10/8 draft

Statement of Administration Position

The Senate worked on a bipartisan basis to produce a responsible and balanced bill that would have reduced abuses of the bankruptcy system and required debtors and creditors alike to act responsibly. Unfortunately, H.R. 3150, as agreed to by the Conference Committee, contains many flawed aspects of the House bill, and if this version of the bill is presented to the President, his senior advisors will recommend that he veto it.

On the central issue of means-testing, the Conference Report uses the Senate framework but would, like the House bill produce a rigid and formulaic approach that denies bankruptcy judges adequate discretion to decide whether the debtor has the capacity to repay successfully a portion of debts under Chapter 13. Moreover, the bill would require a moderate income debtor to demonstrate that each monthly expense for housing, clothing, transportation, and food that exceeds an IRS determined level is necessary due to "extraordinary circumstances" before that person could get their debts discharged under Chapter 7.

At the same time H.R. 3150 produces a rigid system to ensure moderate-income debtors repay their debts, it weakens meaningful limits on the homestead exemption -- the mechanism used by the wealthy to shield hundreds of thousands of dollars of wealth from their creditors.

The Senate bill took laudable steps to enhance consumer protections from coercive and predatory behavior by creditors. This version of H.R. 3150, however, fails to limit abusive creditor practices such as coercive affirmations and violations of the automatic stay, and rolls back consumer protections. The bill would also deny consumers the most effective remedy for harm from such practices -- class action liability -- and eliminate the current authorization for punitive damages against creditors for intentional violations of borrower rights.

Finally, the bill does not include the provisions of the Senate bill that would discharge debts that could compete with child support and alimony payments after a debtor has been declared bankrupt. In addition, the bill would make nondischargeable debt that was incurred within 90 days of bankruptcy to pay nondischargeable debt and debt resulting from certain cash advances. This, in effect, puts debt owed to credit card companies on the same plane as other social priorities like child support and alimony, taxes, and educational loans. All too often a debtor struggling to pay child support and alimony lets children and ex-spouses come last when faced with pressures from an aggressive creditor trying to collect nondischargeable debt.

child support - bankruptcy

The overwhelming vote on the Senate floor for the balanced legislation that body produced demonstrates that reasonable and responsible bankruptcy reform is possible. Unfortunately, H.R. 3150 as developed by the Conference Committee, does not provide such reform.

Bankruptcy reform helps women and children. Distorting the facts about reform helps no one.

The truth is that bankruptcy reform gives much-needed help to single parents and their children who are dependent on family support payments.

Today, parents who owe child support or alimony can avoid making these payments by simply filing—and then withdrawing—a bankruptcy application. The Bankruptcy Reform Act (S. 625) will put a stop to deadbeat parents who abuse the system to avoid their responsibilities to their families.

The bill will also:

- Make child support and alimony payments the top priority—no exceptions. Current law makes these family support payments the seventh highest priority in obligations to be paid.
- Require a debtor to pay all past due child support and alimony before any debts can be erased in bankruptcy.
- Provide single parents with key information, including an alert that their ex-spouse has filed for bankruptcy; phone numbers of the closest child support collection agencies; and last known address information for a parent who has "disappeared."

Bankruptcy reform will vastly improve the collection of child support and alimony in bankruptcy. Don't let politics stand in the way of this helping hand for single parents and their children.

KNOW THE FACTS. SUPPORT S. 625

American Bankers Association • American Financial Services Association • America's Community Bankers • Bankruptcy Issues Council • Consumer Bankers Association • Independent Bankers Association of America • National Retail Federation • Agricultural Retailers Association • Air Conditioning Contractors of America • American Sheep Industry Association • American Soybean Association • Associated Equipment Distributors Associated General Contractors of America • Equipment Leasing Association • International Mass Retail Association • Livestock Marketing Association • National Apartment Association • National Association of Wheat Growers • National Automobile Dealers Association • National Cattlemen's Beef Association • National Community Pharmacists Association • National Funeral Directors Association • National Grange • National Home Furnishings Association • National Independent Automobile Dealers Association • National Lumber & Building Materials Dealers Association National Multi-Housing Council • National Pork Producers Council • National Retail Hardware Association • National Ski & Snowboard Retailers Association • National Sporting Goods Association • North American Equipment Dealers Association • North American Retail Dealers Association • World Floor Covering Association

child support
bankruptcy

Sarah Rosen Wartell
06/21/99 10:08:42 AM

Record Type: Record

To: Andrea Kane/OPD/EOP@EOP
cc: See the distribution list at the bottom of this message
bcc:
Subject: Re: Q: re: child support/bankruptcy

I can't provide you a technical answer, but not only are arrearages not forgiven, they are both nondischargeable (meaning survive bankruptcy) and a priority (meaning they must be repaid from any assets available). In addition, in preparing a bankruptcy plan under chapter 13 (when some debts are repaid), courts have discretion to have chidl support arrearages repaid before other debts.

The bankrutpcy bill that is pending in congress helps clarify and improve the treatment of child support in many ways -- requiring that arrearages must be repaid before a full bankruptcy discharge is possible. However, we believe that the bill would have some adverse impact on child support collection only because the bill causes some credit card debts to continue post-bankruptcy where they can compete with child support and alimony. In structured child support or alimony payment settings (e.g., under a bankruptcy plan or if there is wage garnishment), the child support and alimony must be paid first. however, outside those structured settings, we fear credit cards will be more effective at collecting than will be custodial spouses.
Andrea Kane

Andrea Kane 06/21/99 08:45:36 AM

Record Type: Record

To: plegler@acf.dhhs.gov, Lhiggins@os.dhhs.gov, mkharfen@acf.dhhs.gov @ inet
cc: J. Eric Gould/OPD/EOP@EOP, Sarah Rosen Wartell/OPD/EOP@EOP, Cynthia A. Rice/OPD/EOP@EOP
Subject: Q: re: child support/bankruptcy

USA Today article today says 14% of bankruptcies list child support or alimony debts. I just got a Q: from Vice President's staff down at the Family Reunion conference about how a father's child support arrearages are treated in bankruptcy including whether arrearages foregiven. Can one of you let me know ASAP? Thanks

Message Copied To:

Paul Legler <plegler@acf.dhhs.gov>
06/21/99 10:14:42 AM

Please respond to plegler@acf.dhhs.gov

Record Type: Record

To: Andrea Kane/OPD/EOP, Lhiggins@os.dhhs.gov, Michael Kharfen <mkharfen@acf.dhhs.gov>

cc: Cynthia A. Rice/OPD/EOP, J. Eric Gould/OPD/EOP, Sarah Rosen Wartell/OPD/EOP
Subject: re: Q: re: child support/bankruptcy

There has been a lot of confusion regarding this issue because of the bankruptcy reform proposals.

In general, child support is already given special protections designed to give priority to child support obligations. Child support debts are generally not dischargeable in bankruptcy, and actions to collect child support from property of the debtor are exempt from the automatic stay that stops other creditor collections. Child support is also given greater priority when an estate is liquidated and the debtor's funds are disbursed. Finally, child support creditors are given special status to appear in court in bankruptcy cases without charge and without meeting certain other requirements.

There are a few minor technical changes that can strengthen the protections but they are really at the margins. In addition, some people have expressed concerns regarding the possible impact of the proposal to force more people into Chapter 13 bankruptcies, rather than Chapter 7, and to make more debt not dischargeable. However, whether this would have more than a minimal impact on child support obligees is debatable in the opinions of most bankruptcy/child support experts.

Let me know if you need further information.

Paul

Original Text
From: <Andrea_Kane@opd.eop.gov>, on 6/21/99 8:45 AM:
USA Today article today says 14% of bankruptcies list child support or alimony debts. I just got a Q: from Vice President's staff down at the Family Reunion conference about how a father's child support arrearages are treated in bankruptcy including whether arrearages foregiven. Can one of you let me know ASAP? Thanks

U.S. citizens imprisoned by Nazis will be paid

By Peter Eisler
USA TODAY

A1

WASHINGTON — Holocaust survivors who held U.S. citizenship while in Nazi concentration camps will share about $18.5 million under a secretive deal between the U.S. and German governments.

Germany wired the money last week to the U.S. Treasury, which in coming weeks will distribute one-time payments ranging from $30,000 to $250,000 to about 235 qualifying Americans, according to parties in the settlement.

U.S. officials confirm the total settlement amount but additional details are confidential under the agreement's terms.

The pact ends a decades-long struggle waged by U.S. Holocaust survivors. That group has never been eligible to claim any of the approximately $1 billion in compensation Germany has provided over the years to Europeans held in concentration camps.

"The news is good, however, it is late," says Jack Wolf, who landed in the Bergen-Belsen concentration camp as a child after his family was rounded up in Holland.

"Some have died. Some are old and sick and may not be able to enjoy this money anymore. ... There should have been no need for American Holocaust survivors to have to wait 54 years for compensation."

The settlement comes amid renewed global interest in settling financial and moral debts of the Holocaust. There has been a push to find heirs to victims' Swiss bank accounts and efforts to win compensation for those forced into slave labor.

Most of the U.S. concentration camp survivors were Jews caught in Europe as World War II swept the continent. Others were captured U.S. soldiers sent to the camps either because they were Jewish or because Nazi authorities deemed them to be troublemakers.

"We've gotten the paperwork out to the claimants," says Ronald Bettauer, the State Department's lead negotiator, adding that payments could start going out within weeks. "The (claimants) who've gotten back to us seem to be quite happy."

German officials could not be reached for comment.

Women rank 1st in bankruptcy filings

By Christine Dugas
USA TODAY

A1

Women are the fastest-growing group declaring bankruptcy, surpassing men and married couples in total numbers, new data shows.

Women accounted for 39% of bankruptcy filings in the 12 months ending March 31, says bankruptcy expert and Harvard law professor Elizabeth Warren.

Warren blames divorce for the trend. "If a woman is divorced, she is 300% more likely to file for bankruptcy," she says.

Other experts cite the low incomes of many elderly women and their susceptibility to financial fraud.

Warren released the data as Congress is considering a bill that would make it harder to file for Chapter 7 bankruptcy, which wipes out most debt including credit card debt. That would hit women doubly hard, consumer advocates say.

"Many women with a legitimate need for bankruptcy relief would have a harder time getting into the system and getting a fresh start," says Ellen Nissenbaum of the nonprofit Center on Budget and Policy Priorities. "And many women would have a harder time collecting support payments" from husbands who can't get bankruptcy relief, she says. About 14% of bankruptcies list child support and alimony among their debts, Warren says.

Detailed data on bankruptcy are hard to come by. Last year, Oliver Pollack, a history professor and bankruptcy lawyer in Omaha, released a study finding the proportion of women filing in Nebraska had increased from 14.8% in 1967 to 32.4% in 1997.

That mirrors Warren's findings, which are based on a study of eight of the 94 federal bankruptcy districts in 1981, 1991 and 1999. Her preliminary figures show that men account for 28% of filings, married couples 33% and women 39%.

"Bankruptcy reform is very much a women's issue for everyone who is concerned about the economic vulnerability of women," says Joan Entmacher, a vice president of the National Women's Law Center.

Rep. George Gekas, R-Pa., sponsor of the House bankruptcy legislation, says his bill would help women by giving child support and alimony top priority among debts to be paid in a Chapter 7 bankruptcy.

Sarah Rosen
09/11/98 01:49:15 PM

Record Type: Record

To: Sarah Rosen/OPD/EOP

cc: See the distribution list at the bottom of this message
Subject: Re: UP TO THE MINUTE BANKRUPTCY REPORT

One amendment -- on the reaffirmations -- they did delete "clear and convincing evidence" in the language that the reaffirmation can only be approved if the court finds "by clear and convincing evidence" that .

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Maureen T. Shea/WHO/EOP

Sarah Rosen
09/11/98 01:24:48 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:
Subject: UP TO THE MINUTE BANKRUPTCY REPORT

I'm back on email! Yeah!

Even better news, however, is the result of the Senators negotiations this morning on the bankruptcy bill, as reported by Senator Hatch's staff. We made further progress on our proposals.

On the reaffirmation provisions, they accepted not only our language on reaffirmations on unsecured debt, but also on secured debt whose initial value is less than $250. (We'd proposed $500 and would have been prepared to go to $300.) This is a significant concession.

On the 707(b) provisions, the threshold level was raised to capacity to repay 30% of debt, but the bill language was not otherwise changed, leaving our concerns about limiting creditor standing and including the $5000 threshold to a battle in conference. (We've always known, however, that the 707(b) test would be the central conference item.)

As a result of these decisions, the Republicans are struggling to prevent Senator Sessions from opposing the UC. (Senator Kyl also is balking on the debt incurred within 90 days of bankruptcy provision.) However, the leadership views those deals as done and will try to hold their Republicans.

The vote now will not be til next week. As a result, we may have an opportunity to do a SAP afterall, if we want to do so. If so, I suspect the SAP would speak favorably of the Senate approach, significantly better than House, support bill but look forward to working with conferees to make important improvements in the 707(b) test and creditor standing in conference. Note our support for the financial netting provision that was included at Treasury request. We might also mention support for minimum wage or do separate SAP or leave that to the DoL letter. Welcome views on approach of the SAP this afternoon, before I draft.

I will try to get a copy of the manager's amendment today. (Will be hundreds of pages.) Let me know if you NEED a copy.

Thanks.

Message Sent To:

Brian A. Barreto 09/10/98 11:46:58 AM

Record Type: Record

To: Brian A. Barreto/OPD/EOP

cc: See the distribution list at the bottom of this message
Subject: MORE FROM SARAH RE BANKRUPTCY

If anyone is trying to reach me, DO NOT EMAIL. Any messages sent to me get lost in a black hole never to be recovered.

In response to David Beier -- I concur on setting priorities. I would argue that the items in our Administration proposal (reaffirmations, disclosure of amortization period, raising the threshold for 707(b) factors, and eliminate the nondischargeability provision) are our highest priorities. Some of the other balancing items in the joint democratic list are important, but at the end of the day we can't insist on any specific ones that we haven't raised ourselves.

Finally, I have not heard anything further about D'Amato and ATM fees. The Republican leadership was trying to get him to agree to back down. And with his primary next week, he may not be around for the floor debate if the amendments get debated next Tuesday instead of this Friday, as is probable. However, I do not have any reason to believe he has yet backed down.

