repeat filing as a major source of abuse that needs to be barred wholesale as the only means of preventing abuse of the Code. Instead, there is recognition that people who abuse the bankruptcy system, by filing without any real intent to pay, may be likely to try to abuse the system

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123. See 11 U.S.C. § 1302; 28 U.S.C. § 586.

124. See 11 U.S.C. §§ 323, 341, 1302 (1994).

125. See Braucher, *supra* note 4, at 3 n.14, 12, 16.

126. See *supra* note 94.

more than once—but that abuse can and should be dealt with using the tools available in the current Code to creditors and to the courts. The trustees do not conclude that the right to refile must be eliminated in order to curb abuse. Instead there is wide recognition that access to bankruptcy relief is essential; and that the use of Chapter 13 should be encouraged, not discouraged, by new filing bars.

### *C. Methodology and Response*

The Survey aimed to get information from the trustees about their perceptions of several aspects of this issue.<sup>127</sup> First, I wanted to collect information as to the purpose of the Chapter 13 bankruptcies administered by the trustees. Much of the concern about abusive repeat filings expressed in the National Bankruptcy Review Commission process initially emphasized eviction as an issue—that tenants file under Chapter 13 to stop eviction and such filings are in bad faith or abusive because Chapter 13 should not be available simply to delay the eviction process.<sup>128</sup> Second, I sought information about the levels and types of abuse of the bankruptcy process as perceived by the trustees, and whether perceived abuse is related to repeat filings in particular. Finally, I solicited the trustees' views on how to reduce abusive filings and their evaluation of several specific proposals that were then pending before the Commission to address perceived abusive serial filings.

I sent a Survey containing twenty-two<sup>129</sup> questions to each of the 179 standing Chapter 13 trustees on the mailing list for the National Association of Chapter Thirteen Trustees. The information I sought and obtained represents the thoughtful input of the sixty-two trustees who responded to the Survey questions.<sup>130</sup> Their role, as key players in the existing bankruptcy system, gives them a unique and critical voice that should be heard as changes are contemplated.

Over one-third of the trustees surveyed completed and returned the questionnaire. All of the responses were complete and many were thoughtful and expansive. Although the responding trustees recognized some abuses in the Chapter 13 process, most of those responding had not experienced repeat Chapter 13 filers as substantially more abusive than other Chapter 13 debtors.<sup>131</sup> The responding trustees also strenuously objected to severe new restrictions on the right to refile.<sup>132</sup> They emphasized that the tools available in the current Code are adequate and that discretion and flexibility are essential.<sup>133</sup>

The Survey instrument asked the trustees to identify which of several reasons was the primary purpose of the bankruptcy filings administered by the responding

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127. Original instrument on file with author.

128. *See, e.g.*, Memorandum from the Consumer Bankruptcy Working Group to the National Bankruptcy Review Commission 4 & n.11 (Apr. 11, 1997) (on file with author); Minutes of the National Bankruptcy Review Commission Meeting 8 (Oct. 20, 1996) (on file with author).

129. The questionnaire contained 22 questions, some with subparts.

130. The original responses are on file with the author.

131. *See infra* Tables 1, 2.

132. *See infra* Tables 4, 5.

133. *See infra* Table 5, Comment Section.

trustee. The responses reflect the trustees' impressions of the debtors' goals; many responses identified multiple goals so that the total percentages exceeded 100. The one consistent theme of the responses was that prevention of eviction is rarely the apparent goal of Chapter 13 filings. Not one of the sixty-two respondents identified eviction prevention as a goal of more than 20% of the bankruptcies filed.<sup>134</sup> Fifty-five of the trustees said that eviction prevention was rarely the goal; forty-five listed eviction as the goal in "very few" or fewer than 5% of the filings, ten identified it as the goal in 5-10% of the cases and two trustees identified eviction as the primary goal in 11-20%. Five trustees made no entry next to the eviction option. Based on these responses, the claim that repeat Chapter 13 filings to stop eviction are a big problem seems greatly overblown and perhaps totally unsupported by reality. The responding trustees do not share the view that there is a serious problem of abuse in this area, even as to original filings, and certainly not as a primary source of abusive repeat filings.

Many trustees explicitly voiced the opinion that the major sources of abuse are debtors being evasive about assets or having no intent to live up to their plans, and that these problems have little to do with whether it is the first or a later filing. Most trustees thought that there is a higher level of abuse in repeat filings than in overall filings—but did not find high levels of abuse in either situation.<sup>135</sup> The attached tables collate the responses according to the overall level of repeat filings identified by the responders. Generally, the theme of the responses is that there are abuses by debtors who file without the intent or ability to pay on the terms required by Chapter 13, but that the current Code contains the necessary mechanisms to deal with these abuses. The Survey also included four common fact scenarios that arise in Chapter 13 bankruptcies and asked the respondents whether they viewed these hypothetical repeat filings as abusive.<sup>136</sup> The results

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134. Responses on file with author.

135. See *infra* Tables 1, 2.

136. The scenarios were:

Question 18(a): Debtor has ability to pay at time of filing but is laid off right after confirmation. Plan is dismissed for nonpayment after debtor has made 12 of 48 payments. Debtor regains job after dismissal and has the equivalent ability to pay as she had at time of original filing but remains subject to potential risk of layoff.

Question 18(b): Same as above but debtor obtains new, more secure job at slightly higher rate of pay after dismissal.

Question 18(c): Husband and wife debtor stop paying after marital separation. Bankruptcy is dismissed post confirmation after 20 of 60 plan payments are made. Wife refiles, listing as income child support she is entitled to but is not currently receiving. She also works but her income is less than the former marital income. Her plan is feasible if she receives the child support and a family court judgment has been entered directing wage garnishment against the husband.

Question 18(d): Debtor's first bankruptcy was dismissed for nonpayment. Debtor stopped paying because he had to repair his roof. Debtor's income remains the same—he is on social security. Debtor refiles and now has contributions from his adult children listed. They file affidavits with court saying they are committed to giving their father \$200 each month (total contribution from the children).

Survey instrument on file with author.

were remarkably consistent.<sup>137</sup> Only one of the sixty-two respondents thought that either of the first two scenarios were possibly abusive.<sup>138</sup> That respondent thought the first scenario was an abusive refiling if the debtor was likely to face layoff.<sup>139</sup> Only two of sixty-two found the third scenario abusive.<sup>140</sup> Four viewed the fourth scenario as abusive and an additional five thought it might be.<sup>141</sup>

Question 21 of the Survey asked for the trustees' reactions to four specific legislative proposals that have been made to address perceived problems of abuse.<sup>142</sup> Proposal 1 would impose a waiting period on refiling after dismissal. A slightly higher number of responding trustees (thirty) favored this proposal than opposed it (twenty-eight), but those in favor recommended relatively short times for the waiting period.<sup>143</sup> A waiting time of six months was recommended by fourteen of the thirty; six months to one year by two trustees; sixty days by two; and ninety days by two.<sup>144</sup> Seven trustees recommended one year; one recommended two years; one did not propose a time period.<sup>145</sup> Three trustees said they might support a time bar.<sup>146</sup>

Question 21(b) asked whether the trustees favored shifting the burden to the debtor to move for continuance of the automatic stay within a short time after refiling, beginning with the debtor's third filing.<sup>147</sup> This proposal drew the highest levels of support from the responding trustees with thirty-four trustees favoring the idea, and one possibly in favor. Twenty-three trustees opposed the proposal.<sup>148</sup>

Question 21(c) asked whether the trustees favored requiring repeat debtors to file a motion in order to get the stay imposed in the repeat filing. Thirty-three respondents opposed the proposal,<sup>149</sup> twenty favored it; and two thought they might favor it.<sup>150</sup>

Question 21(d) asked whether earlier confirmation hearings should be required. This proposal drew almost no support. Only three respondents favored such a requirement.<sup>151</sup> Fifty-four opposed the proposal or said it would have no effect on abusive filings and/or that confirmation already occurs promptly.<sup>152</sup>

The Survey also solicited the trustees' suggestions for change. Ten of the respondents explicitly stated that there is no need to change the current provisions

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137. *See infra* Table 3.

138. *See infra* Table 3.

139. *See infra* Table 3.

140. *See infra* Table 3.

141. *See infra* Table 3.

142. These proposals were pending before the National Bankruptcy Review Commission ("NBRC") at the time of the survey.

143. *See infra* Table 4.

144. *See infra* Table 4.

145. *See infra* Table 4.

146. Responses on file with author.

147. *See infra* Table 4.

148. *See infra* Table 4.

149. *See infra* Table 4.

150. *See infra* Table 4.

151. *See infra* Table 4.

152. *See infra* Table 4.



and that abuse must continue to be dealt with on a case-by-case basis.<sup>153</sup> There is some support for wider application of the 109(g) bar on refiling to include cases that have been involuntarily dismissed (one); to apply the bar to a particular asset in addition to a particular debtor (two); to require the repeat debtor to show cause soon after filing in order to continue to have the benefit of the automatic stay in the second case (ten); for a longer time bar on refiling of one year (two) or eighteen months (one); for greater discretion to the court for orders barring refiling (three); and for a fast track process for dismissal or stay relief in repeat filings (seven).<sup>154</sup>

The final Survey question asked for the trustees' position on a six-year bar on refiling under Chapter 13 following entry of a discharge in either Chapter 7 or Chapter 13. There is near uniform opposition to the proposed six-year bar on refiling after a debtor has obtained a discharge under Chapter 7 or 13.<sup>155</sup> Only two respondents directly supported a six-year bar.<sup>156</sup> Three supported a shorter bar.<sup>157</sup> Two supported a bar that would preclude a Chapter 13 filing following immediately upon a Chapter 7 discharge.<sup>158</sup> One favored the six-year bar, but only for "proven abusers."<sup>159</sup> Two responses were non-committal. The overwhelming majority, fifty-two out of the sixty-two respondents, were adamantly and eloquently opposed to such a bar. The reasons given for their opposition indicate that most trustees believe a six-year bar would eviscerate the purpose of Chapter 13 and ignore social realities:<sup>160</sup> "The facts of life are such that secondary relief can be vital to the debtor's ability to function as a contributing member of society and not as a welfare liability."<sup>161</sup> "This proposal puts morality over reality. Artificial bars on [Chapter] 13 are no more in order than bars in [Chapter] 11. The courts and trustees are capable of addressing bad faith—which is the nature of abusive filings—on a case by case basis."<sup>162</sup> "Bans many worthy filers with subsequent adversity (medical—marital—injury—job interruption)—The mark of Cain."<sup>163</sup> "Because we'd have to open up debtors' prisons, or else leave people exposed to ruthless collection tactics, or else mandate a redistribution of wealth."<sup>164</sup>

The trustees uniformly expressed support for continuing the current Code's recognition that the courts must have discretion to decide on a case-by-case basis whether particular debtors are acting in good faith. "I think rigid rules do not

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153. Responses on file with author.

154. Responses on file with author.

155. *See infra* Table 5.

156. *See infra* Table 5.

157. *See infra* Table 5.

158. *See infra* Table 5.

159. *See infra* Table 5.

160. *See infra* Table 5.

161. Kansas Trustee response (on file with author); *see infra* Table 5, Comment Section.

162. Maine Trustee response (on file with author); *see infra* Table 5, Comment Section.

163. California Trustee response (on file with author); *see infra* Table 5, Comment Section.

164. Utah Trustee response (on file with author); *see infra* Table 5, Comment Section.

allow for consideration of individual situations. I think having discretion in the Court will more often lead to the right solution for a case."<sup>165</sup>

The attached Tables compile the results organized by the level of repeat filings identified by the respondents. I believed it worthwhile to see whether the respondents' perceptions of the serial filing issue vary depending on the frequency of serial filings in their experience. There do not appear to be such differences. The responses were consistent, with no obvious variations related to the level of repeat filings.

Each of the attached Tables sorts the survey data by the rate of repeat filings in total caseload reported by each responding trustee.

Repeat filings identified as fewer than or equal to 5% of the total caseload—17 respondents. States represented: California, Indiana (3), Kansas, Michigan, New Mexico, North Carolina (2), Oklahoma, Rhode Island, South Dakota, Tennessee, Texas (2), Vermont, Virginia.