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Alice Veenstra/OMB/EOP
Robert N. Weiner/WHO/EOP

September 9, 1998

MEMORANDUM TO: **GENE SPERLING**
SALLY KATZEN

FROM: **SARAH ROSEN**

RE: **STATUS REPORT ON BANKRUPTCY REFORM**

Below you will find a brief summary of the Bankruptcy Reform legislation to be considered by the Senate this week, including a brief description of the status of negotiations on the bill, the Administration's criticism of the current version Senate bill, and the list of amendments that the Administration and Senators Durbin, Dodd, and Sarbanes jointly provided to Senators Hatch and Grassley for inclusion in the manager's amendment. In addition, per your request, I provide comments on the letter to the First Lady from Professor Elizabeth Warren.

I. STATUS OF NEGOTIATIONS ON THE BILL

As described below, the Administration and Senators Durbin, Dodd and Sarbanes, in consultation with Senator Daschle, prepared a list of amendments that we would like to see incorporated into the managers' amendment. However, we have not, as yet, had a comprehensive response from the Republicans to the list of amendments.

Last Thursday, Senator Lott attempted to bring up the bankruptcy bill for debate. Senator Kennedy objected to the motion to proceed to take up the bankruptcy bill. Senator Lott filed a cloture petition, which ripened and passed today (Wednesday, 9/9), by a vote of 99-1 (with only Brownback against). Senators Lott and Grassley then introduced a substitute amendment that we will not see until Thursday morning, but which we expect contains new farm homestead exemption language, some corporate bankruptcy issues, and a few of the amendments included in the Administration/Durbin/Dodd/Sarbanes list for the managers' amendment. Leadership and bill managers then reached agreement to proceed as follows: (1) two hours of debate on Senator Kennedy's minimum wage amendment; (2) Democrats to provide all their amendments to the bankruptcy bill by noon on Thursday; (3) Democratic and Republican leadership will negotiate and agree to a finite list of amendments that will be in order on the bill; and (4) Democrats and Republicans will complete negotiations on the Administration/Durbin/Dodd/Sarbanes issues for a manager's amendment. The Administration has been asked to participate in those negotiations on Thursday afternoon (9/10).

If all proceeds apace, Lott will withdraw the cloture petition. Thus the first votes could be held as early as Friday (9/11).

II. ADMINISTRATION VIEW OF CURRENT SENATE BANKRUPTCY BILL

Denying Access to Chapter 7: The Senate bill is based on the approach that the Administration prefers -- using the Section 707(b) abuse test to determine whether a borrower should be required

to repay a portion of their debts under Chapter 13 or can obtain a full and immediate discharge of debt under Chapter 7. (This contrasts with the House approach that would use a rigid formula with limited court discretion.) However, we believe that the thresholds in the abuse test are too low. Instead of capacity to repay 20% of their debt, the test should be capacity to repay 35% of their debt (we'd compromise at 30%) or $5000. (We also would agree to making those guidelines presumptive, but would prefer to offer that as a compromise with the House in conference.)

New Nondischargeable Debts: The Senate bill provides that debts incurred to pay nondischargeable debts are nondischargeable, except if the debtor owes child support or alimony, unless the debtor intended to avoid repayment through shifting the nondischargeable debt to a credit card. This effectively eliminates our concern about competition with child support and alimony. However, we continue to argue that it is inappropriate to give credit card companies the same protection as student loans, taxes, etc. Concern about creditor fraud can be better dealt with in the abuse test, by making repayment of such debt to avoid nondischargeability a factor in determining whether eligible for Chapter 7.

Regarding debt incurred within 90 days of bankruptcy, the Senate bill has been modified so that only debt of more than $400 to a single creditor for goods not necessary for the support of the debtor (the old luxury definition) can be discharged. We had been prepared to accept no "luxury" safe harbor (although we never articulated that in public), so we have little argument with this provision. However, we have kept silent so as to not undercut Senator Durbin who continues to seek to restore the $1000 safe harbor.

Balance: requiring responsibility of creditors as well as debtors. The bill's greatest flaw, at this point, is the absence of balance. It does nothing to address creditor practices of coercing reaffirmations and encouraging borrowers to utilize credit without appreciation for the burdens involved. The Administration has said to bill managers that additional protections against coercive reaffirmations and additional disclosures of the time periods on which debt will amortize at the minimum payment level are necessary for Administration support.

III. DEMOCRATIC/ADMINISTRATION AMENDMENT LIST

Administration staff met with Senators Durbin, Daschle, Dodd, and Sarbanes and developed a joint list of amendments that we would like to see in the manager's amendment. It includes all of the Administration's list of issues, as well as others to which we do not strongly object. In a few cases, we believe Senator Durbin or Dodd or Sarbanes provisions go too far, but we agreed that the Administration would encourage the Republicans to address the Democrats concerns without the Administration specifically endorsing every item on the list.

The list of amendments included:

1. Raise thresholds in the 707(b) abuse test factor from ability to repay 20% of debt to ability to repay 35% of debt or $5000 over 3 years.

2. Eliminate provision making debt incurred to pay nondischargeable debt nondischargeable.

3. Lift ceiling on the debts incurred within 90 days of bankruptcy to one creditor, that are not necessary for the support of the debtor or its dependent, from $400 to $1000.

4. Prohibit coercive reaffirmations of unsecured debt (or debt secured by small items of personalty) by:
   - requiring the court to make a finding that there is clear and convincing evidence that it is in the debtor's best interest to reaffirm the debt and would not cause a hardship to the debtor or its dependants;
   - prohibiting the reaffirmation of any unsecured debt that includes attorneys fees or costs;
   - clarifying that it is a violation of the automatic stay to threaten to oppose the discharge of debt or to threaten to file a 707(b) abuse motion or to repossess the debtor's collateral.

5. Require that creditors provide debtors with up-front and monthly disclosure of the time period over which their debt would amortize if they paid only the minimum payment.
   - Also require that the monthly statement calculate what payment would be necessary to repay the debt in three years.
   - Also require that a simple worksheet be provided that allows to creditor to determine how much debt they can afford to incur.
   - Also require that it be disclosed that: "Your pre-approval for this credit card does not mean that we have reviewed your individual financial circumstances. You should review your own budget before accepting this offer of credit."
   - Also require that consumers are informed that they are entitled to a copy of their credit report at low cost.
   - Also require that consumers be informed when use of a credit card creates a security interest in the goods that they are purchasing.

6. Provide debtors with relief from the mandatory deadlines to file back tax returns and wage information if they can demonstrate that they have made bona fide efforts to seek the information from the relevant tax authorities or old employers and await response from those sources.

7. Allow tenants to have one opportunity to pay rent after filing for bankruptcy before the automatic stay is lifted and an eviction can commence.

8. Revise requirements that debtors receive consumer counseling before the can file for bankruptcy to provide an exception for exigent circumstances and to ensure requirement isn't a bar to bankruptcy because of limited counseling resources.

9. Expand categories of types of retirement programs that qualify as exempt assets.

10. To revise the definition of household goods to include items reasonable necessary for the maintenance and support of the debtor and dependents.

III. COMMENTS ON PROFESSOR WARREN LETTER

In mid-August, Harvard Law Professor Elizabeth Warren wrote to the First Lady about the status of the bankruptcy bill. I provide below a few comments on the aspects of the letter concerning the Senate bill

Abusive Creditor Practices. Professor Warren describes some of the widespread abuse by creditors who have violated the automatic stay by seeking payment on charge card debts that can be or have been discharged in bankruptcy. These facts, in part, are what motivates the Administration to insist on inclusion of our package of protections against coercive reaffirmations of debt.

Use of Consumer Credit Counseling. Professor Warren complains that the bill requires that debtors make a good faith attempt to create a repayment plan through consumer credit counseling services before filing for bankruptcy, regardless of the severity of current circumstances, including imminent foreclosure. These provisions have been significantly modified in an agreement between Senator Sessions and the Consumer Credit Counseling Services to reduce the burden of the counseling required, eliminate concerns about the availability of credit counseling, and provide exceptions for exigent circumstances. The credit counselors now support the provision as does Senator Durbin.

Means-testing. Professor Warren argues that the Senate bill, which provides a means-test for remaining in Chapter 7, is not significantly different than the House bill's means-test to gain access to Chapter 7. In fact, the Administration supports requiring some kind of test to determine if a debtor has the capacity to repay. We support the Senate approach, but think the thresholds for determining capacity to repay are too low.

Harm to Women and Children from Non-Dischargeable Debt. Professor Warren argues that the injury to women and children from additional new nondischargeable debts has not been resolved by the various child support and alimony protections in the House and Senate bill. We concur as to the House bill. However, the current version of the Senate bill has largely addressed this problem, by two modifications:

- the bill now only makes newly nondischargeable luxury items over $400 incurred within 90 days of bankruptcy; and

- the bill does not make debt incurred to pay nondischargeable debt nondischargeable <u>if</u> the debtor owes child support or alimony, unless they paid the nondischargeable debt with the credit card with an intent to avoid payment post-bankruptcy.

We continue to believe that the latter nondischargeability provision should be eliminated altogether, regardless of whether one owes child support or alimony; however, one can no longer credibly argue that the nondischargeability provisions harm women and children.

Cynthia A. Rice 09/02/98 02:53:00 PM

Record Type: Record

To: Sarah Rosen/OPD/EOP

cc: Jennifer L. Klein/OPD/EOP
Subject: Child Support and Bankruptcy

Hi Sarah. Jen Klein and I want to talk to you a bit more about child support and bankruptcy, now that we've read the statutory language and reviewed the letter from Elizabeth Warren, to make sure we've all got the same understanding of how the current language works and how we might respond to those who say it still isn't enough. Do you have any time available tomorrow? Anytime after 2:00 is good for me. Jen, what's your availability?

One thought about the SAP. I think it would make sense to stop the fourth paragraph after the first sentence (in fact, make that sentence the last one in the third paragraph) -- that way it won't raise questions by having child support so notibly absent from the list of things in competition with credit cards. Thus, the third graph would read:

S. 1301 also makes nondischargeable certain credit card debt incurred to pay other nondischargeable debts. The Bankruptcy Code generally makes debts nondischargeable only where there is an overriding public purpose, as with debts for child support and alimony payments, [liability awards to victims of drunk driving], educational loans, tax obligations, or debts incurred by fraud. There has not been a sufficient finding that current protections against fraud are ineffective and that the additional debt made nondischargeable by this bill rise to that level of public priority. Moreover, by making these credit card debts nondischargeable, the bill puts them in competition with other nondischargeable debts after the debtor leaves bankruptcy.

PRELIMINARY DRAFT -- SENATE BANKRUPTCY SAP

The Administration supports bankruptcy reform that requires responsibility of debtors who have the ability to repay a portion of their debts. But responsibility must also be required of creditors. The Administration opposes S. 1301 in its present form.

The Administration prefers the discretionary approach to limiting access to Chapter 7 used in S. 1301 over the rigid and arbitrary approach in the Senate bill. However, the thresholds in the Senate bill are too low. Those who are denied access to Chapter 7 should be those with a strong likelihood of success under a Chapter 13 plan.

S. 1301 also makes nondischargeable certain credit card incurred to pay other nondischargeable debts. The Bankruptcy Code generally makes debts nondischargeable only where there is an overriding public purpose, as with debts for child support and alimony payments, [liability awards to victims of drunk driving,] educational loans, tax obligations, or debts incurred by fraud. There has not been a sufficient finding that current protections against fraud are ineffective and that the additional debt made nondischargeable by this bill rise to that level of public priority.

Moreover, by making these credit card debts nondischargeable, the bill puts them in competition with other nondischargeable debts after the debtor leaves bankruptcy. This competition could diminish the ability of debtors to pay their student loans, tax bills, or liability awards to victims of drunk driving so that credit card companies can be paid. . **NOTE: WE CAN'T REALLY MAKE THE CHILD SUPPORT ARGUMENT SINCE THE DEBT IS ONLY NONDISCHARGEABLE, IF THEY HAVE CHILD SUPPORT AND ALIMONY OBLIGATIONS, IF THEY INTENDED TO REPAY A NONDISCHARGEABLE DEBT (ALTHOUGH LANGUAGE IS UNCLEAR)?** ?

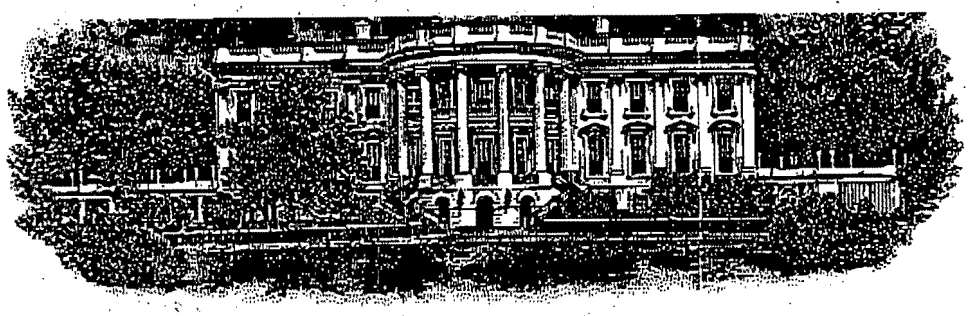
S. 1301 fails to adequately address the abuses of creditors in the system. The Administration supports amendments that would require that the creditor fully disclose to the consumer the time period over which their debt would amortize if they made the minimum payment. Furthermore, the Administration supports strong protections against coercing debtors to reaffirm their unsecured debt.

The manager's amendment takes a significant step forward in incorporating reaffirmation provisions that would ..... Additional changes are required however to >.....

The Manager's amendment incorporates a business bankruptcy provision recommended by the Treasury, Federal Reserve, CFTC and SEC. We support inclusion of that provision.

WHAT ABOUT INCLUSION OF HUD MF BANKRUPTCY PROVISION AND INTERIOR MINERAL LEASE PROVISIONS?