Repeat filings identified as 6-10% of total caseload—16 respondents. States represented: Alabama, Arizona, California, Florida, Idaho, Indiana, Iowa, Louisiana, Maine, New York, Oregon, Pennsylvania, South Carolina, Texas (2), Virginia.

Repeat filings identified as 11-15% of total caseload—7 respondents. States represented: Idaho, Illinois, Kentucky, Louisiana, Michigan, Missouri, Oregon.

Repeat filings identified as 16-20% of total caseload—9 respondents. States represented: California, Florida, Illinois, Indiana, Louisiana, New York, Tennessee, Virginia, Wisconsin.

Repeat filings identified as 21-25% of total caseload—2 respondents. States represented: Virginia, Utah.

Repeat filings identified as 26-30% of total caseload—5 respondents were in this category. States represented: Arizona, Georgia, Mississippi, New Jersey, New York.

Repeat filings identified as 31-40% of total caseload—5 respondents were in this category. States represented: California, Maryland, New York, Tennessee (2).

Repeat filings not identified—1 respondent from Wisconsin.

Table 1 sets forth the instances of abuse reported by the trustees in all Chapter 13 filings. Table 2 sets forth the instances of abuse reported by the trustees in repeat Chapter 13 filings. Table 3 sets forth the trustees' responses to the Question 18 hypotheticals. Table 4 sets forth the trustees' responses to the Question 21 legislative proposals. Table 5 sets forth the trustees' responses to the proposed six year ban on refiling following a Chapter 13 discharge, as well as the trustees' comments in response to this proposal.

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165. Rhode Island Trustee response (on file with author); see *infra* Table 5, Comment Section.

V. THE CASE LAW ALSO REFUTES THE RHETORIC THAT  
ABUSIVE SERIAL FILINGS ARE CRUSHING THE  
BANKRUPTCY SYSTEM

*A. Cases Reported in 1997*

Anecdotal claims of serial filing abuse do not stand up when actual cases are studied. There were 1.3 million consumer bankruptcies filed in 1997.<sup>166</sup> In that same year, there were only thirty-one reported cases that directly related to serial filings by individual debtors as an abuse of the Code.<sup>167</sup> In the vast majority of them, the debtors lost. The paucity of cases and their results show that the system functions well now and can cope with the abuses that do exist.<sup>168</sup> Judges have no hesitancy in sanctioning behavior that is abusive. Numerous opinions characterize multiple filings for the purpose of delay, not payment, as abusive.<sup>169</sup> But, like the trustees, the courts also recognize that multiple filings are not inherently abusive, that many debtors need more than one try at Chapter 13 in order to complete an effective repayment plan, and that flexibility is needed to foster the goals of the Code.<sup>170</sup>

It is interesting that there are so few cases addressing a problem that is presumed to be enormous. The relative dearth of cases implies that either the problem is overblown, these cases get resolved informally, or it is "too hard" for creditors to fight. But creditors do fight, as do trustees, where real abuse occurs. The reality of the reported cases refutes the rhetoric that the system is unable to cope with this issue.

The reported cases show that courts deal seriously and creatively with serious cases of abusive filings.<sup>171</sup> The cases buttress the trustees' position that the

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166. *See supra* note 43.

167. Numerous other cases mention that the debtor involved has a previous bankruptcy filing; but very few cases, those that are catalogued in this Section, required the expenditure of judicial resources to resolve issues of good faith, relief from the automatic stay, dismissal, or confirmation that arose from the fact the debtor filed for bankruptcy more than one time. In contrast, a computer research query for all 1997 cases containing the terms "bankruptcy" and "false pretenses, a false representation, or actual fraud," language contained in the section 523(a)(2)(A) provision barring discharge of debts incurred by fraud, produced 104 case citations. A request for 1997 cases containing the terms "bankruptcy" and "523(a)(15)," the provision governing non-dischargeability of debts incurred from divorce or property settlements, produced 51 citations.

168. *See Donald Testimony, supra* note 5.

169. *See, e.g., In re Richards*, No. 97-14798DWS, 1998 WL 205915 (Bankr. E.D. Pa. Apr. 3, 1998); *In re Siciliano*, 167 B.R. 999 (Bankr. E.D. Pa. 1994).

170. *See generally* *Society Nat'l Bank v. Barrett (In re Barrett)*, 964 F.2d 588 (6th Cir. 1992); *Downey Sav. & Loan Ass'n v. Metz (In re Metz)*, 820 F.2d 1495 (9th Cir. 1987).

171. Indeed judicial efforts are not always appreciated by those creditors who benefit from them. One Texas bankruptcy judge, in response to publicized creditor concerns about repeat filings, issued show cause orders in five repeat filing cases pending before him. The orders directed the debtor to appear so that the debtor could explain the need for a repeat filing and

current Code provisions effectively deal with the debtors who try to truly abuse the Code.<sup>172</sup> They show that abusive debtors and their lawyers are sanctioned and their attempts to manipulate the Code fail. The mere existence of people who try to abuse the Code is not justification for elimination of access to bankruptcy for the vast majority of nonabusive debtors. Instead, these cases show that the abusive serial filing is not common and is effectively squelched now. Of the thirty-one cases, seven involved Chapter 13 petitions filed after a previous Chapter 7 filing,<sup>173</sup> and the remainder involved multiple Chapter 13 filings, some with other chapters as well.<sup>174</sup> One was a Chapter 11 petition converted to Chapter 7, followed by a filing under Chapter 13.<sup>175</sup>

The 180-day bar of 11 U.S.C. § 109(g) was applied stringently with little room for discretion. In each of the three cases dealing with this issue, the debtor lost.<sup>176</sup> The district court reversed a bankruptcy court order denying a Motion to Dismiss a debtor's second Chapter 13 petition that was filed thirty-five days after she voluntarily dismissed her first case after the holder of her car loan was granted

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invited any concerned creditor to present evidence of any damage suffered as a result of the repeat filings. All creditors in all five cases were notified. None appeared to claim damages. The court added that in 12 years on the bench, he could not recall "one instance of a creditor objecting to a repeat filing by a debtor." *In re Tuckey*, 222 B.R. 549, 552 (Bankr. N.D. Tex. 1998). That judge concluded that the creditors' demonstrated lack of concern about repeat filings relieved the court of the burden of sharing the non-existent concern. *See id.*

172. *See Klein*, *supra* note 7, at 294 n.5 ("Every lender has its favorite anecdote about how a debtor abused the Code. Most of the stories, when examined, establish how well the current Code actually works.").

173. *See Smyrnos v. Padilla (In re Padilla)*, 213 B.R. 349 (B.A.P. 9th Cir. 1997); *Turner v. Citizens Nat'l Bank (In re Turner)*, 207 B.R. 373 (B.A.P. 2d Cir. 1997); *In re Barnett*, 216 B.R. 202 (Bankr. N.D. Ohio 1997); *Piwowarczyk v. Shayeb (In re Shayeb)*, 211 B.R. 390 (Bankr. D. Ariz. 1997); *In re Britt*, 211 B.R. 74 (Bankr. M.D. Fla. 1997); *In re Day*, 208 B.R. 358 (Bankr. E.D. Pa. 1997); *Transamerica Credit Corp. v. Bullock (In re Bullock)*, 206 B.R. 389 (Bankr. E.D. Va. 1997).

174. *See Klein v. Ulster Sav. Bank (In re Stein)*, 127 F.3d 292 (2d Cir. 1997); *Perez v. Fajardo Fed. Sav. Bank*, No. 96-2116, 1997 WL 330410 (1st Cir. June 13, 1997) (unpublished disposition); *Colonial Auto Ctr. v. Tomlin (In re Tomlin)*, 105 F.3d 933 (4th Cir. 1997); *Leavitt v. Soto (In re Leavitt)*, 209 B.R. 935 (B.A.P. 9th Cir. 1997); *Andersson v. Security Fed. Sav. & Loan (In re Andersson)*, 209 B.R. 76 (B.A.P. 6th Cir. 1997); *Chrysler Fin. Corp. v. Dickerson (In re Dickerson)*, 209 B.R. 703 (W.D. Tenn. 1997); *In re Lippolis*, 216 B.R. 378 (Bankr. E.D. Pa. 1997); *In re Martin*, 215 B.R. 119 (Bankr. N.D. Tex. 1997); *In re Green*, 214 B.R. 503 (Bankr. N.D. Ala. 1997); *In re Yimam*, 214 B.R. 463 (Bankr. D. Md. 1997); *In re King*, 214 B.R. 334 (Bankr. W.D. Tenn. 1997); *In re McDaniels*, 213 B.R. 197 (Bankr. M.D. Ga. 1997); *In re Hurst*, 212 B.R. 890 (Bankr. W.D. Tenn. 1997); *In re Smart*, 212 B.R. 419 (Bankr. S.D. Ga. 1997); *In re Fernandez*, 212 B.R. 361 (Bankr. C.D. Cal. 1997); *In re Rauso*, 212 B.R. 242 (Bankr. E.D. Pa. 1997); *In re Ramos*, 212 B.R. 29 (Bankr. D.P.R. 1997); *In re McElroy*, 210 B.R. 833 (Bankr. D. Or. 1997); *In re Hollberg*, 208 B.R. 755 (Bankr. D.D.C. 1997); *In re Hric*, 208 B.R. 21 (Bankr. D.N.J. 1997); *In re Tanguay*, 206 B.R. 575 (Bankr. M.D. Fla. 1997); *Blue Ridge Bank v. Boswell (In re Boswell)*, 206 B.R. 421 (Bankr. W.D. Va. 1997); *In re Ellinwood*, 206 B.R. 300 (Bankr. W.D.N.Y. 1997).

175. *See Fishell v. United States Trustee (In re Fishell)*, No. 95-1637, 1997 WL 188458 (6th Cir. Apr. 16, 1997) (unpublished disposition).

176. *See In re Andersson*, 209 B.R. at 78; *In re Ramos*, 212 B.R. at 30; *In re Dickerson*, 209 B.R. at 708.

relief.<sup>177</sup> *In re Dickerson* rejected the bankruptcy court's interpretation that it had discretion under § 109(g) to allow a second filing where the creditor did not show a causal connection between the dismissal and refiling.<sup>178</sup> The debtor dismissed the first case because of illness and unemployment but was making plan payments through a wage order in the second case.<sup>179</sup> The creditor, holder of her car loan, had not attempted to repossess the car after relief was granted in the first bankruptcy.<sup>180</sup> Despite the lack of connection between the first dismissal and the refiling, the court held that § 109(g) is mandatory and bars the second filing whether or not there is a causal relation between the relief order and the second filing.<sup>181</sup> The Bankruptcy Appellate Panel for the Sixth Circuit similarly barred a refiling within the 180-day period even where the first case was dismissed a year and a half after the motion for relief was filed.<sup>182</sup> The motion was resolved and the dismissal was apparently totally unrelated but the debtor was still subject to the 180-day filing bar.<sup>183</sup> The only case that acknowledged even the possibility that equitable considerations could justify suspension of the refiling bar—for example if a debtor successfully defended against the relief motion or the relief request and dismissal were totally unrelated especially by the timing of the events—did not find that the debtors' claim of extreme financial difficulties justified an exception to the § 109(g) bar.<sup>184</sup>

Courts are thoughtful when they employ the tool of dismissal with prejudice, recognizing that a permanent bar on discharge of debt is the bankruptcy equivalent of "capital punishment."<sup>185</sup> A dismissal with prejudice is assumed to invoke § 109(g) but not to create a permanent bar on discharge of the debts existent at the timing of the filing of the dismissed bankruptcy unless the court explicitly orders such relief.<sup>186</sup> But permanent bars on discharge have been enforced nonetheless where the bankruptcy court clearly meant to provide such relief. For example, the Ninth Circuit B.A.P. affirmed a bankruptcy court's permanent bar on discharge of a judgment for fraud, conversion, and breach of fiduciary duty obtained by the debtor's former business partner.<sup>187</sup> The debtor

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177. See *In re Dickerson*, 209 B.R. at 704-05.

178. See *id.* at 705.

179. See *id.*

180. See *id.* at 706.

181. See *id.* at 707.

182. See *Andersson v. Security Fed. Sav. & Loan (In re Andersson)*, 209 B.R. 76, 77 (6th Cir. B.A.P. 1997).

183. See *id.* at 78.

184. See *In re Ramos*, 212 B.R. 29, 30 (Bankr. D.P.R. 1997).

185. *In re Merrill*, 192 B.R. 245, 253 (Bankr. D. Colo. 1995).