Unless protection against coercive reaffirmation will be new debts that compete with child support



THE WHITE HOUSE

SARAH ROSEN
SENIOR ADVISOR
NATIONAL ECONOMIC COUNCIL
(202) 456-2223 (Fax)

TO: See Distribution List

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COMMENTS: Pls. See attached FYI Info. Thanks.

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George Greenberg	401-7321	HHS
Marcy Wilder	690-7998	HHS
Donald Oellerich	690-6562	HHS
Arnold Grundeman	690-1741	USDA
Paul Weech	205-6802	SBA
Jean Veta	205-2689	Education
Shayla Simmons	208-7619	Dept. of Interia
Robert Weiner	61647	
Maria Echaveste	62983	OPL
Alice M. Veenstra	51292	Financial Institutions Branch
Doug Elmendorf	56809	CEA
Becky Blank	56947	CEA
Audrey Haynes	67311	
Joe Minarik	51198	White House - OMB
Roger Ballentine	66468	White House - Leg. Affairs
Nicole Rabner	62878	DPC
Diana Fortuna	67431	

HARVARD LAW SCHOOL
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ELIZABETH WARREN
LEO GOTTLIEB PROFESSOR OF LAW

Direct Phone: (617) 495-3101
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August 12, 1998

The First Lady
c/o Melanne Verveer
The White House
Washington, D.C. 20001

Dear Mrs. Clinton:

The bankruptcy legislation we've discussed remains a very serious threat. While its momentum has been slowed, thanks in part to your efforts, Senator Lott apparently has agreed that the bill will be brought to the Senate floor on September 4. Senator Kennedy may try to append his minimum wage proposal to the bill and there will be other amendments as well. Whether or not they succeed, the Republicans will push for 60 votes and cloture.

Here is a brief summary of what has happened since you and Brady Williamson last spoke.

Abusive Creditor Practices

While the pending legislation focuses almost exclusively on inadequately substantiated debtor abuses, there is uncontroverted evidence of widespread creditor abuse. Retailers and lenders have violated the federal discharge injunction in hundreds of thousands of cases by seeking payment on charge card debts that have been or can be discharged in bankruptcy.

Sears, Roebuck, and Co. was the first to concede that it engaged in this practice with over 200,000 consumers, resulting in a settlement earlier this year of $475 million. A federal criminal investigation of Sears' practices is still pending as are state investigations.

In the past few weeks, May Department Stores (Hecht's, Lord & Taylor) and GE Capital settled charges for violations of the consumer bankruptcy laws for over $100 million.

Other retailers and lenders that have admitted or have been named as participants in these unlawful activities include Circuit City, Montgomery Ward, Federated (Bloomingdale's, Macy's), Ford Motor Credit, Chrysler Motor Credit, AT&T Universal, Beneficial, and Avco.

The current bankruptcy filing rate

The Administrative Office of the United States Courts reports that bankruptcy filings increased 8.5% for the twelve month period ending June 30, 1998. Total filings numbered 1,429,451, up from 1,316,999 for the same period in 1997. Ninety-six percent of these cases were consumer bankruptcies.

At least one researcher, SMR Research Corporation, predicts that the number of personal bankruptcy filings will be flat in 1998 and will decline in 1999. However, SMR warns that the decline merely reflects low long term interest rates and that the causes of bankruptcy are getting worse, which ultimately will lead to a higher filing rate.

Status of the Senate Bill

The Consumer Bankruptcy Reform Act of 1997 was reported favorably out of the Senate Judiciary Committee in May by a vote of 16-2. Senator Lott's staff has announced that the senator is planning to bring S. 1301 to the floor of the Senate on or around September 4th.

This bill, co-sponsored by Senator Grassley (R-IA) and Senator Durbin (D-IL), contains consumer bankruptcy provisions, technical corrections, and an authorization for additional bankruptcy judges. The bill expands the nondischargeability of credit cards and other consumer debts.

S. 1301 differs in significant ways from H.R. 3150, but also has caused substantial concern among those familiar with the bankruptcy system due to its substantive changes and the technical unworkability of many of its provisions.

New amendments

Under S. 1301, an individual debtor would be required to make a good faith attempt to create a debt repayment plan through a consumer credit counseling service within 90 days prior to filing for bankruptcy as a condition of aligibility to file. There are no exceptions for people facing imminent foreclosure or other creditor collection actions, and there is no provision for expanding or funding credit counseling services.

S. 1301 would make the ability to pay 20% of one's nonpriority unsecured debts out of disposable income grounds for conversion or dismissal of a Chapter 7 bankruptcy case, thereby imposing a "means test" to remain in Chapter 7 rather than at the point of filing, as the House bill requires.

While Senator Grassley's business bankruptcy bill, S. 1914, has not been marked up by the relevant subcommittee, substantial portions of this bill will probably be introduced on the Senate floor as amendments to the consumer bill. S. 1914 contains some controversial provisions dealing with asset securitization, small business, and employee benefits—all pro bank.

Status of the House Bill

The Bankruptcy Reform Act of 1998 is the omnibus bankruptcy bill introduced by Rep. Gekas (R-PA), Rep. McCollum (R-FL), Rep. Boucher (D-VA), and Rep. Moran (D-VA). On June 10, the House of Representatives passed H.R. 3150 by a vote of 306 to 118. No Republicans voted against passage of H.R. 3150.

The bill would increase the amount of credit card debt surviving bankruptcy and would establish an up-front "means test" to determine Chapter 7 eligibility based on budget guidelines prescribed by the Internal Revenue Service for the purpose of offers in compromise. The bill also would eliminate the ability of self-employed people to reorganize very small businesses in Chapter 13.

When reported out of the Judiciary Committee, the bill would have curbed abuse by high end debtors by capping state homestead exemptions, but the House voted to eliminate this restriction, choosing instead to restrict bankruptcy relief for heavily indebted middle class families.

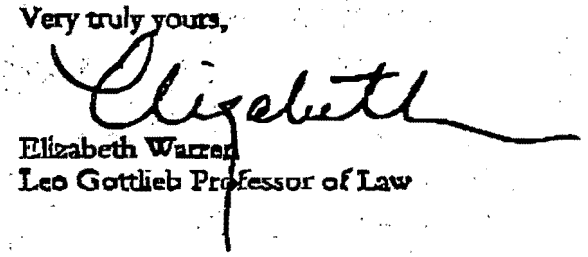
When debating this bill, the House also defeated a substitute bill introduced by several Democrats on the House Judiciary Committee that would have employed a more workable means test, deleted the new special interest exceptions to discharge for credit card debt, and modified the provisions in H.R. 3150 that discriminate against small businesses.

On the date of passage, the Administration issued a statement that it "strongly opposes" H.R. 3150 in its current form, and reiterated concerns regarding the "formulaic" means test and the nondischargeability provisions. Since then, the Attorney General has publicly said she would recommend a veto of the house bill.

The injury to women and children in this legislation has *not* been resolved. Both the House and the Senate have tinkered with the bill, but the fact remains that substantial credit card debt would be elevated to non-dischargeable status, forcing ex-spouses trying to collect support payments to compete with banks.

Thank you again for the energy you have put into this. Each year more than a million vulnerable families will be affected by whatever changes occur.

Very truly yours,



Elizabeth Warren
Leo Gottlieb Professor of Law

cc: Brady Williamson

July 28, 1998

Dear Senator:

The National Partnership for Women and Families, the National Women's Law Center, and the other undersigned women's and children's organizations write to express our deep concerns about S. 1301, the Consumer Bankruptcy Reform Act of 1998. By increasing the rights of credit card companies and other creditors, the bill further jeopardizes the precarious financial position of many women and children.

Women and children are affected by the bankruptcy system in two principal ways: as creditors due child support and as potential users of the bankruptcy system. As creditors, families entitled to support receive protection under the current bankruptcy system. Child support and alimony payments are among the few debts that cannot be discharged in bankruptcy; debtors who can get their finances re-ordered in bankruptcy are left in a better position to pay support. As potential users, the current bankruptcy system provides an avenue of relief for single mothers and children experiencing financial crises, in many cases as a result of nonpayment of child support.

S. 1301 does not directly reduce the priority of child support obligations. But it does increase the rights of other creditors such as credit card lenders, setting up a competition for scarce resources between mothers and children owed support and commercial credit card companies. In such a contest mothers and children, even if they are assisted by state child support enforcement agencies, will lose out.

State child support enforcement programs collect support in only one out of five cases. For cases with support orders in place, collections were made in just over a third of the cases (35 percent); only 52 percent of the current child support due was collected in fiscal year 1996.[1] Child support reforms adopted by Congress in 1988 and 1996 should increase the effectiveness of wage withholding and other enforcement measures. Unfortunately, implementation of these reforms has been slow. Some states have not yet developed the automated child support enforcement systems required by Congress a decade ago. Congress can and should do more to improve the effectiveness of state child support programs -- not set up new barriers to the collection of support, as S. 1301 would do.

Our specific concerns with S. 1301 are described in more detail below.

---

[1] *Child Support Enforcement: FY 1996 Preliminary Data Report* (August 1997).

08/18/98 11:52 → DOMESTIC POLICY 008/021

We're OK w/ new draft of bill, luxury that involve a grant from $400

Under S. 1301, more debts, such as credit card debt, will survive bankruptcy, and compete for payment with child support.

We support using current law "luxury" definition (will be in D amendment)

The bill greatly expands the categories of debts, including a substantial portion of credit card debt, that cannot be discharged in a bankruptcy proceeding. Debts incurred within 90 days of filing for bankruptcy, except for necessities that *total* less than $400, would be nondischargeable. Debts incurred to pay other nondischargeable debts also would be nondischargeable.[2] Increasing the debts that survive bankruptcy means that more debts will be competing with child support payments after bankruptcy for the limited resources of a bankrupt debtor. For custodial parents forced into bankruptcy, it means that there will be fewer resources available for them to support their children.

SR: We don't think they compete w/ child support but we support change

We support eliminating this provision (will be D amendment)

S. 1301 creates new barriers that will make it more difficult and expensive to utilize the bankruptcy process.

We want to amend 20% → 35% (D amendment)

In addition to expanding non-dischargeable debts, S. 1301 contains several provisions that will make accessing the necessary protections of the bankruptcy system more difficult. S. 1301 provides creditors with standing to challenge a debtor's eligibility for Chapter 7 bankruptcy based on the debtor's income and ability to repay 20 percent of non-priority unsecured debts (ironically rewarding debtors who incur more debt), and requires pre-filing credit counseling. Each of these provisions not only makes accessing the system more difficult but also increases the creditors' opportunities for costly litigation or pressuring consumers into reaffirming otherwise dischargeable debt. This has the potential for making bankruptcy a prohibitively expensive endeavor. Moreover, such costs divert more resources away from the support of children during a financial crisis.

adequate safeguards

S. 1301 strengthens the ability of credit card lenders and other creditors to take previously protected property, further increasing the competition for scarce resources with child support recipients.

D amendment would require clear & convincing evidence that it's in debtor's best interest and that won't cause hardship to debtor or dependents

S. 1301 provides credit card companies with new tools to target previously protected personal property. For example, § 317 increases the credit card industry's ability to pressure debtors into reaffirming debt by narrowing the definition of household goods and permitting credit card companies to threaten repossession of items with a minimum resale value but high personal value, such as children's toys or family heirlooms. In addition, § 305 would allow creditors to avoid the necessity of seeking a court order to obtain relief from the co-debtor stay, which

---

[2]The Committee amended the latter provision in an effort to provide some protection to families owed support. If the debtor owes child support or alimony, debts incurred to pay nondischargeable debt would not be dischargeable unless the creditor proves they were "intentionally" incurred. However, this may offer little or no relief since it is unclear if any debts can be "unintentionally" incurred. But burden of proof is on creditor to prove it was intentional

08/18/98 11:53 → DOMESTIC POLICY 007/021

currently protects spouses from losing property for which they are jointly liable with a debtor. This provision will hurt women and children because it will permit a creditor to repossess, without court permission, valuable items (such as a car or washing machine) from a spouse, even though the debtor was making payments on the items under a Chapter 13 payment plan. Although this section would not apply to property maintained pursuant to a legally binding separation agreement or divorce decree, families who enter into informal agreements for support and maintenance will be vulnerable to the unilateral actions of creditors.

The Amendments to S. 1301 Designed to Protect Child Support Are Inadequate.

In response to the concern over allowing credit card debts to survive bankruptcy and compete with child support, several amendments were made to the bill in committee to strengthen the position of custodial parents who are owed child support by bankrupt debtors. While the majority of these amendments have been adopted in an effort to place a higher priority on the collection of child support during bankruptcy proceedings, they will not affect the anticipated post-bankruptcy competition between custodial parents and credit card companies. Furthermore, amendments intended to increase child support collection during bankruptcy may have unintended adverse consequences in some cases.

For example, § 323 gives child support and alimony "first priority" in Chapter 7 bankruptcy proceedings. This amendment will have limited practical effect; the vast majority of Chapter 7 debtors have no assets to distribute to creditors, making the level of a creditor's priority irrelevant. And while making support debts the "first priority" sounds good, it may not be in the best interests of support recipients to subordinate administrative expenses to support debts. Unless the administrative expenses of liquidation can be paid, it may not be possible to arrange for the sale of assets from which support, and other debts, must be paid. Likewise, § 324 would allow support obligations to be paid before other priority creditors are satisfied in Chapter 13 bankruptcy plans. This amendment is also unlikely to have any effect on the payment of child support during Chapter 13 proceedings because the amendment *permits* but does not *require* paying child support debts first, and, in most Chapter 13 cases, support obligations are already being paid first.

new co-priority admin exp and child support

Language was also added to condition confirmation of a Chapter 13 plan and discharge on payment of all alimony, maintenance, and child support owed by the debtor post-petition. Requiring debtors to stay current on support payments during the bankruptcy process will help many families to receive the support they need and are owed. However, if this provision is interpreted to require full payment of arrears, this amendment may result in fewer plan confirmations and Chapter 13 discharges. This could have an adverse effect on support recipients, who may prefer in certain circumstances to receive less than full payment of arrears in order to save a home or other vital property that may be jeopardized if the debtor's Chapter 13 plan or discharge is denied. Under S. 1301, the option to agree to such an arrangement may be eliminated.