186. See *Colonial Auto Ctr. v. Tomlin (In re Tomlin)*, 105 F.3d 933, 936 (4th Cir. 1997). *In re Tomlin* did not hold that the bankruptcy court order created a permanent bar even where the debtor had filed three Chapter 13 petitions and three Chapter 7 petitions in the space of six years. Four of the petitions, all filed pro se, did not get out of the starting gate—they were dismissed because of the debtor's failure to file documents or to attend the creditor's meetings. The debtor's first Chapter 13 case made it through confirmation, but the debtor voluntarily dismissed the case after the mortgage company got relief from the stay. The debtor, represented by counsel, got a discharge under Chapter 7 in her last filing. See *id.*

187. See *Leavitt v. Soto (In re Leavitt)*, 209 B.R. 935, 943 (B.A.P. 9th Cir. 1997).

filed a Chapter 13 petition only two weeks after entry of the judgment, understated and omitted assets from his schedules, and proposed to pay nothing to unsecured claimants, including the former partner.<sup>188</sup>

Courts showed no hesitancy to apply the § 109(g) bar on facts that were clearly contemplated by Congress.<sup>189</sup> A mortgage holder defeated the debtors' motion to reopen their original Chapter 13 case that they voluntarily dismissed after the mortgagor got relief from the stay.<sup>190</sup> The debtors' motion to reopen followed the dismissal under § 109(g) of their second Chapter 13 case.<sup>191</sup> Similarly, in *Perez*, the First Circuit affirmed the bankruptcy court's dismissal of the debtor's third Chapter 13 filing within 180 days after his second filing was dismissed because of his failure to file a plan or schedules, go to the meeting of creditors, or make payments.<sup>192</sup> The bankruptcy court's determination that the dismissal for "willful" acts was not error even though the dismissal order itself did not use the term.<sup>193</sup>

Courts engaged in creative efforts to stop abuse.<sup>194</sup> A debtor's lawyer was sanctioned for orchestrating unfair manipulation of the Code—he filed a Chapter 13 petition on the eve of foreclosure, sent postpetition payments buried in other documents so they would be hard to find and put the payments inside self addressed envelopes so they would be returned to the debtor, missed the § 341 meeting, had matters within the bankruptcy going before two judges without informing either judge of the other proceeding, and got the first case dismissed by failing to appear in court to oppose a trustee's motion to dismiss, claiming traffic problems.<sup>195</sup> He then filed a second petition days after the first dismissal and falsely stated in it that there were no prior bankruptcies.<sup>196</sup> The bankruptcy court dismissed the second bankruptcy pursuant to § 109(g) and ordered the lawyer to pay a fine of \$2500. In another example, a bankruptcy court imposed a one-year bar on future bankruptcy filings against a prisoner whose seven pro se Chapter 13 bankruptcies had blocked foreclosure on his home for several years.<sup>197</sup> In *In re Smart*, the court refused to vacate its dismissal with prejudice to refiling for 180 days entered in the debtor's second Chapter 13 bankruptcy.<sup>198</sup> The court dismissed the case after the debtor failed to attend the meeting of creditors. The court was not aware that the debtor filed a voluntary dismissal the day before.

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188. *See id.* at 936-37.

189. *See In re King*, 214 B.R. 334, 335-36 (Bankr. W.D. Tenn. 1997); *Perez v. Fajardo Fed. Sav. Bank*, No. 96-2116, 1997 WL 330410, at \*1 (1st Cir. June 13, 1997) (unpublished disposition).

190. *See In re King*, 214 B.R. at 337.

191. *See id.* at 335-36.

192. *See Perez*, 1997 WL 330410, at \*1.

193. *Id.*

194. *See Stein v. Ulster Sav. Bank (In re Stein)*, 127 F.3d 292, 293-94 (2d Cir. 1997); *In re Smart*, 212 B.R. 419, 420-21 (Bankr. S.D. Ga. 1997); *In re Rauso*, 212 B.R. 242, 243-45 (Bankr. E.D. Pa. 1997).

195. *See In re Stein*, 127 F.3d at 293-94.

196. *See id.* at 294. The sanctions order was vacated only because the lawyer did not get notice and opportunity to respond. The bankruptcy court's power to sanction the lawyer was not challenged. *See id.*

197. *See In re Rauso*, 212 B.R. at 243.

198. *In re Smart*, 212 B.R. at 420.

The court held, despite the debtor's right to voluntarily dismiss her case,<sup>199</sup> it retained the inherent power to sanction the debtor for her misconduct and that misconduct justified a 180-day bar on refiling.<sup>200</sup>

Prospective relief from the automatic stay was imposed where appropriate.<sup>201</sup> A former wife was granted future relief to enforce a child support order where the debtor filed multiple bankruptcy petitions to block enforcement of the child support order—behavior the court described as “contemptible” and “deplorable.”<sup>202</sup> Prospective in rem relief from the stay was granted,<sup>203</sup> where the debtor, his wife, and a transferee filed five cases in eight months to block foreclosure efforts. The debtors' bankruptcy papers were incomplete; the debtors made no trustee payments and they did not appear at the creditors' meetings. The court found the debtors did not intend to save the property but merely sought to obstruct the foreclosure for as long as possible.<sup>204</sup> A court granted in rem relief to the taxing authority whose efforts to collect delinquent taxes had been blocked by the debtor's four Chapter 13 petitions.<sup>205</sup> The court ordered that any future filing involving the property would not bar the annual tax sale as long as the taxing authority sought a hearing within ten days to get retroactive relief and confirm the sale.<sup>206</sup> In rem relief was also granted where the debtors filed seven bankruptcies in the space of four years to block foreclosure of a luxury home.<sup>207</sup> Again the debtors' bankruptcies featured gross misstatements and underreporting on the schedules and a history of total nonpayment. Prospective in rem relief from the stay was granted to the creditors with liens on a debtor's home after the debtor filed his third pro se Chapter 13 petition within a year without accurately disclosing his prior filings or filing complete schedules in any case.<sup>208</sup>

In two cases, debtors who made substantial payments to their creditors still suffered dismissal with prospective relief. One court granted prospective relief after dismissing the debtors' second Chapter 13 petition even though the debtors made substantial payments in both bankruptcies.<sup>209</sup> The court held that the debtors' right to cure the delinquency was extinguished by the sheriff sale that occurred between the two filings and the lapse of more than the sixty days allowed for total redemption.<sup>210</sup> Thus even where the debtors arguably acted in good faith by making payments and offering to continue to do so through a wage

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199. See 11 U.S.C. § 1307(b) (1994).

200. See *In re Smart*, 212 B.R. at 420.

201. See *In re Martin*, 215 B.R. 119, 121 (Bankr. N.D. Tex. 1997); *In re Green*, 214 B.R. 503, 509 (Bankr. N.D. Ala. 1997); *In re Yimam*, 214 B.R. 463, 467 (Bankr. D. Md. 1997); *In re Hurst*, 212 B.R. 890, 894 (Bankr. W.D. Tenn. 1997); *In re Fernandez*, 212 B.R. 361, 372 (Bankr. C.D. Cal. 1997); *In re Hric*, 208 B.R. 21, 26 (Bankr. D.N.J. 1997); *In re Ellinwood*, 206 B.R. 300, 303 (Bankr. W.D.N.Y. 1997).

202. *In re Green*, 214 B.R. at 505-06.

203. See *In re Fernandez*, 212 B.R. at 363-66.

204. See *id.* at 368.

205. See *In re Ellinwood*, 206 B.R. at 303.

206. See *id.*

207. See *In re Yimam*, 214 B.R. 463, 464 (Bankr. D. Md. 1997).

208. See *In re Martin*, 215 B.R. 119, 120-21 (Bankr. N.D. Tex. 1997).

209. See *In re Hric*, 208 B.R. 21, 26 (Bankr. D.N.J. 1997).

210. See *id.*

deduction, their bankruptcy was dismissed. Similarly a debtor who had at least a colorable claim to changed circumstances and good faith suffered an entry of annulment of the automatic stay in her third filing in four years.<sup>211</sup> The debtor's first filing survived for forty-two months, indicating that she made a substantial number of payments.<sup>212</sup> The second filing was less successful, lasting only a few months, though the debtor was paying \$190 weekly through a wage deduction.<sup>213</sup> The mortgagor obtained relief from the stay with a provision that enjoined the debtor from refiling before the foreclosure sale was completed. The debtor filed again the day before the scheduled sale. The mortgagor proceeded with the sale without knowledge of the third filing. It then sought relief to confirm the sale despite the stay effected by the third filing. Although the debtor submitted \$3501.36 to the trustee within the first two months of her third filing and testified that she could pay an additional \$4000 when she received her retirement benefits four months later, the bankruptcy court annulled the stay, finding she lacked equity and had not shown that she was unable to find other shelter.<sup>214</sup>

In two cases,<sup>215</sup> creditors opposed the trustee's request for dismissal fearing that such a dismissal would not impose the 180-day bar of § 109(g).<sup>216</sup> The courts were sympathetic to this concern in cases of abuse. One court suspended the trustee's motion for six months and sua sponte granted relief to all creditors.<sup>217</sup> This resolution prevented a refiling which would frustrate the mortgagor's foreclosure but also avoided unfairness to the other creditors who were not receiving any distributions because of the debtors' failure to pay. In another case, the trustee requested a dismissal with prejudice because of the debtor's refusal to provide information about his employer.<sup>218</sup> The mortgage company, which had obtained relief, opposed the trustee's motion. The court granted the motion but stated that the § 109(g) bar applied because the dismissal was for willful behavior and that any paper filed as a "petition" during the 180-day period was not valid and would not give rise to the automatic stay.<sup>219</sup>

These cases tell the story of a Code that effectively controls abuse. But the proposed amendments to the Code would lump all good faith debtors in with these serious abusers. Instead of allowing a court to exercise its discretion to determine whether a debtor's subsequent bankruptcy was a good faith effort to save a home or essential transportation, the proposal would presume bad faith and

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211. See *In re Hurst*, 212 B.R. 890, 893 (Bankr. W.D. Tenn. 1997).

212. When a debtor fails to pay the mortgage postpetition or fails to make the trustee payments, either the mortgagor moves for relief or the trustee seeks a dismissal. The motion process is short. Existence of a case for 42 months indicates that the debtor made several years of payments though that fact is not specified in the *Hurst* opinion.

213. See *In re Hurst*, 212 B.R. at 892.

214. See *id.* at 892-94.

215. See *In re McDaniels*, 213 B.R. 197, 199 (Bankr. M.D. Ga. 1997); *In re Hollberg*, 208 B.R. 755, 755 (Bankr. D.D.C. 1997).

216. A dismissal on a trustee's motion is not a voluntary dismissal, leaving the creditor to prove that the dismissal was the result of willful behavior by the debtor. See *In re McDaniels*, 213 B.R. at 199-200.

217. See *id.* at 201.

218. See *In re Hollberg*, 208 B.R. at 755.

219. See *id.* at 756.



force the well-intentioned debtor to surmount a huge obstacle—proof by clear and convincing evidence that her previous filing was not dismissed due to her negligence, failure to file or amend documents, or failure to comply with her plan “without substantial excuse”,<sup>220</sup> or that her new petition is supported by a substantial change in circumstances. Her new filing will be dismissed under the proposal if there is no “reason to conclude that the later case will be concluded . . . with a discharge” or there is not “a confirmed plan that will be fully performed.”<sup>221</sup> Several of the reported abuse cases involve debtors with very expensive property.<sup>222</sup> Debtors with the resources to acquire such homes are infinitely more likely to have legal resources as well and will be more able than will the ordinary homeowner acting in good faith, to continue their manipulation of the bankruptcy process even under the proposal. But the truly needy debtor will be hard pressed to pay the additional costs required just to return to bankruptcy protection.<sup>223</sup>

A few of the reported cases show that courts recognize the debtor’s right to return to Chapter 13 protection when the debtor’s circumstances improved after an initial failed Chapter 13 filing.<sup>224</sup> Where the debtors’ first Chapter 13 petition was dismissed because they missed a plan payment due to unanticipated utility deposits and their gross income increased by the second filing, the court overruled the creditor’s objection to confirmation based on an alleged lack of good faith.<sup>225</sup> Another court refused to find the debtors’ Chapter 7 petition filed in bad faith based only on the fact that the debtors filed three preceding, unsuccessful Chapter 13 petitions.<sup>226</sup> The debtors were engaged in a battle with the Internal Revenue Service (“IRS”) over dischargeability of their income taxes. The court stressed that it viewed good faith as a prospective determination but warned that if the Chapter 7 case failed, it would be dismissed with prejudice barring the debtors from refiling “for a period of years in any bankruptcy court in the United States.”<sup>227</sup> In two cases, courts rejected a request for annulment of the stay and prospective relief.<sup>228</sup> Both *In re Boswell* and *In re Lippolis* acknowledged that such relief was available under the Code but did not find it warranted where, in *In re Boswell*, the mortgagor proceeded with a foreclosure sale despite notice of the debtor’s third bankruptcy filing and the debtor was current in plan payments and ready for confirmation.<sup>229</sup> The debtor’s third filing complied with § 109(g). *In re Lippolis* also acknowledged that the Code

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220. Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. § 121 (1998).

221. *Id.*

222. See *In re Yimam*, 214 B.R. 463, 464 (Bankr. D. Md. 1997) (\$1 million home); *In re Fernandez*, 212 B.R. 361, 363 (Bankr. C.D. Cal 1997) (\$600,000 home).

223. See Klein, *supra* note 7, at 296, 303; Wedoff, *supra* note 13.

224. See *Downey Sav. & Loan Ass’n v. Metz (In re Metz)*, 820 F.2d 1495, 1498 (9th Cir. 1987); *In re Lippolis*, 216 B.R. 378, 386 (Bankr. E.D. Pa. 1997); *In re McElroy*, 210 B.R. 833, 837-38 (Bankr. D. Or. 1997); *In re Tanguay*, 206 B.R. 575, 576 (Bankr. M.D. Fla. 1997); *Blue Ridge Bank v. Boswell (In re Boswell)*, 206 B.R. 421, 423 (Bankr. M.D. Fla. 1997).

225. See *In re McElroy*, 210 B.R. at 837-38.

226. See *In re Tanguay*, 206 B.R. at 579.

227. *Id.*

228. See *In re Boswell*, 206 B.R. at 424; *In re Lippolis*, 216 B.R. at 386.

229. See *In re Boswell*, 206 B.R. at 424.

empowers a court to grant prospective relief in cases of serious abuse<sup>230</sup> but found that the debtors, transferees of a property involved in a prior bankruptcy, had a state law right to cure the mortgage delinquency, had proposed a confirmable plan, and did not act in bad faith. The bankruptcy was not dismissed. However, the court, as in *In re Tanguay*, ordered that dismissal of the case preconfirmation would result in a 180-day bar on refile by the debtors, their transferee and any transferee of the property.

The courts were also unsympathetic to creditor challenges of so called "Chapter 20"<sup>231</sup> bankruptcies—understandably so in light of the United States Supreme Court's specific approval of such filings.<sup>232</sup> The Ninth Circuit Bankruptcy Appellate Panel ("B.A.P.") affirmed the bankruptcy court's overruling of a creditor's objection to confirmation based on a lack of good faith where the creditor objected because the debtor filed the Chapter 13 petition a few months after losing a dischargeability dispute in his prior Chapter 7 case.<sup>233</sup> The B.A.P. found the timing troubling but did not find the bankruptcy court's determination that the plan was filed in good faith clearly erroneous. Similarly, a bankruptcy court refused to dismiss a debtor's Chapter 13 bankruptcy solely on the basis that it was filed after the creditor's claim had been held nondischargeable in the preceding Chapter 7 case without any other evidence of bad faith.<sup>234</sup> A debtor's "Chapter 33"<sup>235</sup> case survived dismissal where the debtor obtained a discharge in her original Chapter 13 filing, but, due to bad advice from her soon-after disbarred lawyer, mistakenly thought her secured debt was discharged rather than simply cured.<sup>236</sup> The creditor compounded the problem by failing to contact the debtor for over a year—because the note was assigned several times. When the creditor woke up and began foreclosure, the debtor got a new lawyer who ineptly advised her to file a Chapter 7 petition. The creditor promptly filed for and obtained relief and the debtor finally got a competent lawyer who filed a Chapter 13 petition the day before the scheduled foreclosure sale. The Chapter 7 discharge was entered four days later.<sup>237</sup> The court denied the mortgage company's relief motion, holding that the debtor's simultaneous bankruptcies did not violate the Code nor breach the "single estate rule" because the Chapter 13 filing, unlike the Chapter 7 filing, sought to cure the default on the secured debt, not to discharge it.<sup>238</sup> The court recognized that extreme circumstances, including

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230. See *In re Lippolis*, 216 B.R. at 380 n.3.

231. A Chapter 20 case is a Chapter 13 case filed after the debtor obtains a discharge in Chapter 7. See Lex A. Coleman, *Individual Consumer "Chapter 20" Cases After Johnson: An Introduction to Nonbusiness Serial Filings Under Chapter 7 and Chapter 13 of the Bankruptcy Code*, 9 BANKR. DEV. J. 357, 357 (1992).

232. See *Johnson v. Homestate Bank*, 501 U.S. 78 (1991).

233. See *Smyrnos v. Padilla (In re Padilla)*, 213 B.R. 349, 351 (B.A.P. 9th Cir. 1997).

234. See *Piwowarczyk v. Shayeb (In re Shayeb)*, 211 B.R. 390, 391 (Bankr. D. Ariz. 1997).

235. The debtor obtained a Chapter 13 discharge in 1994, filed a Chapter 7 case in 1996, and while the Chapter 7 case was still pending, filed a second Chapter 13 case in 1996. See *Transamerica Credit Corp. v. Bullock (In re Bullock)*, 206 B.R. 389, 390-91 (Bankr. E.D. Va. 1997).

236. See *id.* at 393-94.

237. See *id.* at 391.

238. *Id.* at 394.

the bad legal advice, warranted the second filing which was made in good faith. On less sympathetic facts, the court in *In re Britt*<sup>239</sup> denied a creditor's objection to confirmation of a Chapter 13 plan. The debtor first filed under Chapter 7 and lost a dischargeability determination when the court held that her debt to her former employer was nondischargeable because it resulted from her embezzlement of funds. Given the broader discharge applicable in Chapter 13 cases and the debtor's compliance with the Code,<sup>240</sup> she met the good faith requirements. Similarly, a court refused to dismiss as a bad faith filing, the Chapter 13 petition of a debtor whose debt to the creditor was found nondischargeable in her previous Chapter 7 case.<sup>241</sup> Again, the debtor's plan proposed a 35% distribution to unsecured claimants and absorbed all of her disposable income for three years. However, where debtors filed a Chapter 13 petition before discharge was entered in their pending Chapter 7 case and after the mortgagor obtained relief to foreclose, the Second Circuit B.A.P. described the Chapter 13 filing as a nullity.<sup>242</sup> Tenants who sought to retain their public housing leases through Chapter 13 filings following Chapter 7 discharges were required to pay the postdischarge rents in full through their Chapter 13 plans.<sup>243</sup>

The final 1997 case<sup>244</sup> involved three chapters—the debtors' original Chapter 11 case was converted to Chapter 7. While the Chapter 7 case was pending, the debtors filed a Chapter 13 petition and asked the court to consolidate the new Chapter 13 filing with the pending Chapter 7 case. The bankruptcy court denied the motion, dismissed the Chapter 13 petition, and authorized the sale of the debtors' home. On appeal, the circuit affirmed, holding that the consolidation was really an effort to end the Chapter 7 case and avoid the trustee's control of the assets, and the bankruptcy court did not abuse its discretion in finding the Chapter 13 petition filed in bad faith.<sup>245</sup>

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239. 211 B.R. 74, 79 (Bankr. M.D. Fla. 1997).

240. She submitted accurate schedules and proposed to devote all of her disposable resources to fund the plan. *See id.* at 76.

241. *See In re Barnett*, 216 B.R. 202, 205 (Bankr. N.D. Ohio 1997).

242. *See Turner v. Citizens Nat'l Bank (In re Turner)*, 207 B.R. 373, 378 (B.A.P. 2d Cir. 1997). The immediate issue before the B.A.P. was whether to grant the debtors' request for a stay of the bankruptcy court's relief order pending appeal. The B.A.P. denied the stay, holding that the debtors' likelihood of success on the merits was slim given that their Chapter 13 was a nullity so no stay on appeal was appropriate. *See id.* at 379. The debtors had engaged in further inappropriate manipulation of the Code which no doubt influenced the decision. Although their Chapter 13 plan proposed a sale of the house, they had taken no steps to effect a sale during the year that the foreclosure was pending. They mailed their Chapter 13 petition instead of providing direct notice to the mortgagor even though the foreclosure sale was imminent—in fact it occurred an hour before the petition was time stamped. And there were third-party bidders at the sale who stood to lose a house they had successfully purchased. *See id.* at 374-76.

243. *See In re Day*, 208 B.R. 358, 360 (Bankr. E.D. Pa. 1997).

244. *See Fishell v. United States (In re Fishell)*, No. 95-1637, 1997 WL 188458 (6th Cir. Apr. 16, 1997) (unpublished disposition).

245. *See id.* at \*5.

*B. Cases Reported in 1996*

The cases reported in 1996 show similar results. Again they are sparse. There were a mere twenty-nine.<sup>246</sup> As before, the truly abusive bankruptcies met an appropriate doom. Trustees or creditors were successful in objecting to confirmation or obtaining a dismissal for bad faith in eighteen cases.<sup>247</sup> A bankruptcy court had no trouble dismissing with prejudice the last Chapter 13 bankruptcy filed by a husband who, with his wife, engaged in five tag team<sup>248</sup> Chapter 13 filings between January 1995 and August 1996.<sup>249</sup> The last case was dismissed as a bad faith abuse of the Code. Another court dismissed the debtors'

246. See *F.D.I.C. v. Cortez*, 96 F.3d 50 (2d Cir. 1996); *In re Lilley*, 91 F.3d 491 (3d Cir. 1996); *Molitor v. Edison (In re Molitor)*, 76 F.3d 218 (8th Cir. 1996); *Greatwood v. IRS (In re Greatwood)*, 194 B.R. 637 (B.A.P. 9th Cir. 1996), *aff'd*, 120 F.3d 268 (9th Cir. 1997); *In re Inmon*, 208 B.R. 455 (Bankr. E.D. Ark. 1996); *In re Robertson*, 206 B.R. 826 (Bankr. E.D. Va. 1996); *In re Bucco*, 205 B.R. 323 (Bankr. M.D. Fla. 1996); *Norwalk Sav. Soc'y v. Peia (In re Peia)*, 204 B.R. 310 (Bankr. D. Conn. 1996); *In re Spear*, 203 B.R. 349 (Bankr. D. Mass. 1996); *In re Harrison*, 203 B.R. 253 (Bankr. E.D. Va. 1996); *Hopkins v. United States (In re Hopkins)*, 201 B.R. 993 (Bankr. D. Nev. 1996); *Vines v. IRS (In re Vines)*, 200 B.R. 940 (Bankr. M.D. Fla. 1996); *In re Ziyambe*, 200 B.R. 790 (Bankr. D.N.J. 1996); *In re Greenberg*, 200 B.R. 763 (Bankr. S.D.N.Y. 1996); *In re Slater*, 200 B.R. 491 (Bankr. E.D.N.Y. 1996); *In re Ortiz*, 200 B.R. 485 (Bankr. D.P.R. 1996); *United States v. Smith (In re Smith)*, 199 B.R. 56 (Bankr. N.D. Okla. 1996); *In re Robinson*, 198 B.R. 1017 (Bankr. N.D. Ga. 1996); *Mock v. Hannet, Inc. (In re Mock)*, 197 B.R. 1017 (Bankr. E.D. Pa. 1996); *In re Robinson*, 196 B.R. 454 (Bankr. E.D. Ark. 1996); *In re Landes*, 195 B.R. 855 (Bankr. E.D. Pa. 1996); *In re Pickering*, 195 B.R. 759 (Bankr. D. Mont. 1996); *In re Burton*, 195 B.R. 588 (Bankr. W.D.N.Y. 1996); *In re Herrera*, 194 B.R. 178 (Bankr. N.D. Ill. 1996); *In re Stober*, 193 B.R. 5 (Bankr. D. Ariz. 1996); *Integra Bank v. Sixta (In re Smith)*, 192 B.R. 397 (Bankr. W.D. Pa. 1996); *In re Harris*, 192 B.R. 334 (Bankr. W.D.N.Y. 1996); *Matter of Jones*, 192 B.R. 289 (Bankr. M.D. Ga. 1996); *Friend v. Chemical Residential Mortgage Corp. (In re Friend)*, 191 B.R. 391 (Bankr. W.D. Tenn. 1996).