Bad

Language looks like it would require arrearages to be paid ... but in many cases this provision could be good maybe we should ~~have a~~ allow court to ~~consider~~ ~~waive~~ except arrearages if would cause hardship to debtors or dependents

08/18/98 11:53 → DOMESTIC POLICY 008/021

S. 1301 will reduce the ability of parents to pay their most important debt — their debt to their children. Unless it is substantially amended to protect families, not the credit industry, we urge you to withhold your support.

Very truly yours,

American Association of University Women
American Medical Women's Association
Association for Children for Enforcement of Support, Inc. (ACES)
Black Women's Agenda, Inc.
Catholics for a Free Choice
Center for Law and Social Policy
Children's Defense Fund
Church Women United-Washington Office
Coalition of Labor Union Women
Feminist Majority
General Board of Church and Society, The United Methodist Church
Hadassah
MANA, A National Latina Organization
National Association for Female Executives
National Black Women's Health Project, Inc.
National Organization for Women
National Partnership for Women & Families
National Women's Conference
National Women's Law Center
NAWE Advancing Women in Higher Education
NOW Legal Defense and Education Fund
Older Women's League (OWL)
Wider Opportunities for Women
The Woman Activist Fund, Inc.
Women Employed
Women of Reform Judaism, The Federation of Temple Sisterhoods
Women Work!
Women's Institute for Freedom of the Press
YWCA of the U.S.A.

08/18/98 11:54 ☎ →→→ DOMESTIC POLICY 009/021

National Partnership
for Women & Families

June 9, 1998

Dear Representative:

The National Partnership for Women and Families, the National Women's Law Center, and the other undersigned women's and children's organizations write to express our deep concerns about H.R. 3150, the Bankruptcy Reform Act of 1998. By increasing the rights of credit card companies and other creditors, the bill further jeopardizes the precarious financial position of many women and children.

Women and children are affected by the bankruptcy system in two principal ways: as creditors due child support and as potential users of the bankruptcy system. As creditors, families entitled to support receive protection under the current bankruptcy system. Child support and alimony payments are among the few debts that cannot be discharged in bankruptcy; debtors who can get their finances re-ordered in bankruptcy are left in a better position to pay support. As potential users, the current bankruptcy system provides an avenue of relief for single mothers and children experiencing financial crises, in many cases as a result of nonpayment of child support.

H.R. 3150 does not directly reduce the priority of child support obligations. But it does increase the rights of other creditors such as credit card lenders, setting up a competition for scarce resources between mothers and children owed support and commercial credit card companies. In such a contest mothers and children, even if they are assisted by state child support enforcement agencies, will lose out.

State child support enforcement programs collect support in only one out of five cases. For cases with support orders in place, collections were made in just over a third of the cases (35 percent); only 52 percent of the current child support due was collected in fiscal year 1996.[1] Child support reforms adopted by Congress in 1988 and 1996 should increase the effectiveness of wage withholding and other enforcement measures. Unfortunately, implementation of these reforms has been slow. Some states have not yet developed the automated child support enforcement systems required by Congress a decade ago. Congress can and should do more to improve the effectiveness of state child support programs — not set up new barriers to the collection of support, as H.R. 3150 would do.

Our specific concerns with H.R. 3150 are described in more detail below.

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[1] *Child Support Enforcement: FY 1996 Preliminary Data Report* (August 1997).

1875 Connecticut Avenue, NW / Suite 710 / Washington, DC 20009 / 202.986.2600 / Fax: 202.986.2539 / Web Site: http://www.nationalpartnership.org

08/18/98 11:54 → DOMESTIC POLICY 010/021

Under H.R. 3150, more debts, such as credit card debts, will survive bankruptcy, and compete for payment with child support.

The bill greatly expands the categories of debts that cannot be discharged in a bankruptcy proceeding, including a substantial portion of credit card debt (for example, debts incurred within 90 days of filing for bankruptcy, except for debts for necessities that total less than $250, and debts which the creditor alleges were incurred without a reasonable expectation or ability to repay). Increasing the debts that survive bankruptcy means that more debts will be competing with child support payments for the limited resources of a bankrupt debtor. For custodial parents forced into bankruptcy, it means that there will be fewer resources available for them to support their children.

H.R. 3150 creates an arbitrary means test and other barriers that will make it more difficult and expensive to utilize the bankruptcy process.

In addition to expanding nondischargeable debts, H.R. 3150 contains several provisions that will make accessing the necessary protections of the bankruptcy system more difficult. H.R. 3150 imposes a strict means test for Chapter 7 relief, requires pre-filing credit counseling, and provides standing to creditors to challenge bankruptcy eligibility. Each of these provisions not only makes accessing the system more difficult but increases the creditors' opportunities for costly litigation. This has the potential for making bankruptcy a prohibitively expensive endeavor. Moreover, such costs divert more resources away from the support of children during a financial crisis.

H.R. 3150 generally strengthens the rights of credit card lenders and other creditors, further increasing the competition with child support.

In addition to making more credit card debt nondischargeable, H.R. 3150 strengthens the protections provided to credit card companies in other ways. Several provisions increase the credit card industry's ability to pressure debtors into reaffirming credit card debt by threatening the debtor with repossession or litigation. Through reaffirmation, even more credit card debts become nondischargeable in bankruptcy. Meanwhile, H.R. 3150 does nothing to control the aggressive marketing of high interest credit cards to vulnerable consumers.

The Amendments to H.R. 3150 Designed to Protect Child Support Are Insufficient.

In response to the concern over allowing credit card debts to survive bankruptcy and compete with child support, several amendments were made to the bill. For example, §150 purports to give priority to past child support debts after bankruptcy. Unfortunately, this provision will be virtually impossible to enforce. In Chapter 7 bankruptcies, the most common form of personal bankruptcy, the bankruptcy courts are involved for only a brief period of time. After the debtor's assets (if any) are liquidated, the bankruptcy court does not continue to supervise the debtor's affairs, and there is no other system for coordinating debt collection and child support

enforcement. All creditors holding nondischargeable debts (including women owed child support and, under H.R. 3150, credit card companies) will be competing for payment, and there will be no reference to enforce the priority of child support. Collection agents or other creditor representatives have no incentive to advise the debtor that he should pay his child support first, and are unlikely to do so; even if they did, it would remain within the debtor's discretion whether to honor child support's priority. Even if the credit card companies use the judicial process to collect, the various courts to which they might take their claims will have no way of knowing that a priority child support order exists.

Language also was added that purports to protect the payment of child support in Chapter 13 bankruptcy plans. However, other provisions of H.R. 3150 require that "adequate income," and no less than $50 per month, be committed to repaying non-priority, unsecured debt -- such as credit card debt -- in Chapter 13 plans. If a debtor in Chapter 13 bankruptcy also must make regular payments on credit card debts, payments on child support debt will have to be smaller, and spread out over a longer period of time. H.R. 3150 *says* that child support must be paid in full; but in the real world of limited resources, the bill makes it less likely that this will occur.

This Bankruptcy Reform Act will reduce the ability of parents to pay their most important debt -- their debt to their children. It is for these reasons that we strongly oppose H.R. 3150 and urge you to oppose it as well.

Very truly yours,

American Association of University Women
Association for Children for Enforcement of Support, Inc.
Black Women's Agenda, Inc.
Business and Professional Women/USA
Center for Advancement of Public Policy
Children's Defense Fund
Church Women United
Coalition of Labor Union Women
Federally Employed Women, Inc.
Feminist Majority
MANA, A National Latina Organization
National Association of Commissions For Women
National Association for Female Executives
National Organization for Women
National Women's Conference
NAWE Advancing Women in Higher Education
NOW Legal Defense and Education Fund
Older Women's League
The Women Activist Fund, Inc.
Women Work!
YWCA of the U.S.A.

08/18/98 11:55 → DOMESTIC POLICY 012/021

Senator Dianne Feinstein
Ranking Minority Member
Senate Judiciary Committee
Technology, Terrorism and Government Information Subcommittee
Hart 807
Washington, D.C. 20510
Tel # (202) 224-4933 Fax # 228-0466

Facsimile Cover Sheet

TO: **Roger Ballantine**

August 6, 1998
4:30 pm

FAX NUMBER: **456-6468**

FROM: **Richard Pfohl**
(202) 224-6443

SUBJECT: **Draft Feinstein Creditworthiness Bankruptcy Amendment**

TOTAL NUMBER OF PAGES SENT (including cover sheet): **7**

If you do not receive all pages, please call: **(202) 224-6443**

COMMENTS:

Roger --

Following is draft language for the Feinstein Amendment on creditworthiness. I previously sent you talking points on this.

Please keep this in-house and do not circulate to outside constituents. I would be happy to take suggestions. We really would like to have the Administration behind this, exerting as much leverage as you can.

I will be out from Aug. 13- Sep. 1, so please review and get back to me by early next week if you have any suggestions.

Thanks,
Richard

This and any accompanying pages contain information which is confidential or privileged. The information is intended to be for the use of the individual or entity named above. If you are not the intended recipient, be aware that any disclosures, copying, distribution or use of the contents of this information is prohibited. If have received this facsimile in error, please notify our offices by telephone immediately so that we can arrange for removal of the original document at no cost to you.

S.L.C.
DRAFT 8/6
~~CONFIDENTIAL~~

AMENDMENT NO. ____ Calendar No. ____

Purpose: To ~~amend the Truth in Lending Act to~~ give consumers adequate information and protection with regard to extensions of credit that may result in financial overextension.

IN THE SENATE OF THE UNITED STATES—105th Cong., 2d Sess.

S. 1301

To amend title 11, United States Code, to provide for consumer bankruptcy protection, and for other purposes.

Referred to the Committee on _____
and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mrs. FEINSTEIN

VIZ:

1 At the appropriate place, insert the following:

2 **SEC. ___. HIGH DEBT-TO-INCOME RATIO CREDIT.**

3 (a) AMENDMENTS TO THE TRUTH IN LENDING
4 ACT.—The Truth in Lending Act (15 U.S.C. 1601 et seq.)
5 is amended by inserting after section 109 the following:

6 **"SEC. 110. HIGH DEBT-TO-INCOME RATIO CREDIT.**

7 "(a) DEFINITIONS.—For purposes of this section—

8 "(1) the term 'high debt-to-income ratio credit'
9 means an extension of credit in which the total re-
10 quired monthly payments on consumer credit obliga-

DETERMINED TO BE AN
ADMINISTRATIVE MARKING
INITIALS: KBM DATE: 2/10/2012

1 tions of the borrower (other than residential mort-
2 gage obligations, including any refinancing thereof),
3 together with any amount anticipated to be ad-
4 vanced by the creditor within 30 days after the date
5 on which the extension of credit is made, is greater
6 than 40 percent of the monthly gross income of the
7 borrower; and
8 "(2) the required monthly payment on a credit
9 card obligation shall be calculated as 8 percent of
10 the total principal balance or the minimum payment
11 then due with respect to the obligation, whichever is
12 greater.
13 "(b) DUTY TO INQUIRE.—A creditor that extends
14 credit under an open end credit plan after soliciting the
15 consumer in any manner shall, prior to extending credit,
16 obtain a written statement signed by the consumer, in
17 such form as the Board shall prescribe, that sets forth
18 the information necessary to calculate whether the exten-
19 sion of credit being made is high debt-to-income ratio
20 credit. A creditor may rely on such statement in making
21 the designation provided for under subsection (c), if such
22 reliance is reasonable in light of any other information
23 that the creditor has concerning the financial cir-
24 cumstances of the debtor.

1 "(c) DESIGNATION OF EXTENSION OF CREDIT AS
2 HIGH DEBT-TO-INCOME RATIO CREDIT.—An extension of
3 high debt-to-income ratio credit, as defined in subsection
4 (a), shall be designated as such by the creditor.
5 "(d) SPECIAL REQUIREMENTS FOR HIGH DEBT-TO-
6 INCOME RATIO CREDIT.—A creditor that extends high
7 debt-to-income ratio credit to a consumer shall—
8 "(1) not later than 8 business days prior to
9 making any such credit available to the consumer—
10 "(A) provide information to the consumer,
11 in a form prescribed by the Board, concerning
12 the risks and consequences of becoming over-
13 extended on credit; and
14 "(B) inform the consumer that the exten-
15 sion has been designated as high debt-to-income
16 ratio credit; and
17 "(2) annually report to the Board regarding the
18 number of extensions of high debt-to-income ratio
19 credit made by the creditor, the median interest rate
20 charged by the creditor on such credit, and the total
21 amount of such credit extended by the creditor.
22 "(e) PROHIBITION OF PENALTY RATES.—A creditor
23 may not raise the interest rate charged on high debt-to-
24 income ratio credit based on a default by the consumer.

1 "(f) MINIMUM PAYMENTS ON HIGH DEBT-TO-IN-
2 COME RATIO CREDIT.—A creditor that extends high debt-
3 to-income ratio credit, or its assignees, may not offer to
4 the borrower the option of making monthly minimum pay-
5 ments with regard to the obligation that cover less than
6 4 percent of the total outstanding balance, together with
7 interest then due, at any time during the period of the
8 obligation.
9 "(g) PENALTIES.—A creditor that fails to comply
10 with this section shall be liable to the consumer for actual
11 damages, costs, including attorney fees, and statutory
12 damages of $2,000.".
13 (b) TREATMENT UNDER BANKRUPTCY LAW.—
14 (1) CLAIMS.—
15 (A) ALLOWANCE.—Section 502(b) of title
16 11, United States Code, as amended by section
17 206, is amended—
18 (i) in paragraph (9), by striking "or"
19 at the end;
20 (ii) in paragraph (10), by striking the
21 period at the end and inserting "; or"; and
22 (iii) by adding at the end the follow-
23 ing:
24 "(11) such claim is made in connection with an
25 extension of high debt-to-income ratio credit, as de-

1 fined in section 110 of the Truth in Lending Act, to
2 a debtor seeking—
3 "(A) dismissal under section 707; or
4 "(B) discharge under section 727 or
5 1328.".
6 (B) EXCEPTIONS TO DISCHARGE.—Section
7 523 of title 11, United States Code, as amend-
8 ed by section 202, is amended by adding at the
9 end the following:
10 "(f) The exception under subsection (a)(2) shall not
11 apply to any claim made by a creditor in connection with
12 an extension of high debt-to-income ratio credit, as defined
13 in section 110 of the Truth in Lending Act.".
14 (2) PREPETITION INTEREST.—Section 502(a)
15 of title 11, United States Code, is amended—
16 (A) by striking "unless a party" and in-
17 serting "unless—
18 "(1) a party"; and
19 (B) by striking the period at the end and
20 inserting the following: "; or
21 "(2) the claim is a claim for prepetition interest
22 on an extension of high debt-to-income ratio credit,
23 as defined in section 110 of the Truth in Lending
24 Act, to a debtor seeking dismissal under section 707

1 or discharge under section 727 or 1328, if the court
2 finds that—
3 "(A) the extension of credit caused the
4 debtor to file for such relief; or
5 "(B) payment of a claim on the extension
6 of credit would reduce the payments to other
7 unsecured creditors.".
8 (c) CLERICAL AMENDMENT.—The table of sections
9 for chapter 1 of title I of the Consumer Credit Protection
10 Act (15 U.S.C. 1601 et seq.) is amended by inserting after
11 the item relating to section 109, the following:

"Sec. 110. High debt-to-income ratio credit.".