Again, the contrast to the number of reported cases involving other bankruptcy issues is illuminating. A computer search for 1996 cases containing the terms "bankruptcy" and "false pretenses, a false representation, or actual fraud" produced 111 case citations. A search for cases containing the terms "bankruptcy" and "523(a)(15)" produced 64 case citations. See *supra* note 167.

247. See *In re Molitor*, 76 F.3d at 220; *In re Greatwood*, 194 B.R. at 641; *In re Inmon*, 208 B.R. at 459; *In re Robertson*, 206 B.R. at 831; *In re Bucco*, 205 B.R. at 324; *In re Peia*, 204 B.R. at 331-32; *In re Spear*, 203 B.R. at 354-55; *In re Harrison*, 203 B.R. at 256; *In re Hopkins*, 201 B.R. at 996; *In re Vines*, 200 B.R. at 950; *In re Ortiz*, 200 B.R. at 490; *In re Robinson*, 198 B.R. at 1025; *In re Mock*, 197 B.R. at 474; *In re Robinson*, 196 B.R. at 459; *In re Pickering*, 195 B.R. at 769; *In re Burton*, 195 B.R. at 593; *In re Herrera*, 194 B.R. at 192; *In re Stober*, 193 B.R. at 11.

248. Tag team filings are those in which related debtors, usually married couples or other co-owners of property, file individual petitions serially in an effort to thwart foreclosure. First the husband may file and, once relief is granted in his case and foreclosure proceeds, the wife files to block the foreclosure effort. Timed well by bad faith debtors, such tag team filings can interfere with foreclosure even despite the six-month bar on refiling effected by 11 U.S.C. § 109(g) (1994). Where the "debtors" have fractional interests in a property, the delay can be considerable. See *Task Force Report, supra* note 96, at 7.

249. See *In re Bucco*, 205 B.R. at 324.

third Chapter 13 filing within five years for bad faith, and imposed a one-year bar or refiling, where the debtors ran through six lawyers and filed many frivolous pro se motions in an effort to avoid execution of a state court judgment by one creditor.<sup>250</sup> Another debtor's fourth Chapter 13 filing within one year was dismissed with prejudice as a bad faith filing.<sup>251</sup> A court dismissed with prejudice a second Chapter 13 bankruptcy by a debtor who got a Chapter 7 discharge in 1993 after losing a dischargeability proceeding.<sup>252</sup> She was found to have defrauded a creditor. She immediately filed a Chapter 13 petition proposing to pay the fraud debt but failing to list real property she owned. Three years after she voluntarily dismissed her first Chapter 13 case, she filed again, having lost in the interim a state court fraudulent conveyance action involving the property she failed to list in the first two bankruptcies.<sup>253</sup> A bankruptcy court dismissed a debtor's second Chapter 13 filing and sanctioned the debtor and his attorney where the debtor filed no schedules and made no payments and did not attend the 341 meeting in the first case and admitted filing the second case only to buy time to complete a refinancing.<sup>254</sup> Another husband and wife who filed four Chapter 13 bankruptcies within a year by tag team filing found the last case dismissed with prejudice and a one-year bar on refiling by either of them.<sup>255</sup> Similar bad faith dismissals were rendered against a pro se debtor who filed three infeasible Chapter 13 bankruptcies between 1989 and 1994 after getting a Chapter 13 discharge,<sup>256</sup> a debtor whose third Chapter 13 petition filed within three months was dismissed with prejudice and a 180-day bar because she filed no schedules in any of the cases;<sup>257</sup> and the debtor whose plan in his second Chapter 13 filing within one month was totally infeasible on its face.<sup>258</sup> A debtor's Chapter 13 petition, filed after discharge was entered in her Chapter 7 case but while that case was still pending, was dismissed for bad faith because the debtor failed to fully disclose her income and expenses, did not submit all of her disposable income to fund the plan and filed under Chapter 13 primarily to resolve by token payment the defalcation debt that was found nondischargeable in the Chapter 7 proceeding.<sup>259</sup>

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250. *See In re Ortiz*, 200 B.R. at 490.

251. *See In re Stober*, 193 B.R. at 11. The debtors failed to file full schedules, pay the filing fees, or make trustee or mortgage payments in any of their cases. The court directed that if the debtors violated § 109(g) by attempting another filing, it would hold a prompt hearing to vacate and annul the stay in such a case. *See id.*

252. *See In re Inmon*, 208 B.R. 455, 459 (Bankr. E.D. Ark. 1996).

253. *See id.* at 456-57.

254. *See In re Robinson*, 198 B.R. 1017, 1020, 1025 (Bankr. N.D. Ga. 1996).

255. *See In re Herrera*, 194 B.R. 178, 192 (Bankr. N.D. Ill. 1996).

256. *See In re Robinson*, 196 B.R. 454, 459 (Bankr. E.D. Ark. 1996). The debtor was apparently "helped" by a petition preparer whose penchant for including slanderous and irrelevant statements in the pleadings did not advance the debtor's cause. *Id.*

257. *See In re Spear*, 203 B.R. 349, 354 (Bankr. D. Mass 1996).

258. *See Mock v. Hanner, Inc. (In re Mock)*, 197 B.R. 468, 474 (Bankr. E.D. Pa. 1996).

259. *See In re Pickering*, 195 B.R. 759, 769 (Bankr. D. Mont. 1996).

Tax protesters enjoyed little success in their efforts to block IRS collection through repeat bankruptcy filings.<sup>260</sup> The IRS moved for and got a bad faith dismissal of a Chapter 13 petition that followed a Chapter 7 discharge of a debtor whose plan proposed no payment to the IRS.<sup>261</sup> Another tax protester's third Chapter 13 filing was dismissed with prejudice where the debtor refused to file tax returns and his plan did not provide for the priority claim of the IRS.<sup>262</sup> The IRS not only won dismissal on bad faith grounds but the judge also imposed a bar on future filings for 417 days against a debtor whose three Chapter 13 filings in two years were timed to disrupt tax collection proceedings.<sup>263</sup> The court barred the debtor from further bankruptcy relief for the same period of time his bad faith filings had blocked the IRS. The Third Circuit recognized that lack of good faith may be cause for dismissal of a Chapter 13 filing but remanded the case of a tax protester for determination of whether he met the good faith standard.<sup>264</sup> The debtor's tax debt was held nondischargeable in his Chapter 7 case. He then filed under Chapter 13 but, given his limited income, proposed only minimal distribution to the IRS.<sup>265</sup>

A bad faith objection to confirmation succeeded where a debtor's Chapter 7 discharge was followed two months later by a Chapter 13 plan proposing to pay delinquent child support through a sixty month plan with thirty percent of the debt paid in a lump sum at the end of the plan. The debtor failed to show nonspeculative means of paying the belated lump sum.<sup>266</sup> The Eighth Circuit affirmed a bankruptcy court's decision to convert a Chapter 13 case to one under Chapter 7 for cause where the debtor filed three successive Chapter 13 petitions to block loss of the property he had purchased under a contract he breached. The debtor misrepresented his liabilities and expenses on his schedules.<sup>267</sup> Where a debtor filed a second Chapter 13 petition while her original Chapter 13 case was still pending but after the mortgagor had obtained a relief order, the court granted an emergency relief hearing to the mortgagor to determine whether it could proceed with a foreclosure sale scheduled four days later.<sup>268</sup> The court held the hearing that afternoon and granted relief because the debtor showed no ability to fund a plan adequate to reinstate the mortgage. The court allowed the sale to proceed subject to a later hearing to confirm or void it based on the debtor's ability to fund a plan. The stay was annulled and the sale confirmed when the debtor failed to show reasonable prospects for reorganization at that second hearing.<sup>269</sup>

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260. See *In re Lilley*, 91 F.3d 491, 496 (3d Cir 1996); *Greatwood v. IRS (In re Greatwood)*, 194 B.R. 637, 640 (B.A.P. 9th Cir. 1996); *In re Robertson*, 206 B.R. 826, 831 (Bankr. E.D. Va. 1996); *Vines v. IRS (In re Vines)*, 200 B.R. 940, 950 (Bankr. M.D. Fla. 1996).

261. See *In re Greatwood*, 194 B.R. at 639, 641.

262. See *In re Vines*, 200 B.R. at 943, 950.

263. See *In re Robertson*, 206 B.R. at 831.

264. See *In re Lilley*, 91 F.3d at 496.

265. See *id.*

266. See *In re Harrison*, 203 B.R. 253, 255-56 (Bankr. E.D. Va. 1996).

267. See *Molitor v. Edison (In re Molitor)*, 76 F.3d 218, 219-20 (8th Cir. 1996).

268. See *In re Burton*, 195 B.R. 588, 590 (Bankr. W.D.N.Y. 1996).

269. See *id.* at 593.

It took more judicial time to deal with the 1996-1997 champion of debtor abuse, Albert Peia, who filed thirteen bankruptcy petitions under three different chapters in four different states over a period of eight years, all in a defiant effort to save a property the court determined he had no interest in as of 1993.<sup>270</sup> Mr. Peia, whose litigiousness might have been related to his background as a lawyer, repeatedly violated orders prohibiting him from refiling. The bankruptcy court finally ordered that his simultaneous bankruptcy pending in California was not bona fide, that the automatic stay in this or any future bankruptcy would have no effect on the mortgagor's right to evict him from the property; that his current case would remain open until further order of the court, and that copies of the order would be filed with the state and federal courts involved in the other proceedings.<sup>271</sup>

Only five serial filing cases reported in 1996 ended in victory for the debtors.<sup>272</sup> *In re Rambo* rejected a poorly supported creditor argument that an ordinary relief from stay order in the debtors' prior Chapter 13 bankruptcy was res judicata as to the creditor's right to relief in a subsequent bankruptcy,<sup>273</sup> even though binding circuit authority had rejected that claim and the relief order was silent on prospective relief.<sup>274</sup> *In re Smith* found that the debtors' Chapter 13 filing that followed their Chapter 7 discharge met the good faith test where the plan provided only a two percent distribution to unsecured creditors including the IRS<sup>275</sup> but devoted all the debtors' disposable income and paid secured claims in full.<sup>276</sup> The IRS unsuccessfully requested dismissal with prejudice to any future refiling of a debtor's third bankruptcy.<sup>277</sup> The debtor's first two filings—one under Chapter 13 and one under Chapter 11—also failed. The court dismissed the third case because it found the debtor was unable to make the payments because his business was slow and not because of willful misconduct. It refused to bar future filings.<sup>278</sup> Another court granted the Chapter 13 debtors' request to enforce the automatic stay in their fourth Chapter 13 filing, despite entry of a 180-day bar in their third case where they proved their circumstances had substantially improved.<sup>279</sup> Both debtors had regained employment and agreed to fund the plan

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270. See *Norwalk Sav. Soc'y v. Peia (In re Peia)*, 204 B.R. 310, 313 (Bankr. D. Conn. 1996). *Peia* was the only cross-border repeat filing case reported in 1996 or 1997, despite anecdotal complaints that the abundance of such filings requires the development of a national data base. See COMMISSION REPORT, *supra* note 39, at 105.

271. See *id.*

272. See *In re Rambo*, 196 B.R. 181, 188 (Bankr. W.D. Okla. 1996); *In re Landes*, 195 B.R. 855, 865-66 (Bankr. E.D. Pa. 1996); *United States v. Smith (In re Smith)*, 199 B.R. 56, 57 (Bankr. N.D. Ohio 1996); *In re Jones*, 192 B.R. 289, 293 (Bankr. M.D. Ga. 1996); *Friend v. Chemical Residential Mortgage Corp. (In re Friend)*, 191 B.R. 391, 395-96 (Bankr. W.D. Tenn. 1996).