Bankruptcy Working Gp

Ronald E. Jones 08/12/98 11:00:41 AM

Record Type: Record

To: Sarah Rosen/OPD/EOP, Alice Veenstra/OMB/EOP

cc:
Subject:

---------- Forwarded by Ronald E. Jones/OMB/EOP on 08/12/98 11:00 AM ----------

BNA, Inc.

Daily Report for Executives

No. 155
Wednesday August 12, 1998

Regulation, Law & Economics

Bankruptcy

Bankruptcy Filings Continue to Climb, Reaching Another High, Courts Report

The number of bankruptcy cases filed continues to climb, reaching another all-time high, the Administrative Office of the U.S. Courts reported Aug. 10.

According to the agency's statistics, filings for the 12-month period ending June 30, 1998, totalled 1,429,451, for an 8.5 percent increase over the 1,316,999 cases filed in the same period in 1997. This increase occurred in spite of a decline in the number of business bankruptcies filed, the Administrative Office reported. The agency noted that personal bankruptcy filings increased 9.2 percent, to 1,379,249, in the 12-month period.

The Administrative Office also disclosed that the number of bankruptcy cases filed during the third quarter of FY 1997, April 1, 1998-June 30, 1998, was 373,460, the highest number ever filed for a quarter. This tops the 354,118 filings for the second quarter and 347,685 filings for the third quarter of FY 1997.

Top Districts

The Administrative Office indicated that, among the U.S. bankruptcy courts, the Central District of California remained the district reporting the largest number of filings in the country with 119,776, a 6.3 percent increase over the same 12-month period in 1997.

Several other districts reported bankruptcy filings in excess of 30,000 for the 12-month period: The Northern and Eastern Districts of California, the Middle District of Florida, the Northern District of Georgia, the Northern District of Illinois, the District of Maryland, the District of New Jersey, the Eastern District of New York, and the Eastern District of Virginia.

A breakdown of the latest data on bankruptcy filings is available on the Internet at http://www.uscourts.gov

Bankruptcy Filings by Chapter

- Of the total bankruptcy filings for the 12-month period ending June 30, 1998, there were 1,015,453 Chapter 7 filings, an increase of 10.7 percent over the 917,274 filings in the same period in 1997.

- The next largest group of filings were Chapter 13 filings at 403,501, a 4.1 percent increase over the 387,521 filings in the same period in 1997.

- Chapter 11 filings dropped to 9,613 in the 12-month period ending June 30, 1998, down from 11,159 in the same period in 1997.

- Chapter 12 filings also fell, going from 1,006 in 1997 to 845 in 1998.

- Business filings totaled 50,202, down from the June 30, 1997, total of 53,993.

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THE WHITE HOUSE

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(1) Review (missing 2 sections of USC)

(2) Have HHS scrub citations/technicals

single report; and

``(ii) annually submit such consolidated report to Congress.

``(B) The consolidated report submitted under this paragraph shall include the specific information required under paragraph (3)(B), including the name of each bankruptcy judge with respect to clauses (i) (ii) and (iii) of paragraph (3)(B).''.

SEC. 323. PREFERRED PAYMENT OF CHILD SUPPORT IN CHAPTER 7 PROCEEDINGS.

Section 507(a) of title 11, United States Code, is amended in the matter preceding paragraph (1), by inserting ``, except that, notwithstanding any other provision of this title, any expense or claim entitled to priority under paragraph (7) shall have first priority over any other expense or claim that has priority under any other provision of this subsection'' before the colon.

SEC. 324. PREFERRED PAYMENT OF CHILD SUPPORT IN CHAPTER 13 PROCEEDINGS.

Section 1322(b)(1) of title 11, United States Code, is amended by striking the semicolon at the end and inserting the following: ``and provide for the payment of any claim entitled to priority under section 507(a)(7) before the payment of any other claim entitled to priority under section 507(a), notwithstanding the priorities established under section 507(a).''.

SEC. 325. PAYMENT OF CHILD SUPPORT REQUIRED TO OBTAIN A DISCHARGE IN CHAPTER 13 PROCEEDINGS.

Title 11, United States Code, is amended--

circumstances under which court shall confirm bankruptcy plan =

(1) in section 1325(a)--

(A) in paragraph (5), by striking ``and'' at the end;

(B) in paragraph (6), by striking the period at the end and inserting ``; and''; and

(C) by adding at the end the following:

``(7) if the debtor is required by a judicial or administrative order to pay alimony to, maintenance for, or support of a spouse, former spouse, or child of the debtor, the debtor has paid all amounts payable under that order for alimony, maintenance, or support that are due after the date on which the petition is filed.''; and

(2) in section 1328(a), as amended by section 314 of this Act, in the matter preceding paragraph (1), by inserting ``, and with respect to a debtor who is required by a judicial or administrative order to pay alimony to, maintenance for, or support of a spouse, former spouse, or child of the debtor, only after the debtor certifies as of the later of the date of that completion or the date of certification that all amounts payable under that order for alimony, maintenance, or support that are due before the date of that certification have been paid in accordance with the plan if applicable, or if the underlying debt is not treated by the plan, paid in full'' after ``completion by the debtor of all payments under the plan''.

SEC. 326. CHILD SUPPORT AND ALIMONY COLLECTION.

Section 362(b) of title 11, United States Code, is amended--

A petition will not act as a stay except in circumstances =

(1) in paragraph (17), by striking ``or'' at the end;

(2) in paragraph (18), by striking the period at the end and inserting a semicolon; and

(3) by adding at the end the following:

wage withholding

``(19) under subsection (a) with respect to the withholding of income pursuant to an order as specified in section 466(b) of the Social Security Act (42 U.S.C. 666(b)); or

suspend licenses, report to credit agencies

``(20) under subsection (a) with respect to the withholding,

suspension, or restriction of drivers' licenses, professional and occupational licenses, and recreational licenses pursuant to State law, as specified in section 466(a)(15) of the Social Security Act (42 U.S.C. 666(a)(15)) or with respect to the reporting of overdue support owed by an absent parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act (42 U.S.C. 666(a)(7)).''.

SEC. 327. NONDISCHARGEABILITY OF CERTAIN DEBTS FOR ALIMONY, MAINTENANCE, AND SUPPORT.

Section 523 of title 11, United States Code, as amended by section 202 of this Act, is amended--

(1) in subsection (a), by striking paragraph (5) and inserting the following:

``(5) to a spouse, former spouse, or child of the debtor--

Debts which cannot be discharged

``(A) for actual alimony to, maintenance for, or support of that spouse or child;

``(B) that was incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, property settlement agreement, divorce decree, other order of a court of record, or determination made in accordance with State or territorial law by a governmental unit; or

actual

``(C) that is described in subparagraph (A) or (B) and that is assigned pursuant to section 408(a)(3) of the Social Security Act (42 U.S.C. 608(a)(3)), or to the Federal Government, a State, or any political subdivision of a State,

assigned to state

but not to the extent that the debt (other than a debt described in subparagraph (C)) is assigned to another entity, voluntarily, by operation of law, or otherwise;''; and

What kinds of "other entities"? New

(2) in subsection (c), by striking ``(6), or (15)'' and inserting ``or (6)''.

creditor need not petition to ensure that certain debts won't be discharged

SEC. 328. ENFORCEMENT OF CHILD AND SPOUSAL SUPPORT.

Certain property (i.e. home, car) protected except —

Section 522(c)(1) of title 11, United States Code, is amended by inserting ``, except that, notwithstanding any other Federal law or State law relating to exempted property, such exempt property shall be liable for debts of a kind specified in paragraph (1) or (5) of section 523(a)'' before the semicolon at the end of the paragraph.

SEC. 329. DEPENDENT CHILD DEFINED.

tax alimony or support

Section 101 of title 11, United States Code, is amended by inserting after paragraph (14) the following:

``(14A) `dependent child'' means, with respect to an individual, a child who has not attained the age of 18 and who is a dependent of that individual, within the meaning of section 152 of the Internal Revenue Code;''.

{ certain categories of alimony + support can be discharged }

TITLE IV--TECHNICAL CORRECTIONS

SEC. 401. DEFINITIONS.

Section 101 of title 11, United States Code, as amended by section 317, is amended--

(1) by striking ``In this title--'' and inserting ``In this title:'';

(2) in each paragraph, by inserting ``The term'' after the paragraph designation;

(3) in paragraph (35)(B), by striking ``paragraphs (21B) and (33)(A)'' and inserting ``paragraphs (23) and (35)'';

(4) in each of paragraphs (35A) and (38), by striking ``; and'' at the end and inserting a period;

(5) in paragraph (51B)--

(A) by inserting ``who is not a family farmer'' after ``debtor'' the first place it appears; and

PROVIDE REQUIRED INFORMATION.

Section 707 of title 11, United States Code, as amended by section 102 of this Act, is amended by adding at the end the following:

``(c)(1) Notwithstanding subsection (a), and subject to paragraph (2), if an individual debtor in a voluntary case under chapter 7 or 13 fails to file all of the information required under section 521(a)(1) within 45 days after the filing of the petition commencing the case, the case shall be automatically dismissed effective on the 46th day after the filing of the petition.

``(2) With respect to a case described in paragraph (1), any party in interest may request the court to enter an order dismissing the case. The court shall, if so requested, enter an order of dismissal not later than 5 days after that request.

``(3) Upon request of the debtor made within 45 days after the filing of the petition commencing a case described in paragraph (1), the court may allow the debtor an additional period of not to exceed 20 days to file the information required under section 521(a)(1) if the court finds justification for extending the period for the filing.''.

SEC. 313. ADEQUATE TIME FOR PREPARATION FOR A HEARING ON CONFIRMATION OF THE PLAN.

Section 1324 of title 11, United States Code, as amended by section 304 of this Act, is amended--

(1) by striking ``After'' and inserting the following:

``(a) Except as provided in subsection (b) and after''; and

(2) by adding at the end the following:

``(b) If not later than 5 days after receiving notice of a hearing on confirmation of the plan, a creditor objects to the confirmation of the plan, the hearing on confirmation of the plan may be held no earlier than 20 days after the first meeting of creditors under section 341(a).''.

SEC. 314. DISCHARGE UNDER CHAPTER 13.

Section 1328(a) of title 11, United States Code, is amended by striking paragraphs (1) through (3) and inserting the following:

``(1) provided for under section 1322(b)(5);

``(2) of the kind specified in paragraph (2), (4), (5), (8), or (9) of section 523(a);

``(3) for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime; or

``(4) for restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual.''.

SEC. 315. NONDISCHARGEABLE DEBTS.

Section 523(a) of title 11, United States Code, is amended by inserting after paragraph (14) the following:

debts cannot be discharged (i.e. forgiven)

``(14A) incurred to pay a debt that is nondischargeable by reason of section 727, 1141, 1228 (a) or (b), or 1328(b), or any other provision of this subsection, except for any debt incurred to pay such a nondischargeable debt in any case in which--

``(A)(i) the debtor who paid the nondischargeable debt is a single parent who has 1 or more dependent children at the time of the order for relief; or

``(ii) there is an allowed claim for alimony to, maintenance for, or support of a spouse, former spouse, or child of the debtor payable under a judicial or administrative order to that spouse or child (but not to any other person) that was unpaid by the debtor as of the date of the petition; and

``(B) the creditor is unable to demonstrate that the debtor

i.e. credit card used to pay taxes person must pay credit card bill unless 1) person is single parent owing alimony AND 2) credit card company proves

→ so they can't credit card debt hang over

(1) Certain debts are nondischargeable
(2) Debts incurred to pay nondischargeable debts are also nondischargeable except if debtor (i) is single parent or a parent who owes child support/alimony AND (2) the creditor can't prove person incurred debt to pay non-dis debt

intentionally incurred the debt to pay the nondischargeable debt;''.

SEC. 316. CREDIT EXTENSIONS ON THE EVE OF BANKRUPTCY PRESUMED NONDISCHARGEABLE.

Section 523(a)(2) of title 11, United States Code, as amended by section 202 of this Act, is amended--

(1) in subparagraph (A), by striking the semicolon at the end and inserting the following: ``(and,

for purposes of this subparagraph, consumer debts owed in an aggregate amount greater than or equal to $400 incurred for goods or services not reasonably necessary for the maintenance or support of the debtor or a dependent child of the debtor to a single creditor that are incurred during the 90-day period preceding the date of the order for relief shall be presumed to be nondischargeable under this subparagraph); or'';

(2) in subparagraph (B), by striking ``or'' at the end; and

(3) by striking subparagraph (C).

SEC. 317. DEFINITION OF HOUSEHOLD GOODS AND ANTIQUES.

Section 101 of title 11, United States Code, is amended by inserting after paragraph (27) the following:

``(27A) `household goods' has the meaning given that term in section 444.1(i) of title 16, of the Code of Federal Regulations (as in effect on the effective date of this paragraph), which is part of the regulations issued by the Federal Trade Commission that are commonly known as the `Trade Regulation Rule on Credit Practices', except that the term shall also include any tangible personal property reasonably necessary for the maintenance or support of a dependent child;''.