273. *In re Rambo*, 196 B.R. at 187-88

274. See *id.* at 185-86.

275. *In re Smith*, 199 B.R. at 58.

276. See *id.*

277. See *In re Jones*, 192 B.R. at 290, 293.

278. See *id.*

279. See *In re Friend*, 191 B.R. at 393, 395.

through wage deductions.<sup>280</sup> Finally, a bankruptcy court refused to impose a good faith filing requirement on a Chapter 7 debtor and did not find that the debtor's bankruptcy history—previous filing and dismissal of an individual Chapter 11 bankruptcy, and a Chapter 11 bankruptcy for his business that was converted to Chapter 7—justified dismissal for bad faith or abuse of the bankruptcy process.<sup>281</sup>

Again in 1996 courts applied creative sanctions where they were appropriate.<sup>282</sup> Prospective relief from the stay was granted in cases with particularly egregious facts. Prospective relief was granted to a mortgage holder to complete its postforeclosure eviction of a debtor whose claim to ownership of the home had been resolved against her by two state court judgments.<sup>283</sup> The debtor repeatedly raised the same factual claim—that her brother either forged her signature on or coerced her into signing a deed conveying her home to the brother's girlfriend, who then mortgaged the home and failed to pay, resulting in the foreclosure.<sup>284</sup>

Another court lifted the automatic stay in the debtors' Chapter 7 and further ordered that the mortgagor could proceed with foreclosure even if the debtors filed again, so long as the mortgagor requested a prompt hearing to retroactively annul the stay.<sup>285</sup> A creditor was awarded the fees and costs it incurred in the motion for relief from stay and the objection to dismissal.<sup>286</sup> Mr. Herrera was ordered to stop his unauthorized practice of law.<sup>287</sup> A court annulled the stay effected by an individual debtor's collusion in an pseudo-involuntary Chapter 11 bankruptcy filed while the debtor was under a one-year filing bar issued in her prior voluntary bankruptcy.<sup>288</sup> A court acknowledged a Chapter 13 debtor's absolute right to dismiss her case, her second Chapter 13 filing, but it conditioned the dismissal, ordering that any subsequent bankruptcy filing would not apply to her co-op's ongoing efforts to evict her unless the debtor moved to reimpose the stay.<sup>289</sup> Mr. Peia was permanently barred from imposing the automatic stay on the creditors affected by his numerous abusive filings.<sup>290</sup> A debtor's serial filings backfired on her in *In re Smith*.<sup>291</sup> The court denied her request to have a mortgage foreclosure judgment marked satisfied where, after foreclosure, she filed a chapter 13 and three successive Chapter 11 petitions. The court held that

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280. *See id.*

281. *See In re Landes*, 195 B.R. 855, 862-63 (Bankr. E.D. Pa. 1996).

282. *See F.D.I.C. v. Cortez*, 96 F.3d 50, 51 (2d Cir. 1996); *Norwalk Sav. Soc'y v. Peia (In re Peia)*, 204 B.R. 310, 313-15 (Bankr. D. Conn. 1996); *In re Slater*, 200 B.R. 491, 498 (Bankr. E.D.N.Y. 1996); *In re Greenberg*, 200 B.R. 763, 768-69 (Bankr. S.D.N.Y. 1996); *In re Robinson*, 198 B.R. 1017, 1022 (Bankr. N.D. Ga. 1996); *In re Herrera*, 194 B.R. 178, 191 (Bankr. N.D. Ill. 1996); *In re Harris*, 192 B.R. 334, 337-38 (Bankr. W.D.N.Y. 1996); *In re Smith*, 192 B.R. 397, 400 (Bankr. W.D. Pa. 1996).

283. *See In re Slater*, 200 B.R. at 498.

284. *See id.* at 493-94.

285. *See In re Harris*, 192 B.R. at 338.

286. *See In re Robinson*, 198 B.R. at 1025.

287. *See In re Herrera*, 194 B.R. at 191.

288. *See F.D.I.C. v. Cortez*, 96 F.3d 50, 51 (2d Cir. 1996).

289. *See In re Greenberg*, 200 B.R. 763, 770 (Bankr. S.D.N.Y. 1996).

290. *See Norwalk Sav. Soc'y v. Peia (In re Peia)*, 204 B.R. 310, 315 (Bankr. D. Conn. 1996).

291. *Integra v. Sixta (In re Smith)*, 192 B.R. 397, 398 (Bankr. W.D. Pa. 1996).



the stay imposed by the bankruptcy filings extended the mortgagor's period for filing a deficiency action so that time still remained and the mortgagor had no obligation to satisfy the judgment.<sup>292</sup>

The small number of cases involving abusive serial filings and the success enjoyed by the creditors and trustees who objected to abusive actions by the debtors give lie to the anecdotes about widespread abuse of the bankruptcy system running rampant over a system incapable of stopping such manipulation. The reported cases no doubt do not reflect the number of repeat filings that are not challenged or those that are withdrawn without litigation. Such cases do exist. But arguments for change based on anecdote show that the real issue is not whether the Code must be revised to deal with abusive serial filings. The Code now precludes such filings and the cases establish that the courts enforce those provisions. The real issue is whether the definition of abuse should be changed—do we want to expand that definition to include debtors who need relief, who are filing in good faith, who seek bankruptcy relief to save their homes but who may honestly need more than one chance to effect a reorganization? A high percentage of current Chapter 13 bankruptcies fail,<sup>293</sup> at least in the sense that the debtor does not reach discharge. Creditors would like to cut marginal debtors off from Chapter 13 bankruptcy relief if they fail once. But creditors would probably prefer to eliminate bankruptcy entirely so they could retain complete control over working out of debt. Bankruptcy exists and has existed historically as a direct challenge to the belief that creditor control is always the ideal way to resolve debt problems. The attack on repeat filings is fundamentally a dispute over the value of Chapter 13 as a tool.

#### VI. CHAPTER 13 ACCESS IS ESSENTIAL FOR REDUCING MORTGAGE FORECLOSURE

Chapter 13's greatest significance for debtors is its use as a weapon to avoid foreclosure on their homes. Restricting initial and repeat access to Chapter 13 protection will increase foreclosure rates for financially distressed homeowners. Loss of homes hurts not only the individual homeowner but also the family, the neighborhood and the community at large. Preserving access to Chapter 13 will reduce this harm.

Chapter 13 bankruptcies do not result in destruction of the interests of traditional mortgage lenders. Under Chapter 13, a debtor cannot discharge a mortgage debt and keep her home. Rather, a Chapter 13 bankruptcy offers the debtor an opportunity to cure a mortgage delinquency over time—in essence it is a statutorily mandated payment plan—but one that requires the debtor to pay precisely the amount she would have to pay to the lender outside of bankruptcy.<sup>294</sup>

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292. *See id.*

293. *See* William C. Whitford, *Has the Time Come to Repeal Chapter 13?*, 65 *IND. L.J.* 85, 92-93 (1990).

294. *See* 11 U.S.C. §§ 1322, 1325 (1994). Depending on the origination date of the mortgage, the lender will get a windfall in bankruptcy—additional interest on the cure figure which itself includes the interest on principal owed under the loan contract. *See id.* § 1322(e); *Rake v. Wade*, 506 U.S. 1046 (1993).

Under Chapter 13, the plan must provide the amount necessary to cure the mortgage default, which includes the fees and costs allowed by the mortgage agreement and by state law. Mortgage lenders who are secured only by an interest in the debtor's residence enjoy even greater protection under 11 U.S.C. § 1322(b)(2) of the Code. Known as the "anti-modification provision," § 1322(b)(2) bars a debtor from modifying any rights of such a lender—including the payment schedule provided for under the loan contract. Such lenders are not subject to lien stripping that can otherwise reduce an undersecured claim to the true value of the collateral.<sup>295</sup>

Even though a debtor must, through reinstatement of her delinquent mortgage by a Chapter 13 repayment plan or by plan payments that pay the entire mortgage off over the life of the plan, pay her full obligation to the lender, Chapter 13 remains the only viable way for most mortgage debtors to cure defaults and save their homes. Mortgage lenders are extraordinarily unwilling to accept repayment schedules outside of bankruptcy. Federal Housing Administration regulations require reinstatement to be complete within six months, a prohibitively short time limit for borrowers in financial distress.<sup>296</sup> There is no history to support any claim that lenders will accommodate the need for extended workouts without the pressure of bankruptcy as an option for consumer debtors. Reducing the availability of chapter 13 protection to mortgage debtors is most likely to result in higher foreclosure rates, not in greater flexibility by lenders.

Homeowners need bankruptcy protection not only to preserve ownership in the face of foreclosure on traditional purchase money mortgages. They also need protection from the pressures of the credit industry segment focused on second mortgages. The hot new lending area<sup>297</sup> for mortgagees is subprime lending—secured mortgage loans originated as loans in excess of the borrowers' equity.<sup>298</sup> Indeed these lenders advertise vigorously that you can borrow "up to

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295. Lien stripping is a bankruptcy event that places secured claims on an equal footing with other secured claims by treating the obligation as secured only to the extent of the actual value of the security—the claim holder enjoys the benefits of secured status to the extent its claim is truly secured—but cannot artificially inflate its rights at the expense of other unsecured claim holders or the debtor. *See* 11 U.S.C. § 506 (1994); David Gray Carlson, *Bifurcation of Undersecured Claims in Bankruptcy*, 70 AM. BANKR. L. J. 1, 14-15 (1996).

296. *See* 24 C.F.R. § 206.125(d)(1) (1998).

297. High loan-to-value lending has been described as "the hottest product on the market" by those involved in the mortgage lending industry. *See* Advertisement from AIC Conferences, Inc. for Residential Mortgage Delinquency & Default Management 1998 (on file with author).

298. As a homeowner in Philadelphia, I have received at least 35 mail solicitations for home equity loans from 25 different lenders since January 1, 1998. These mail solicitations frequently contain documents that appear to be checks in substantial sums—ranging from \$25,000 to \$80,000, although the fine print acknowledges that they are not negotiable. Many of the solicitations state explicitly that I was specially selected for a limited time offer (14) and that past or current credit problems are no obstacle (17). Nine explicitly advertise that I can borrow up to 125% of my home's value and 10 say no equity is required. One even offers a mini-vacation in Orlando, Florida "just for applying." I have not kept track of the numerous telephone solicitations which I find too annoying to tolerate.

125% of the value of your home,"<sup>299</sup> and poor credit histories are no obstacle.<sup>300</sup> Such lenders should not be able to benefit from the protections given to secured lenders when they never were truly secured even at the time the loan was originated. This type of lending, while lucrative<sup>301</sup> for the lender, heightens the risk of loss to the lender and the homeowner.

Chapter 13 has also come under criticism from those who believe it is overused by debtors who would be better off under Chapter 7. The empirical studies to date also show greater debtor desire for Chapter 13 than is economically wise.<sup>302</sup> Indeed a major concern of academics has been the lure of Chapter 13 to debtors who would be better off in Chapter 7.<sup>303</sup> Restrictions on the right to refile under Chapter 13 may serve to "protect" starry eyed consumer debtors from their own naive intentions but they will also result in many of those consumers losing the chance to save their homes.<sup>304</sup>

The bare economic analysis of the expenses of saving a house contrasted with the expense of an apartment leaves too much out of the equation.<sup>305</sup> It may appear financially unwise for a consumer to spend half her disposable income to save a house in a Chapter 13 that requires her to pay more than the house is worth, if for example the mortgage balance exceeds the fair market value or the monthly payments exceed half her income. But the house has other values to the consumer. It represents her only substantial investment—even if she is paying more than it is worth. Home ownership, rightly or wrongly, has enormous psychological and emotional significance for people. Losing a home affects self worth deeply. Houses are in neighborhoods—a typical debtor with children has to factor in

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299. Mail solicitation from New Jersey Mortgage and Investment Corporation ("NJMIC") (on file with author).

300. "Credit Problems are our specialty—bankruptcies, foreclosures, and delinquencies are no problem." Solicitation from Old City Mortgage (on file with author); "All credit histories considered." Solicitation from P.C. Mortgage Co. Inc. (on file with author); "Loans available for those with past or present credit problems. (Personal bankruptcies, late payment histories, judgements, financial hardship due to divorce and medical problems, etc.)" Solicitation from NJMIC (on file with author) (parenthetical in original).