SEC. 318. RELIEF FROM STAY WHEN THE DEBTOR DOES NOT COMPLETE INTENDED SURRENDER OF CONSUMER DEBT COLLATERAL.

(a) Automatic Stay.--Section 362 of title 11, United States Code, as amended by section 305, is amended--

(1) in subsection (c)(1), in the matter preceding subparagraph (A), by striking ``(e) and (f)'' and inserting ``(e), (f), and (h)'';

(2) by redesignating subsection (h) as subsection (i); and

(3) by inserting after subsection (g) the following:

``(h) In an individual case under chapter 7, 11, or 13 the stay provided by subsection (a) is terminated with respect to property of the estate securing in whole or in part a claim that is in an amount greater than $3,000, or subject to an unexpired lease with a remaining term of at least 1 year (in any case in which the debtor owes at least $3,000 for a 1-year period), if within 30 days after the expiration of the applicable period under section 521(a)(2)--

``(1)(A) the debtor fails to timely file a statement of intention to surrender or retain the property; or

``(B) if the debtor indicates in the filing that the debtor will retain the property, the debtor fails to meet an applicable requirement to--

``(i) either--

``(I) redeem the property pursuant to section 722; or

``(II) reaffirm the debt the property secures pursuant to section 524(c); or

``(ii) assume the unexpired lease pursuant to section 365(d) if the trustee does not do so; or

``(2) the debtor fails to timely take the action specified in a statement of intention referred to in paragraph (1)(A) (as amended, if that statement is amended before expiration of the period for taking action), unless--

ulation between debtors and bank, wherein debtors agreed to pay such sums in return for bank allowing debtors to continue uninterrupted use of dairy farm on grounds funds were paid to provide adequate protection under 11 USCS §§ 361 and 362, because such stipulation was ineffective since it was never submitted to Bankruptcy Court for approval and because fund was generated by postpetition operation of debtor's business; moreover, once bank chose to seek foreclosure rather than continue proposed stipulation and stay was lifted, bank is no longer entitled to adequate protection since there was no property being used by debtors for which bank could request adequate protection. In re Engle (1987, BC ED Pa) 73 BR 870, 4 UCCRS2d 264, revd on other grounds (1987, ED Pa) 93 BR 58, 9 UCCRS2d 765.

Adequate protection under 11 USCS §§ 361 and 362 is question of fact, whereas what specific creditor interests are to be incorporated in scope of adequate protection is question of law. In re Greives (1987, BC ND Ind) 81 BR 912.

27. Burden of proof

Pursuant to 11 USCS § 362, debtors must demonstrate to Bankruptcy Court that creditors have adequate protection of their interest in property, once plaintiffs have shown sufficient cause to grant relief from stay. In re Bradley (1980, BC ED Va) 3 BR 313, 6 BCD 157, 1 CBC2d 803, CCH Bankr L Rptr ¶ 67630.

Debtors fail to meet burden of proving adequate protection for plaintiffs necessary to stay unlawful detainer action seeking to oust debtors from plaintiffs' property, where they (1) are not vested with title to property, and so cannot grant security interest, (2) offer no evidence to indicate they are financially able to make periodic cash payments to plaintiffs, inasmuch as they have not made rental payments pursuant to agreement entered into during course of state proceeding, and have failed to comply with bond requirement which would have stayed state court proceeding, and (3) offer no other relief which would be indubitable equivalent of plaintiffs' interest in property; in such circumstances plaintiffs show sufficient cause to grant relief from stay under 11 USCS § 362. In re Bradley (1980, BC ED Va) 3 BR 313, 6 BCD 157, 1 CBC2d 803, CCH Bankr L Rptr ¶ 67630.

Under 11 USCS § 362, party seeking to maintain automatic stay has burden to establish that secured creditor is adequately protected, and, where secured property itself does not adequately protect creditor, because creditor's secured claim in excess of $704,000 is secured by mortgage valued at $650,000, debtor is obliged to come forward and offer adequate protection to creditor within definition of this concept under 11 USCS § 361. In re Riviera Inn of Wallingford, Inc. (1980, BC DC Conn) 7 BR 725, CCH Bankr L Rptr ¶ 67726.

Debtor meets his burden of proving that interest of creditor is adequately protected and creditor is not entitled to relief from automatic stay under 11 USCS § 362(d)(1) where debtor testifies that in his opinion value of property subject to creditor's mortgage is $18,000 and that debt owing is $10,600 and creditor does not contradict this testimony. In re Lee (1981, BC ED Pa) 11 BR 84.

Relief from automatic stay imposed under 11 USCS § 362 would be granted with respect to debtor's tractor and trailer where debtor failed to establish equity in property, that it was necessary for his rehabilitation under Chapter 13 plan of arrangement or that payments he offered to make under plan would adequately protect creditor within meaning of 11 USCS § 361. In re Rush (1981, BC WD Mo) 16 BR 223.

Creditor can only show that its interest is in need of protection against lost opportunity cost by presenting facts establishing the opportunity cost in need of protection; mere proof of lack of equity in debtor's property does not create presumption of lost opportunity cost. In re Wolsky (1985, BC DC ND) 53 BR 751.

Party seeking adequate protection against lost opportunity cost must, at minimum, prove by preponderance of evidence that: (1) it has valid security interest in debtor's property, (2) date when, but for bankruptcy, receipts would have been realized by sale of secured property, and (3) date proceeds would have been reinvested and rate of return which would have been realized upon reinvestment. In re Wolsky (1985, BC DC ND) 53 BR 751.

28. Power and duties of court

Under 11 USCS § 361, it is responsibility of Bankruptcy Court to satisfy public policy favoring rehabilitation of distressed debtors while at same time protecting interests of creditors, and, where it is undisputed that retention of property levied by IRS will cause demise of debtor as competitive commerce entity and have devastating effect on economy of small community in which debtor is located, and will mean no other creditors' claims can be satisfied out of property levied or its proceeds, Bankruptcy Court, under equitable powers, will require IRS to turn over funds seized, to be placed by debtor in escrow account from which withdrawals may be made only upon order of court, with IRS being considered secured creditor of debtor as to such funds. In re Aurora Cord & Cable Co. (1980, BC ND Ill) 2 BR 342, 5 BCD 1310, 1 CBC2d 486, CCH Bankr L Rptr ¶ 67446.

Bankruptcy Court is court of equity, and Congress has expressly intended to give it great flexibility in formulating methods of protection appropriate to circumstances of case. In re Crockett (1980, BC ND Ill) 3 BR 365, 6 BCD 226, 1 CBC2d 926, CCH Bankr L Rptr ¶ 67406.

Standard of adequate protection for creditor which must be met if relief from automatic stay is to be denied is applied as matter of right and not matter of discretion by Bankruptcy Court, with debtor having responsibility to propose methods to be used, rather than Bankruptcy Court devising method of providing adequate protection. In re San Clemente Estates (1980, BC SD Cal) 5 BR 605, 6 BCD 838, 2 CBC2d 1003.

Burden is upon debtor in possession to propose method of adequate protection when such protection is required; bankruptcy court need not determine if protection is possible but only decide is proposed method is sufficient. In re Sun Valley Ranches, Inc. (1984, BC DC Idaho) 38 BR 595, 10 CBC2d 459.

It is function of court to pass upon adequacy of protection under 11 USCS § 361 offered by trustee with reference to secured claim rather than to formulate and provide adequate protection to secured party on court's initiative; thus trustee is given opportunity to propose means in which creditors' secured claim might be adequately protected and creditors, whose claims are secured by pledge of Chapter 11 debtor's stock, are entitled to offer proof of trustee's equity in debtor's assets. In re Cash Currency Exchange, Inc. (1985, BC ND Ill) 52 BR 577.

29. Appeal and review

Judicial determination of adequate protection under 11 USCS § 361(3) is question of fact rooted in measurements of value and credibility of witnesses and, unless District Court is clearly erroneous in its decision that creditor is adequately protected, its decision will be affirmed. In re Snowshoe Co. (1986, CA4 W Va) 789 F2d 1085, CCH Bankr L Rptr ¶ 71146.

Chapter 11 debtors seeking to use cash collateral may establish that secured creditors are adequately protected within meaning of 11 USCS § 361 by proving existence of sufficient equity cushion in collateral; in reviewing Bankruptcy Court's determination that creditors are adequately protected, District Court may also consider conditions imposed upon debtors limiting use of such funds. In re Grant Broadcasting, Inc. (1987, ED Pa) 75 BR 819.

§ 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 [15 USCS § 78eee(a)(3)], operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 [15 USCS § 78eee(a)(3)], does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section—

(A) of the commencement or continuation of an action or proceeding for—

(i) the establishment of paternity; or

(ii) the establishment or modification of an order for alimony, maintenance, or support; or

(B) of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, or secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of repurchase agreements against cash, securities, or other property held by

or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of—

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 [20 USCS § 1085(j)] or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt and claim under or in connection with any swap agreement that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash, securities, or other property of the debtor held by or due from such swap participant to guarantee, secure or settle any swap agreement; or

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax imposed by the District of Columbia, or a political subdivision of a State, if such tax comes due after the filing of the petition.

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), and (f) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title [11 USCS §§ 701 et seq.] concerning an individual or a case under chapter 9, 11, 12, or 13 of this title [11 USCS §§ 901 et seq., 1101 et seq., 1201 et seq., or 1301 et seq.], the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization; or

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period)—

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

(Nov. 6, 1978, P. L. 95-598, Title I, § 101, 92 Stat. 2570; July 27, 1982, P. L. 97-222, § 3, 96 Stat. 236; July 10, 1984, P. L. 98-353, Title III, Subtitle

to comply with court orders and to attend discharge hearing; attendance at discharge hearing is not mandatory if debtor is excused from hearing and counsel for debtor has advised debtor of her rights and duties under 11 USCS § 524(d); debtor must, however, request to be excused and, in instant case, debtor failed to request to be excused after repeated notice. In re Flowers (1985, BC MD Ala) 55 BR 661.

§ 522. Exemptions

(a) In this section—

(1) "dependent" includes spouse, whether or not actually dependent; and

(2) "value" means fair market value as of the date of the filing of the petition or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate.

(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. In joint cases filed under section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Federal Rules of Bankruptcy Procedure, one debtor may not elect to exempt property listed in paragraph (1) and the other debtor elect to exempt property listed in paragraph (2) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (1), where such election is permitted under the law of the jurisdiction where the case is filed. Such property is—

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; and

(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.

(c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except—

(1) a debt of a kind specified in section 523(a)(1) or 523(a)(5) of this title;

(2) a debt secured by a lien that is—

(A)(i) not avoided under subsection (f) or (g) of this section or under section 544, 545, 547, 548, 549, or 724(a) of this title; and

(ii) not void under section 506(d) of this title; or

(B) a tax lien, notice of which is properly filed; or

(3) a debt of a kind specified in section 523(a)(4) or 523(a)(6) of this title owed by an institution-affiliated party of an insured depository institution to a Federal depository institutions regulatory agency acting in its capacity as conservator, receiver, or liquidating agent for such institution.

(d) The following property may be exempted under subsection (b)(1) of this section:

(1) The debtor's aggregate interest, not to exceed $15,000 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.

(2) The debtor's interest, not to exceed $2,400 in value, in one motor vehicle.

(3) The debtor's interest, not to exceed $400 in value in any particular item or $8,000 in aggregate value, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(4) The debtor's aggregate interest, not to exceed $1,000 in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(5) The debtor's aggregate interest in any property, not to exceed in value $800 plus up to $7,500 of any unused amount of the exemption provided under paragraph (1) of this subsection.

(6) The debtor's aggregate interest, not to exceed $1,500 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.

(7) Any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract.

(8) The debtor's aggregate interest, not to exceed in value $8,000 less any amount of property of the estate transferred in the manner specified in section 542(d) of this title, in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

(9) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(10) The debtor's right to receive—

(A) a social security benefit, unemployment compensation, or a local public assistance benefit;

(B) a veterans' benefit;

(C) a disability, illness, or unemployment benefit;

(D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless—

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

(11) The debtor's right to receive, or property that is traceable to—

(A) an award under a crime victim's reparation law;

(B) a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(C) a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(D) a payment, not to exceed $15,000, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or

(E) a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(e) A waiver of an exemption executed in favor of a creditor that holds an unsecured claim against the debtor is unenforceable in a case under this title [11 USCS §§ 101 et seq.] with respect to such claim against property that the debtor may exempt under subsection (b) of this section. A waiver by the debtor of a power under subsection (f) or (h) of this section to avoid a transfer, under subsection (g) or (i) of this section to exempt property, or under subsection (i) of this section to recover property or to preserve a transfer, is unenforceable in a case under this title [11 USCS §§ 101 et seq.].

(f)(1) Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

(A) a judicial lien, other than a judicial lien that secures a debt—

(i) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement; and

(ii) to the extent that such debt—

(I) is not assigned to another entity, voluntarily, by operation of law, or otherwise; and

(II) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support.

(B) a nonpossessory, nonpurchase-money security interest in any—

(i) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

(ii) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or

(iii) professionally prescribed health aids for the debtor or a dependent of the debtor.

(2)(A) For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of—

(i) the lien;

(ii) all other liens on the property; and

(iii) the amount of the exemption that the debtor could claim if there were no liens on the property;

exceeds the value that the debtor's interest in the property would have in the absence of any liens.

(B) In the case of a property subject to more than 1 lien, a lien that has been avoided shall not be considered in making the calculation under subparagraph (A) with respect to other liens.

(C) This paragraph shall not apply with respect to a judgment arising out of a mortgage foreclosure.

(3) In a case in which State law that is applicable to the debtor—

(A) permits a person to voluntarily waive a right to claim exemptions under subsection (d) or prohibits a debtor from claiming exemptions under subsection (d); and

(B) either permits the debtor to claim exemptions under State law without limitation in amount, except to the extent that the debtor has permitted the fixing of a consensual lien on any property or prohibits avoidance of a consensual lien on property otherwise eligible to be claimed as exempt property;

the debtor may not avoid the fixing of a lien on an interest of the debtor or a dependent of the debtor in property if the lien is a nonpossessory, nonpurchase-money security interest in implements, professional books, or tools of the trade of the debtor or a dependent of the debtor or farm animals or crops of the debtor or a dependent of the debtor to the extent the value of such implements, professional books, tools of the trade, animals, and crops exceeds $5,000.