301. The solicitations do not emphasize the interest rates charged for the loans but those that provide information on sample payments use Annual Percentage Rates ("APR") in the range of 12% to 14.5%. See, for example, Solicitations from Flagship Mortgage Services (14.390% APR) (on file with author), Capital One Lending Services (12.9% APR) (on file with author), and Direct Equity Lending (15.934% APR) (on file with author).

302. See Braucher, *supra* note 40, at 530, 535; Whitford, *supra* note 293, at 92-93.

303. See Braucher, *supra* note 40 at 546, 551 (stating that lawyers have a financial incentive to promote Chapter 13 filings to collect higher fees); Braucher, *supra* note 106, at 166 (noting that some lawyers have admitted to encouraging Chapter 13 out of financial self-interest).

304. Warren, *Principled Approach*, *supra* note 4, at 489 (single chapter idea).

305. This view also fails to consider that Chapter 13 has enormous strategic value as an excellent forum for consumer issues. In contrast to the short time frame of a Chapter 7 bankruptcy, the Chapter 13 process allows the debtor time to strategize; the issues matter sufficiently to justify involved litigation, and the court's jurisdiction is more firmly grounded. See David A. Scholl, *Bankruptcy Court: The Ultimate Consumer Law Forum?*, 44 BUS. LAW. 935, 938-39 (1989); William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397, 404-05 (1994).

community and support issues. Will she lose the schools her kids like if she moves? Will she lose family or neighbor assistance with child care? Will she have to switch the day care or afterschool care arrangements she relies on? Can she even get an apartment with the adverse credit resulting from mortgage foreclosure? Rents for an apartment adequate to house a family can easily exceed a typical mortgage payment in many communities, and subsidized housing is becoming less and less available.<sup>306</sup>

The wider community itself is adversely affected by foreclosure. Although many commentators do not consider the community as a component of the bankruptcy equation<sup>307</sup> the impact of foreclosure on the remaining neighbors has a real impact. Empty houses hurt the community by increasing blight and reducing the availability of mortgage financing and homeowners' insurance for those who remain.<sup>308</sup> Bankruptcy laws that help people avoid foreclosure reduce the risk of this community harm.

One major contribution to the failure rate of Chapter 13 plans is the prevalence of 100% payout requirements in some areas of the country.<sup>309</sup> It is hardly surprising that a payment plan requiring a financially hard pressed debtor to pay not only the entire amount of her mortgage delinquency with interest but also 100% of her unsecured claims rarely succeeds. Chapter 13 success rates could be improved simply by enforcing the Code as written and treating the disposable income test with seriousness. If the debtor is devoting her disposable income to fund the plan, she should receive the benefits of Chapter 13, even if the distribution to unsecured creditors is only a fraction of the total debt.<sup>310</sup> The deceptive nature of the "reform" proposals again shows in their failure to improve Chapter 13 in this regard. Instead the reforms will doom even more debtors to failure as they are forced into Chapter 13 based on means testing, they are required to pay unsecured claims pro rata with the mortgage arrearages, and they must meet a floor payment of \$50 per month on their unsecured claims regardless of their disposable income.<sup>311</sup>

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306. See JOINT CENTER FOR HOUSING STUDIES, ANNUAL REPORT SHIFTS IN HOUSING POLICIES 2-3 (1997).

307. See KAREN GROSS, FAILURE AND FORGIVENESS, REBALANCING THE BANKRUPTCY SYSTEM 193-214 (1997).

308. See Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City with Resident Control*, 27 U. MICH. J. L. REFORM 689, 707 (1994).

309. See Braucher, *supra* note 40, at 532 (noting a 100% repayment plan for San Antonio, Tex.); Whitford, *supra* note 305, at 405 & n.40, 410-11.

310. Professor Braucher has thoughtfully analyzed the professional responsibility issues raised by debtors' lawyers who funnel their clients into 100% payment Chapter 13 plans without adequately counseling the client about other options or without attempting to challenge local bankruptcy culture expectations that ignore the language of the disposable income test. See generally Braucher, *supra* note 106.

311. The Bankruptcy Reform Act of 1998 eliminates the disposable income test and substitutes the means testing prerequisite for Chapter 7 eligibility, H.R. 3150, 105th Cong. § 101 (1998), and requires payment of all monthly net income to unsecured non-priority creditors and administrative claimants with a minimum monthly payment of \$50 regardless of income, see *id.* §§ 101, 102.

It is unrealistic to think mortgage companies will do workouts without the threat of the debtor's access to Chapter 13 protection. The bankruptcy process is still very protective of the mortgage industry.<sup>312</sup> To the extent that the existence of Chapter 13 protections increases the costs of mortgage financing to all consumers, it can and should be viewed as an essential form of consumer insurance, assuming the cries of the industry are really valid.<sup>313</sup>

## VII. CONCLUSION

There is something surreal about the current attack on the Bankruptcy Code. Much of it boils down to the argument that the Code is bad because it works—that it allows people to discharge their debts.<sup>314</sup> That is of course the historic and traditional purpose of bankruptcy. It is absurd to accuse debtors of bad faith for taking advantage of Code provisions that were intended to protect them.<sup>315</sup> In large part, the credit industry, which has chosen to increase profits by extending credit in large amounts to people with weak credit histories, wants to be saved from itself.<sup>316</sup> Increased bankruptcy filings are part of the cost of these trends in lending.

Objective studies show that the vast majority of bankrupt debtors desperately need the relief that the current Code offers them. The rhetoric of the lazy, immoral debtor who takes the easy road of bankruptcy instead of paying her bills is belied by the truth of the debt burdens now carried by the average consumer in the United States. And this rhetoric provides no support for the ill-considered, counterproductive attack on access to Chapter 13 bankruptcies that do provide a means for consumers to repay their creditors.

The Chapter 13 trustees' responses and the case law show that the current system works. It could work better if courts had some additional discretion to deal with instances of actual abuse. The Code should allow judges to grant relief as to particular property, to avoid the gamesmanship of tag team filings and fractional interest transfers. Courts should make effective use of the means the Code gives them in section 110 to police bankruptcy mill operators and others, including lawyers, who victimize debtors and their creditors through improper manipulation of the bankruptcy process. The disposable income test should be realistically applied to give debtors a fair chance at completing their Chapter 13 plans. At the barest minimum, Congress should slow down the freight train of "reform" so that changes in the Code come from thoughtful, realistic, and accurate study of the reality of bankruptcy, not anecdotal and inaccurate rhetoric. The speed of the current legislative "reform" process and dearth of any serious policy consideration fail to consider the real needs of all of the participants in the bankruptcy system—the debtors and their dependents who need their homes, the administrative burden on the court system, and the rights of the other creditors

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312. See Forrester, *supra* note 15, at 423-32; *supra* text accompanying notes 279-80.

313. See Klein, *supra* note 7, at 304 n.71.

314. See, e.g., CHIMERINE, *supra* note 3.

315. "[I]t cannot be an indication of bad faith that one takes advantage of a law that was passed for his benefit." *In re Coburn*, 175 B.R. 400, 403 (Bankr. D. Or. 1994).

316. See Ausubel, *supra* note 51, at 265-68; Klein, *supra* note 7, at 315-16.

who will lose if debtors are routinely denied the right to the orderly process of bankruptcy relief.

TABLE 1: INSTANCES OF REPORTED ABUSE IN TOTAL FILINGS										
Rate of Abuse Reported by Respondents	Rate of Repeat Filings in Total Caseload									
	5% or less	6-10%	11-15%	16-20%	21-25%	26-30%	31-40%	None Stated	TOTAL	
5% or less	13	10	1	6	1	2	2	1	1	36
6-10%	2	2	4	1	1	0	0	0	0	10
11-20%	0	3	1	0	0	0	1	0	0	5
21-30%	0	1	0	0	0	3	1	0	0	5
31-40%	2	0	0	1	0	0	1	0	0	4
41-50%	0	0	0	0	0	0	0	0	0	0
51-60%	0	0	0	0	0	0	0	0	0	0
61-70%	0	0	0	0	0	0	0	0	0	0
71-80%	0	0	0	0	0	0	0	0	0	0
81-90%	0	0	0	1	0	0	0	0	0	1
91-100%	0	0	0	0	0	0	0	0	0	0
Not Reported	0	0	1	0	0	0	0	0	0	1
TOTAL	17	16	7	9	2	5	5	1	1	62

**TABLE 2: INSTANCES OF REPORTED ABUSE IN REPEAT FILINGS**

**Rate of Abuse Reported by Respondents**

	5% or less	6-10%	11-15%	16-20%	21-25%	26-30%	31-40%	None Stated	TOTAL
5% or less	7	3	0	0	1	1	2	1	15
6-10%	1	4	0	3	1	2	0	0	11
11-20%	1	3	4	2	0	1	1	0	12
21-30%	2	2	1	0	0	0	1	0	6
31-40%	1	1	1	0	0	0	0	0	3
41-50%	4	2	0	2	0	0	0	0	8
51-60%	0	1	0	1	0	0	0	0	2
61-70%	0	0	0	0	0	0	0	0	0
71-80%	0	0	0	0	0	1	1	0	2
81-90%	1	0	0	0	0	0	0	0	1
91-100%	0	0	0	1	0	0	0	0	1
Not Reported	0	0	1	0	0	0	0	0	1
<b>TOTAL</b>	<b>17</b>	<b>16</b>	<b>7</b>	<b>9</b>	<b>2</b>	<b>5</b>	<b>5</b>	<b>1</b>	<b>62</b>



**TABLE 3—Trustees' Responses to Question 18 Hypotheticals**

The survey asked if the following scenarios were abusive of the Code:

A. Debtor has the ability to pay at time of filing but is laid off right after confirmation. Plan is dismissed for nonpayment after debtor has made 12 of 48 payments. Debtor regains job after dismissal and has the equivalent ability to pay as she had at time of original filing but remains subject to potential risk of layoff.

B. Same as above but debtor obtains new, more secure job at slightly higher rate of pay after dismissal.

C. Husband and wife-debtor stop paying after marital separation. Bankruptcy is dismissed post confirmation after 20 of 60 plan payments are made. Wife refiles, listing as income child support she is entitled to but is not currently receiving. She also works but her income is less than the former marital income. Her plan is feasible if she receives the child support and a family court judgment has been entered directing wage garnishment against the husband.

D. Debtor's first bankruptcy was dismissed for nonpayment. Debtor stopped paying because he had to repair his roof. Debtor's income remains the same—he is on social security. Debtor refiles and now has contributions from his adult children listed. They file affidavits with court saying they are committed to giving their father \$200.00 each month (total contribution from the children).

**See the following page for Table 3.**

Reported Rate of Repeat Filings in Caseload	Scenario 18A. abusive 1-if future layoff likely	Scenario 18A. non-abusive	Scenario 18B. abusive	Scenario 18B. non-abusive	Scenario 18C. abusive 1-if income not being received	Scenario 18C. non-abusive	Scenario 18D. abusive 2-maybe	Scenario 18D. non-abusive (3-indicate some question)
5% or less 17 total	0	16	0	17	1-if income not being received	16	2	15 (3-indicate some question)
6-10% 16 total	0	16	0	16	0	16	3 2-maybe	11
11-15% 7 total	0	7	0	7	0	7	0	7
16-20% 9 total	0	9	0	9	1-question	8	1	8
21-25% 2 total	0	2	0	2	1-not abuse if disclosed	1	0	2
26-30% 5 total	0	5	0	5	0	5	0	5
31-40% 5 total	0	5	0	5	1	4	0	5
rate not identified 1 total	0	1	0	1	0	1	0	1
Total 62	1	61	0	62	4	58	8	54

**TABLE 4—Responses to Question 21 proposals for change:**

Question 21 asked the trustees if the following changes would be helpful or unhelpful in reducing abuse:

A. Requiring a waiting period between any dismissal and refiling. If yes, what length would be appropriate?

B. After the second serial filing, shifting the burden to the debtor to move for continuance of the automatic stay within a short time after the refiling.

C. Requiring a debtor in a serial filing to file a motion before the stay is imposed initially.

D. Earlier confirmation hearings.

Rate of repeat filing	Scenario 21A. helpful	Scenario 21A. unhelpful	Scenario 21B. helpful	Scenario 21B. unhelpful	Scenario 21C. helpful	Scenario 21C. unhelpful	Scenario 21D. helpful	Scenario 21D. unhelpful
5% or less 17 total <sup>317</sup>	2: 1 year, 1: 6 mos. to 1 yr. 3: 6 mos.	8	7	8	4	10	0	14
6-10% 16 total <sup>318</sup>	1: no time specified 1: 60 days 3: 6 mos. 1: 6 mos. to 1 yr. 2: 1 yr.	8	10	6	7	7	0	15
11-15% 7 total <sup>319</sup>	2: 6 mos. <sup>320</sup> 1: 90 days 1: modify 109(g) 1: 2 yrs.	2	5	2	3	3	2	5
16-20% 9 total <sup>321</sup>	1: 30 to 60 days 2: 6 mos.	5	6	3	2	7	0	9
21-25% 2 total <sup>322</sup>	1: 3 mos.	1		1		1		1
26-30% 5 total <sup>323</sup>	4: 6 mos.	1 ("hard to say")	2	2	2	3	1	4
31-40% 5 total	3: 1 yr.	2	4	1	4	1	0	5
no rate identified 1 total	0	1	1	0	0	1	0	1
<b>TOTALS</b>		<b>30</b>	<b>28</b>	<b>35</b>	<b>23</b>	<b>33</b>	<b>3</b>	<b>54</b>

317. Two trustees did not respond to any part of Question 21. One responded only to 21B.

318. Two trustees did not respond to Question 21C.; one did not respond to Question 21D.

319. One trustee did not respond to Question 21C.

320. One of these trustees would allow immediate refiling for emergency reasons.

321. One trustee did not respond to Question 21A.

322. One trustee did not respond to Question 21B., C., or D.

323. One trustee did not respond to Question 21B.

**TABLE 5—Responses to Proposed Six Year Ban on Refiling After Discharge**

Rate of repeat filings	In Favor of Six Year Ban	Other	Opposed to Six Year Ban
5% or less 17 total	0	1-maybe 1-? 1-3 year ban	14
6-10% 16 total	0	1-some restriction but not sure of length 1-yes to stop Chapter 20 filings	14
11-15% 7 total	2	0	5
16-20% 9 total	0	1-after chapter 7	8
21-25% 2 total	0	0	2
26-30% 5 total	0	1-but only for repeated proven abuse	4
31-40% 5 total	0	1-favors a bar but six years may be excessive	4
Rate not identified 1 total	0	0	1
<b>TOTALS</b>	<b>2</b>	<b>8</b>	<b>52</b>

**Trustee Comments in Response to Six-Year Refiling Ban Proposal:**  
(in alphabetical order by state)

ALABAMA: “No. Too many second cases are successful. Bad circumstances cause good debtors to be unable to pay but a change in that circumstance leads to many second cases successfully proposing to pay all creditors in full.”

ARIZONA: “No. 1. There are reasons why a ‘Ch. 20’ should be done. 2. Eligibility limits of Ch. 13 (not as important now). 3. Circumstances change for people.”

ARIZONA: “Yes, but only for repeat filings which are *proven* to abuse the system.”

CALIFORNIA: "Kinda . . . maybe on a scale . . . because a 90% repayment should not be bar[r]ed from filing for the same period as a 1% repayment. I believe there should be a time/% scale just as I feel there should be a time/% scale on credit reporting."

CALIFORNIA: "No—Bans many worthy filers with subsequent adversity (medical—marital—injury—job interruption)—The mark of Cain."

CALIFORNIA: "No—Things change so we should encourage repayment of debts as much as possible."

CALIFORNIA: "I favor a bar but 6 years may be excessive."

FLORIDA: "No, debtors with substantial debt in addition to the IRS would be left defenseless if a 7 is discharged prior to an IRS determination."

GEORGIA: "No. This period is *too long*. Debtors in our area are poor, under-employed people. Many live their whole lives in financial trouble. They can be garnished and then fired. The six year bar is too severe!!!"

IDAHO: "Yes! Would eliminate the current Chapter 20 process, of obtaining a Chapter 7 discharge to get rid of certain unsecured debts, then immediately filing a Chapter 13."

IDAHO: "Yes, a Chapter 13 discharges all unsecured debt. The debtor(s) should not accrue excessive debt with a six year time period. I would hope, the debtor would be more conscious about accruing more debt after filing bankruptcy."

ILLINOIS: "No. The student loan debt cannot be discharged in a Chapter 7, therefore a 13 is sometimes the logical place to go after a Chapter 7 discharge. Also in our district you may not discriminate against dischargeable unsecured by paying non-dischargeable debts at a higher percentage. Therefore, a repeat filing can allow a debtor to manage that non-dischargeable debt in a repeat filing."

ILLINOIS: "No. If Debtor has obtained a discharge under Ch. 13, by completing his plan as proposed, six-year bar is too long."

INDIANA: "No. 'Repeat' is not abusive. If abusive the creditor can stop repeat filings."

INDIANA: "No. Elephant gun solution for a mosquito problem."

INDIANA: "Dynamics of living move too fast for a six year bar."

INDIANA: "No, *I strongly do not*."

INDIANA: "No if debtor has paid at least 50 [to] 70 [percent] of allowed claims in completed ch. 13."

KANSAS: "Absolutely not. The facts of life are such that secondary relief can be vital to the debtor's ability to function as a contributing member of society and not as a welfare liability. The threat of bankruptcy is the only social restraint upon the credit community. This fact may be, at last, impacting the credit card community with the end product of restraint in granting credit; this should eliminate 'abuse' if extensions of unsecured credit are reconnected to the capacity of the debtor."

KENTUCKY: "No. The refiling after a 7 can fill a legitimate purpose, e.g., provide orderly means of paying off nondischargeable debts, co-signed debts (?), secured debts that have been reaffirmed."

LOUISIANA: "No. Unfortunately we do not have control over our employment. In many cases, the debtor has the ability to pay for his home (after reduction in employment) but does not have the resources to pay his unsecured debt. (Many times a result of accident or illness.) The filing of a Chapter 7 and obtaining the discharge is the only way some debtors can receive a 'fresh start.'"

LOUISIANA: "Yes. Such would require planning and education by debtors and would be consistent with other federal law (internal revenue code, ERISA, etc.) to make election."

MAINE: "This proposal puts morality over reality. Artificial bars on c. 13 are no more in order than bars in c. 11. The courts and trustees are capable of addressing bad faith—which is the nature of abusive filings—on a case-by-case basis."

MARYLAND: "No—we do not think a six-year bar would be appropriate for many cases. Possibly, this bar would be warranted in the event the debtor continues to file (more than 3 or 4 filings)."

MICHIGAN: "Not as a general rule. I do, however, dislike a 10% plan filed right after the first 10% plan was completed. Here is where a minimum dividend level could possibly be imposed on the second filing. The debtor obviously built up debt post-petition while in the previous case. On the other hand, what if that debt was medical debt from a heart attack or cancer surgery—beyond the control of the debtor? This situation cries for an escape mechanism that an absolute bar would preclude."

MISSISSIPPI: "No. Judge each case on own merits."

MISSOURI: "No. In today's environment of downsizing, cutting back on benefits; people earning less, there are legitimate reasons for people to need multiple filings."

NEW JERSEY: "No, I think there are many extenuating circumstances in each case that has to be decided on its own merit."

NEW MEXICO: "No. The present Chapter 13 process allows for substantial changes in circumstance to be reflected in changed procedures."

NEW YORK: "No—I agree that the Ch. 20 (Ch. 7 then Ch. 13) should be permitted, as it is often the only way a debtor with excessive nondischargeable tax debt can handle it—discharge unsecured, file Ch 13 for taxes."

NEW YORK: "No!—A debtor who receives a discharge has performed as expected by the current laws. *No bar* is appropriate for these debtors."

NORTH CAROLINA: "No. If creditors undertake the risk to give the debtors credit once again, they should be willing to go through bankruptcy again."

NORTH CAROLINA: "Each case is different. There are circumstances in which a 2nd case is needed. In a repeat filing often, in order to obtain my recommendation for confirmation in a 2nd case, the debtor's attorney will agree to a clause in the plan that bars another C-13 for 180 days if the present case is dismissed."

OKLAHOMA: "I favor putting a 3 year bar between discharge and refiling. 3 years is short enough that a debtor can see if catastrophe strikes within 6 months of a discharge."

OREGON: "No. Discharge is performance. Even though it is not desirable to spend your life involved in the bankruptcy process, it may be necessary for some folks."

OREGON: "No—legitimate chapter 13 with payback to creditors should be encouraged not discouraged."

PENNSYLVANIA: "No, creates burden *IF* changes of circumstances would justify otherwise."

RHODE ISLAND: "No. I think rigid rules do not allow for consideration of individual situations. I think having discretion in the Court will more often lead to the right solution for a case."

SOUTH DAKOTA: "No. The Court has the power to decide if there is an abusive filing and can dismiss the case. The system must remain flexible."

TENNESSEE: "No, there are circumstances where debtors should have a chance to pay off any debts through a Chapter 13 . . . I believe that most debtors are honest people wanting a fresh start. I do not believe that there is a problem with the Bankruptcy Code or the Bankruptcy system which such surveys as this seem to imply. I think that the small percentage of cases that are abusive are the result of sociological and economic problems. For example the erosion of a strong work ethic, or the prevalence of easy credit such as credit cards being sent to people barely surviving on social security payments."

TENNESSEE: "No. We must remember we are dealing with people in a dynamic, as opposed to static, situation. A bar such as this ignores the individual circumstances in each case."

TEXAS: "No. This would be too harsh for many debtors who are making a sincere effort to reorganize."

TEXAS: "There should be some restriction on debtors filing new Chapter 13s after a discharge in Chapter 7 or Chapter 13, but I am not sure how long it should be."

TEXAS: "No. In doing so you would do away with the main purpose of Ch. 13, that being to deal with secured creditors and creditors whose claims are non-dischargeable in Ch. 7. If you apply such a bar you need to do away with the debt limits. Timing is essential for Ch. 13 to work for debtors and creditors. I do not believe Ch. 13 should exist to entirely abrogate the law of contracts and property rights applicable outside of bankruptcy. It should exist however where the debtors have a reasonably foreseeable and legitimate prospect of working out a plan under the existing parameters of section 1325. The problem with most debtors I see is they are all in denial about what their realistic financial capabilities are. They have been told by the sellers of consumer goods for so long and on so many occasions that they can and must spend for things they can't really afford that they refuse to accept the notion that if they cannot afford a certain car or house, they would be better off without it."

UTAH: "No. Because we'd have to open up debtors' prisons, or else leave people exposed to ruthless collection tactics, or else mandate a redistribution of wealth. Creditors must stop monkeying with the Code, stop soliciting credit applications from unqualified borrowers, stop denying the existence of a growing underclass who can never afford the American dream, and stop charging interest rates that include a component to recover losses due to bad loans and then recover again those losses in the form of collateral and ch. 13 dividends."

VERMONT: "No. It has been my experience that several/many refilings are justified by particular facts. Courts should have *DISCRETION* to consider the facts of each case."

VIRGINIA: "No, why shouldn't an individual have the right to repay his/her bills, and what's wrong with providing the protection of Chapter [13] while its done."

VIRGINIA: "No. Chapter 13 is a flexible remedy to deal with a variety of situations/problems. Imposing rigid rules will defeat the purpose, and cost debtors and creditors time and money with no corresponding benefit."

VIRGINIA: "No. The debtor may have entirely legitimate reasons for a second filing. The decision should be within the discretion of the court."



WISCONSIN: "I am unalterably opposed to a bar on repeat filings under Chapter 13 that precludes filing for 6 years after the debtor has had a discharge in Chapter 7 or Chapter 13. Job loss, illness, or uninsured motor vehicle accidents can happen to any individual at any time. They seem more likely with people that file bankruptcy as they are scrimping on health or automobile insurance and are closer to the edge where they are more likely to be facing layoffs or other job changes."

WISCONSIN: "No. There are numerous legitimate reasons for filing a Chapter 13 following an earlier case. It is better to keep the burden on the creditor to demonstrate bad faith or lack of adequate protection than require the debtor to provide good faith."

Of the remaining respondents, eight said "no" without further comment (Trustees from Virginia, New York, Mississippi, Florida, South Carolina, New York, Tennessee, and Iowa); one said "yes" without comment (Louisiana); and one put a question mark (Texas).