(g) Notwithstanding sections 550 and 551 of this title, the debtor may

exempt under subsection (b) of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if—

(1)(A) such transfer was not a voluntary transfer of such property by the debtor; and

(B) the debtor did not conceal such property; or

(2) The debtor could have avoided such transfer under subsection (f)(2) of this section.

(h) The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if—

(1) such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549, or 724(a) of this title or recoverable by the trustee under section 553 of this title; and

(2) the trustee does not attempt to avoid such transfer.

(i)(1) If the debtor avoids a transfer or recovers a setoff under subsection (f) or (h) of this section, the debtor may recover in the manner prescribed by, and subject to the limitations of, section 550 of this title, the same as if the trustee had avoided such transfer, and may exempt any property so recovered under subsection (b) of this section.

(2) Notwithstanding section 551 of this title, a transfer avoided under section 544, 545, 547, 548, 549, or 724(a) of this title, under subsection (f) or (h) of this section, or property recovered under section 553 of this title, may be preserved for the benefit of the debtor to the extent that the debtor may exempt such property under subsection (g) of this section or paragraph (1) of this subsection.

(j) Notwithstanding subsections (g) and (i) of this section, the debtor may exempt a particular kind of property under subsections (g) and (i) of this section only to the extent that the debtor has exempted less property in value of such kind than that to which the debtor is entitled under subsection (b) of this section.

(k) Property that the debtor exempts under this section is not liable for payment of any administrative expense except—

(1) the aliquot share of the costs and expenses of avoiding a transfer of property that the debtor exempts under subsection (g) of this section, or of recovery of such property, that is attributable to the value of the portion of such property exempted in relation to the value of the property recovered; and

(2) any costs and expenses of avoiding a transfer under subsection (f) or (h) of this section, or of recovery of property under subsection (i)(1) of this section, that the debtor has not paid.

(l) The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section. If the debtor does not file such a list, a dependent of the debtor may file such a list, or may claim property as exempt

from property of the estate on behalf of the debtor. Unless a party in interest objects, the property claimed as exempt on such list is exempt.

(m) Subject to the limitation in subsection (b), this section shall apply separately with respect to each debtor in a joint case.

(Nov. 6, 1978, P. L. 95-598, Title I, § 101, 92 Stat. 2586; July 10, 1984, P. L. 98-353, Title III, Subtitle A, § 306, Subtitle H, § 453, 98 Stat. 353, 375; Oct. 27, 1986, P. L. 99-554, Title II, Subtitle C, § 283(i), 100 Stat. 3117; Nov. 29, 1990, P. L. 101-647, Title XXV, Subtitle B, § 2522(b), 104 Stat. 4866; Oct. 22, 1994, P. L. 103-394, Title I, § 108(d), Title III, §§ 303, 304(d), 310, Title V, § 501(d)(12), 108 Stat. 4112, 4132, 4133, 4137, 4145.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Legislative Statements

Section 522 of the House amendment represents a compromise on the issue of exemptions between the position taken in the House bill, and that taken in the Senate amendment. Dollar amounts specified in section 522(d) of the House bill have been reduced from amounts as contained in H.R. 8200 as passed by the House. The States may, by passing a law, determine whether the Federal exemptions will apply as an alternative to State exemptions in bankruptcy cases.

Section 522(c)(1) tracks the House bill and provides that dischargeable tax claims may not be collected out of exempt property.

Section 522(f)(2) is derived from the Senate amendment restricting the debtor to avoidance of nonpossessory, nonpurchase money security interests.

Exemptions: Section 522(c)(1) of the House amendment adopts a provision contained in the House bill that dischargeable taxes cannot be collected from exempt assets. This changes present law, which allows collection of dischargeable taxes from exempt property, a rule followed in the Senate amendment. Nondischargeable taxes, however, will continue to the [be] collectable out of exempt property. It is anticipated that in the next session Congress will review the exemptions from levy currently contained in the Internal Revenue Code [title 26] with a view to increasing the exemptions to more realistic levels.

Senate Report No. 95-989

Subsection (a) of this section defines two terms: "dependent" includes the debtor's spouse, whether or not actually dependent; and "value" means fair market value as of the date of the filing of the petition [see the 1984 amendment to subsec. (a)(2) of this section].

Subsection (b) tracks current law. It permits a debtor the exemptions to which he is entitled under other Federal law and the law of the State of his domicile. Some of the items that may be exempted under Federal laws other than title 11 include:

Foreign Service Retirement and Disability payments, 22 U.S.C. 1104 [replaced by 22 U.S.C. 4060(c)];

Social security payments, 42 U.S.C. 407;

Injury or death compensation payments from war risk hazards, 42 U.S.C. 1717;

Chapter 7 debtor from exercising 11 USCS § 547 avoidance power by way of 11 USCS § 522(h) to set aside garnishment of $280.78 in wages as preferential transfer, but debtor may still proceed under 11 USCS § 522(f)(1) to avoid exemption impairing judicial lien. In re Buzzell (1986, BC DC Md) 56 BR 197, CCH Bankr L Rptr P 70943.

322. Insurance proceeds

Although trustee has power under 11 USCS § 544 to set aside restraining order served by judgment creditor upon insurer holding fire insurance proceeds for debtor since no lien exists on proceeds, trustee has waived any claim in proceeds; by virtue of 11 USCS § 522(h), debtor may liquidate insurance settlement as trustee would for benefit of estate, and once liquidated, proceeds are cash and debtor may claim exempt as much as is allowed by state debtor and creditor law. In re Sullivan (1983, BC ND NY) 31 BR 125, 10 BCD 918.

When debtor voluntarily grants security interest and is required to insure collateral for secured creditor's benefit, payment of insurance money to creditor is voluntary transfer from debtor to creditor for purposes of 11 USCS § 522(g)(1)(A); where debtor voluntarily executed mortgage with "other debts" clause, he voluntarily transferred fire insurance proceeds including $6,000 in excess of specific mortgage debt as collateral for his other debts for purposes of 11 USCS § 522(g)(1)(A) and, even though debtor paid for insurance premiums, that does not entitle him to exempt proceeds in excess of mortgage debt. In re Rollins (1986, BC ED Tenn) 63 BR 780, 15 CBC2d 1075.

Fact that trustee learned of insurance proceeds from debtor's bankruptcy schedules does not preclude him from recovering as preferential transfer proceeds received by bank in excess of recorded mortgage debt or preclude him from objecting to debtor's claimed exemption in proceeds in amount of excess under 11 USCS § 522(g)(1)(A) because debtor has duty to reveal payment to bank under 11 USCS § 521(1), Bankruptcy Rule 1008, and 11 USCS § 727(a)(4)(A). In re Rollins (1986, BC ED Tenn) 63 BR 780, 15 CBC2d 1075.

Insurance proceeds are not equity which debtor may exempt merely because proceeds are in excess of particular debt secured by destroyed property where proceeds also secured debtors' other debts to bank, and remaining debts total more than value of remaining collateral, including excess insurance proceeds; without avoiding lien, debtor can exempt insurance proceeds under 11 USCS § 522(h) only to extent they are equity over and above secured debts. In re Rollins (1986, BC ED Tenn) 63 BR 784.

323. Miscellaneous

Property which had been placed into spendthrift trust by Chapter 7 debtors, who were both settlors and beneficiaries of trust, and which had been recovered by Chapter 7 trustee, was property of estate under 11 USCS § 541 because, under Wyoming law, trust by which alienation of settlor's beneficial interest is restrained is invalid as to creditors, and assets of trust can be reached by creditor, and, therefore, 11 USCS § 541(c)(2) does not except trust property from property of estate; in such case, there was no fraudulent transfer because property came into estate unhindered by antialienation clause, and debtors were not precluded from claiming property as exempt by 11 USCS § 522(g). Royal v Pancratz (In re Pancratz) (1994, DC Wyo) 175 BR 85.

Since debtor could have exempted tax refund under 11 USCS § 522(g)(1) if trustee had avoided transfer of tax overpayment because transfer from IRS to state was involuntary transfer and debtor did not conceal property, debtor has standing to seek to avoid transfer under § 522(h). In re Biddle (1983, BC ND Iowa) 31 BR 449, 11 BCD 480, 83-2 USTC ¶ 9471, 53 AFTR 2d 84-1009.

Debtor is not entitled to avoid setoff by bank with respect to social security payments deposited in debtor's checking account and exempt from legal process under 42 USCS § 407 because setoff utilized by bank is not legal process but rather is self-help procedure; therefore, 11 USCS § 552(h) does not apply. In re Gillespie (1984, BC DC Colo) 41 BR 810.

Transfer of funds from Chapter 13 debtor former tenant to former landlord from bank account in which debtor deposited rentals during pendency of appeal from judgment in favor of landlord did not occur on date when judge ordered transfer, but on date of actual remittance of funds; where this was within 90 days of bankruptcy, transfer is avoidable under 11 USCS § 547 and debtor may exempt funds under 11 USCS § 522; all but portion of funds representing current rental payment were payments for antecedent debt and are avoidable. In re Mason (1987, BC ED Pa) 69 BR 876.

Transaction between debtor Social Security beneficiaries and state welfare department that paid debtors assistance benefits pending approval of applications for Social Security benefits upon execution by debtors of reimbursement authorizations, were assignments creating perfected equitable liens on behalf of welfare departments in Social Security benefits and, as such, liens are immune from trustee's avoiding powers under 11 USCS § 554 and from debtor's avoiding powers under 11 USCS § 522(h); since debtor-creditor relationship existed between parties, debtors' obligations to welfare department are dischargeable under 11 USCS § 727(b). In re Dias (1987, BC ED Cal) 70 BR 424.

Chapter 7 debtors may not proceed under 11 USCS § 522(h) or (f) to avoid consensual lien on mobile home since mobile home does not fall within listed types of exempt property under § 522 and because of consensual nature of lien; nor can debtors avoid lien under § 522(c), which they argue permits them to avoid lien by operation of 11 USCS § 506(d), because debtors cannot strip down lien and because they lack standing. Eakin v Beneficial Idaho, Inc. (1993, BC DC Idaho) 156 BR 59.

§ 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

(1) for a tax or a customs duty—

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, if required—

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C) for purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating more than $1,000 for "luxury goods or services" incurred by an individual debtor on or within 60 days before the order for relief under this title [11 USCS §§ 101 et seq.], or cash advances aggregating more than $1,000 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 60 days before the order for relief under this title [11 USCS §§ 101 et seq.], are presumed to be nondischargeable; "luxury goods or services" do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor; an extension of consumer credit under an open end credit plan is to be defined for purposes of this subparagraph as it is defined in the Consumer Credit Protection Act;

(3) neither listed nor scheduled under section 521(1) of this title [11 USCS § 521(1)], with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit—

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that—

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(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)(3) of the Social Security Act [42 USCS § 608(a)(3)], or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty—

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

(8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless—

(A) such loan, benefit, scholarship, or stipend overpayment first became due more than 7 years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents;

(9) for death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act;

(11) provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union;

(12) for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution, except that this paragraph shall not extend any such commitment which would otherwise be terminated due to any act of such agency; or

(13) for any payment of an order of restitution issued under title 18, United States Code;

(14) incurred to pay a tax to the United States that would be nondischargeable pursuant to paragraph (1);

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(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit unless—

exceptions: when alimony or CSE can be discharged

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor;

(16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a dwelling unit that has condominium ownership or in a share of a cooperative housing corporation, but only if such fee or assessment is payable for a period during which—

(A) the debtor physically occupied a dwelling unit in the condominium or cooperative project; or

(B) the debtor rented the dwelling unit to a tenant and received payments from the tenant for such period,

Nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case;

(17) for a fee imposed by a court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under section 1915 (b) or (f) of title 28, or the debtor's status as a prisoner, as defined in section 1915(h) of title 28; or

(18) owed under State law to a State or municipality that is—

(A) in the nature of support, and

(B) enforceable under part D of title IV of the Social Security Act (42 U.S.C. 601 et seq.).

(b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act, under section 439A of the Higher Education Act of 1965, or under section 733(g) of the Public Health Service Act in a prior case concerning the debtor under this title or under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

(c)(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6), ~~or (15)~~ of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), (6), ~~or (15)~~, as the case may be, of subsection (a) of this section.

(2) Paragraph (1) shall not apply in the case of a Federal depository institutions regulatory agency seeking, in its capacity as conservator, receiver, or liquidating agent for an insured depository institution, to recover a debt described in subsection (a)(2), (a)(4), (a)(6), or (a)(11) owed to such institution by an institution-affiliated party unless the receiver, conservator, or liquidating agent was appointed in time to reasonably comply, or for a Federal depository institutions regulatory agency acting in its corporate capacity as a successor to such receiver, conservator, or liquidating agent to reasonably comply, with subsection (a)(3)(B) as a creditor of such institution-affiliated party with respect to such debt.

(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

(e) Any institution-affiliated party of a [an] insured depository institution shall be considered to be acting in a fiduciary capacity with respect to the purposes of subsection (a)(4) or (11).

(Nov. 6, 1978, P. L. 95-598, Title I, § 101, 92 Stat. 2590; Aug. 14, 1979, P. L. 96-56, § 3, 93 Stat. 387; Aug. 13, 1981, P. L. 97-35, Title XXIII, Subtitle

A, Ch 2, § 2334(b), 95 Stat. 863; July 10, 1984, P. L. 98-353, Title III, Subtitle A, § 307, Subtitle D, § 371, Subtitle H, § 454, 98 Stat. 353, 364, 375; Oct. 27, 1986, P. L. 99-554, Title II, Subtitles B, C, §§ 257(n), 281, 283(j), 100 Stat. 3115-3117; Nov. 15, 1990, P. L. 101-581, § 2(a), 104 Stat. 2865; Nov. 29, 1990, P. L. 101-647, Title XXV, Subtitle B, §§ 2522(a) Title XXXI, § 3102(a), Title XXXVI, Subtitle B, § 3621, 104 Stat. 4866, 4916, 4964; Sept. 13, 1994, P. L. 103-322, Title XXXII, Subtitle I, § 320934, 108 Stat. 2135; Oct. 22, 1994, P. L. 103-394, Title II, § 221, Title III, §§ 304(e), (h)(3), 306, 309, Title V, § 501(d)(13), 108 Stat. 4129, 4133, 4134, 4135, 4137, 4145; April 26, 1996, P. L. 104-134, Title I [Title VIII, § 804(b)], 110 Stat. 1321-74; May 2, 1996, P. L. 104-140, § 1(a), 110 Stat. 1327; Aug. 22, 1996, P. L. 104-193, Title III, Subtitle G, § 374(a), 110 Stat. 2255.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Legislative Statements

Section 523(a)(1) represents a compromise between the position taken in the House bill and the Senate amendment. Section 523(a)(2) likewise represents a compromise between the position taken in the House bill and the Senate amendment with respect to the false financial statement exception to discharge. In order to clarify that a "renewal of credit" includes a "refinancing of credit", explicit reference to a refinancing of credit is made in the preamble to section 523(a)(2). A renewal of credit or refinancing of credit that was obtained by a false financial statement within the terms of section 523(a)(2) is nondischargeable. However, each of the provisions of section 523(a)(2) must be proved. Thus, under section 523(a)(2)(A) a creditor must prove that the debt was obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition. Subparagraph (A) is intended to codify current case law e.g., *Neal v. Clark*, 95 U.S. 704 (1887) [24 L. Ed. 586], which interprets "fraud" to mean actual or positive fraud rather than fraud implied in law. Subparagraph (A) is mutually exclusive from subparagraph (B). Subparagraph (B) pertains to the so-called false financial statement. In order for the debt to be nondischargeable, the creditor must prove that the debt was obtained by the use of a statement in writing (i) that is materially false; (ii) respecting the debtor's or an insider's financial condition; (iii) on which the creditor to whom the debtor is liable for obtaining money, property, services, or credit reasonably relied; (iv) that the debtor caused to be made or published with intent to deceive. Section 523(a)(2)(B)(iv) is not intended to change from present law since the statement that the debtor causes to be made or published with the intent to deceive automatically includes a statement that the debtor actually makes or publishes with an intent to deceive. Section 523(a)(2)(B) is explained in the House report. Under section 523(a)(2)(B)(i) a discharge is barred only as to that portion of a loan with respect to which a false financial statement is materially false. In many cases, a creditor is required by state law to refinance existing credit on which there has been no default. If the creditor does not forfeit remedies or otherwise rely to his detriment on a false financial statement with respect to existing credit, then an extension, renewal, or refinanc-

13 trustee appear and be heard at confirmation hearing, as opposed to merely permitting trustee to appear and be heard, because with responsibilities and duties imposed upon Chapter 13 trustee by § 1302, especially where Chapter 13 debtor is engaged in business in which case trustee has duty to investigate and report on any matter that is relevant to case, trustee is only person who is able to completely report to Court on matters concerning debtor's affairs; thus, trustee is required to attend confirmation hearing while other parties in interest are not so required and grant in § 1302 is not duplicative of § 1324. Re Kelsey (1980, BC SD Tex) 6 BR 114, 6 BCD 927, 2 CBC2d 1192.

Debtor is not required to attend Chapter 13 plan confirmation hearing although it is in debtor's best interests to do so. Re Perskin (1981, BC ND Tex) 9 BR 626, 7 BCD 798, 4 CBC2d 294.

Creditor who filed objection to confirmation of Chapter 13 debtors' plan pursuant to 11 USCS § 1324 but who failed to appear at confirmation hearing to prosecute objection abandoned his only remedy under Chapter 13, because § 727 is inapplicable in Chapter 13 case and no grounds for cause of action exist under 11 USCS § 1328 for determination of nondischargeability of debt. Re Parker (1985, BC ED Va) 49 BR 61.

§ 1325. Confirmation of plan

(a) Except as provided in subsection (b), the court shall confirm a plan if—

(1) the plan complies with the provisions of this chapter [11 USCS §§ 1301 et seq.] and with the other applicable provisions of this title [11 USCS §§ 101 et seq.];

(2) any fee, charge, or amount required under chapter 123 of title 28 [28 USCS §§ 1911 et seq.], or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title [11 USCS §§ 701 et seq.] on such date;

(5) with respect to each allowed secured claim provided for by the plan—

(A) the holder of such claim has accepted the plan;

(B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or

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

(6) the debtor will be able to make all payments under the plan and to comply with the plan.

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

(2) For purposes of this subsection, "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended—

(A) for the maintenance or support of the debtor or a dependent of the debtor; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

(c) After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay all or any part of such income to the trustee.

(Nov. 6, 1978, P. L. 95-598, Title I, § 101, 92 Stat. 2649; July 10, 1984, P. L. 98-353, Title III, Subtitle A, § 317, Subtitle H, § 530, 98 Stat. 356, 389; Oct. 27, 1986, P. L. 99-554, Title II, Subtitle C, § 283(y), 100 Stat. 3118.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

House Judiciary Report

The court is required to confirm the plan if six requirements are met. The plan must comply with the provisions of chapter 13 and with other applicable provisions of the bankruptcy code. Fees and charges required under chapter 123 of title 28 to be paid before confirmation must have been paid. The plan must have been proposed in good faith, and not by any means forbidden by law. The plan must meet the best interest of creditors test with respect to unsecured claims-the value, as of the effective date of the plan, of property to be distributed under the plan on account of each unsecured claim must be not less than the amount that would have been paid on that claim if the estate of the debtor were liquidated under chapter 7 as of the effective date of the plan. With respect to secured claims provided for by the plan, the holder of the claim must have accepted the plan, or the debtor must either distribute under the plan the value, as of the effective date of the plan, to the holder of the claim, property of a value that is not less than the allowed amount of the secured claim, as determined under proposed 11 U.S.C. 506(a), or the debtor must surrender the property securing the claim to the holder of the claim. Finally, the debtor must be able to make all payment under the plan and to comply with it.

After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay it, or a part of it, to the trustee, who will serve as the disbursing agent under section 1326.

(H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) p. 430.)

Senate Judiciary Report

The bankruptcy court must confirm a plan if (1) the plan satisfies the provisions of chapter 13 and other applicable provisions of title 11; (2)

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Democratic (Durbin/Daschle) Changes
For Managers' Amendment on Senate Bankruptcy Bill

1. Raise thresholds in the 707(b) abuse test factor from ability to repay 20% of debt to ability to repay 35% of debt over 3 years.
   - In conference, would agree to make this factor a rebuttable presumption with ability to bring motions against those who meet the test.
   - In conference or as fall back, agree to make movement of more than $50k from exempt to nonexempt assets a factor under the 707(b) abuse test.

2. Allow creditors to bring 707(b) motions against only those who meet the new 707(b) abuse test.

3. Eliminate provision making debt incurred to pay nondischargeable debt nondischargeable.
   - In conference or as fall back, would agree to make payment of such debt a factor to be considered under the 707(b) abuse test.

4. Change definition of debt incurred 90 days prior to bankruptcy subject to $400 limit from debts "not necessary for the support of the debtor or its dependants" back to current language which defines luxuries.
   - Also, if we determine that all debt incurred for small business purposes (i.e., not necessary for the support of the debtor or its dependants") is made nondischargeable, require that small business debt is exempted from the provision.

5. Prohibit coercive reaffirmations of unsecured debt (or debt secured by personalty, other than automobiles) by:
   - requiring the court to make a finding that there is clear and convincing evidence that it is in the debtor's best interest to reaffirm the debt and would not cause a hardship to the debtor or its dependants;
   - prohibiting the reaffirmation of any unsecured debt that includes attorneys fees or costs;
   - clarifying that it is a violation of the automatic stay to solicit the reaffirmation of unsecured debt or to threaten to file a 707(b) abuse motion.

6. Require that creditors provide debtors with up-front and monthly disclosure of the time period over which their debt would amortize if they paid only the minimum payment.
   - Also require that the "Durbin worksheet" be provided
   - Also require that the monthly statement calculate what payment would be necessary to repay the debt in three years.

7. Provide debtors with relief from the mandatory deadlines to file back tax returns and wage information if they can demonstrate that they have made bona fide efforts to seek

the information from the relevant tax authorities or old employers and await response from those sources.

8. Protections to allow tenants to have one opportunity to pay rent after filing for bankruptcy before the automatic stay is lifted.

9. Revise provisions concerning consumer notice of debt counseling services.

10. Other?

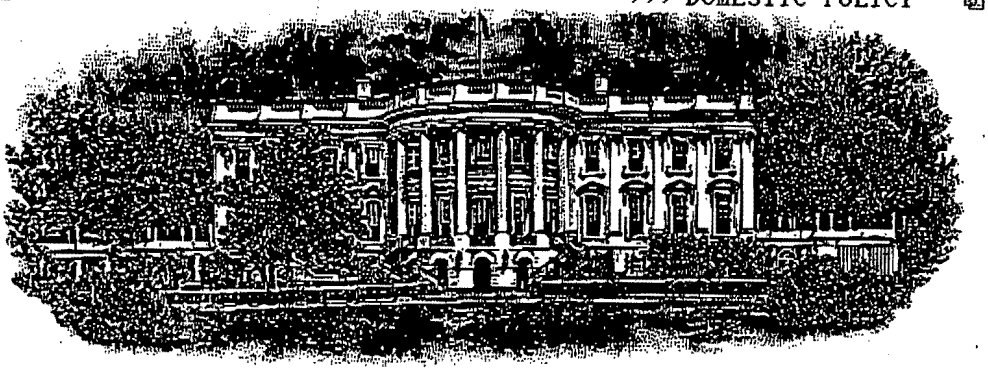
Retirement

Funds coming into household earmarked for children would not be part of household income

---

Non-germane/or not in managers amdmt

1. K: min wage
2. Dodd: < 21 have to show they have means to repay
3. Feingold: no filing fees
4. Lautenberg: protect victims of DWI and their judgments
5. Boxer: Paycheck Equity Act S-71 [ask Tom/Mary — do we support] we endorsed [Dorsch bill]
6. Cornyn drawn: can't get to solutions
7. Jeffy: tobacco debts → non dischargeable tobacco liabilities } in McCain



THE WHITE HOUSE

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Preliminary

Explaining the Increase in Bankruptcy and Delinquency: Stigma versus Risk-Composition

Summary*

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August 28, 1998

* This is a summary of a more detailed, academic working paper that is available from the authors upon request.

Between 1994 and 1997 the number of personal bankruptcy filings in the U.S. rose by 73%. The 1.35 million filings in 1997 represent well over 1% of U.S. households. Delinquency rates on credit cards have risen almost as sharply. These trends in default, both in bankruptcy and delinquency, are particularly surprising in light of the strong economy over the period. The resulting losses to lenders represent a sizeable fraction of the interest payments they collect, potentially raising the average cost of credit.

There are two leading explanations for these trends. First, the risk-composition of borrowers might have worsened. Under the "risk effect," less creditworthy borrowers obtained additional credit in recent years, and it is these borrowers who accounted for most of the subsequent rise in default. In particular, many analysts cite growth in the number of credit card offers and in the sizes of credit card lines as the most important factors behind the rise in default.[1]

A second explanation for these trends is a decline in the social stigma associated with default or an increase in knowledge about default. Under the "stigma effect," people have become more willing to default over time, even controlling for their risk characteristics and other economic fundamentals. Even a relatively small decline in stigma can potentially have large effects. For example, one study has estimated that between 15-31% of U.S. households could benefit, in terms of their current net worth, by filing for bankruptcy. If the decline in stigma caused even a small fraction of these households to file, default rates would substantially increase.

It is important to determine the relative significance of these alternative explanations. For example, some policy makers have advocated restricting credit supply in order to improve the risk composition of the borrowing population. Others have advocated making the terms of bankruptcy less attractive in order to increase the perceived costs of default. However, it has been difficult to separate the risk and stigma effects empirically. Controlling for risk-composition requires measures of credit risk for a large sample of borrowers, including a large number of borrowers who have defaulted. None of the traditional governmental surveys of households provides such information.

[1] See for example "The Sky is Becoming the Only Limit for Credit Card Users," *The New York Times*, Aug 9, 1998.

This paper uses a unique new data set containing a panel of several hundred thousand individual credit card accounts from several different credit card issuers.[2] The data set is of unusually high quality. It includes essentially everything that the issuers know about their accounts, including information from individuals' credit applications, monthly statements, and credit bureau reports.

We use this data to estimate the size of stigma effect, for both bankruptcy and credit card delinquency. We begin with a representative sample of all credit card accounts in mid-1995, and follow these accounts for eight quarters or until they default. Since the data includes the information that the card issuers themselves use to measure account risk, we are able to control for all aspects of risk-composition that are observable by the issuers. The available risk measures are quite comprehensive. They include direct observations of the usage of each card, like debt levels, purchase and payment histories, and credit lines, as well as the credit risk scores, the issuers' own summary of the riskiness of each account. Our analysis also controls for economic conditions such as the local unemployment rate. Any changes in the propensity to default that are not accounted for by changes in risk-composition or economic fundamentals are due to changes in stigma.

The main finding is that even after controlling for risk-composition and other economic fundamentals, the propensity to default significantly increased between 1995 and 1997. Since credit card holders with the same risk characteristics became increasingly likely to default over time, the risk effect does not explain the increase in default rates in the sample. Instead, the stigma of default appears to have fallen.

Figures 1 and 2 show the estimated effects of changes in stigma on the propensity to declare bankruptcy and to go delinquent between 1995:Q3 and 1997:Q2. For bankruptcy, the stigma effect increased the annual probability of filing by about 1 percentage point over the sample period. In other words, a given cardholder at the end of 1997 was 1 percentage point more likely to declare bankruptcy than a cardholder with identical risk characteristics in 1995. For delinquency, in Figure 2, a credit card account in 1996 and 1997 was about 4 percentage points more likely to go delinquent than an account with identical risk characteristics in 1995. These magnitudes are substantial. They are approximately as large as if the entire universe of

[2] In a companion paper, "How Do Individuals Use Credit Cards?" the authors use the same panel data set to examine how people normally use their credit cards, when they do not default.

Figure 1: Bankruptcy

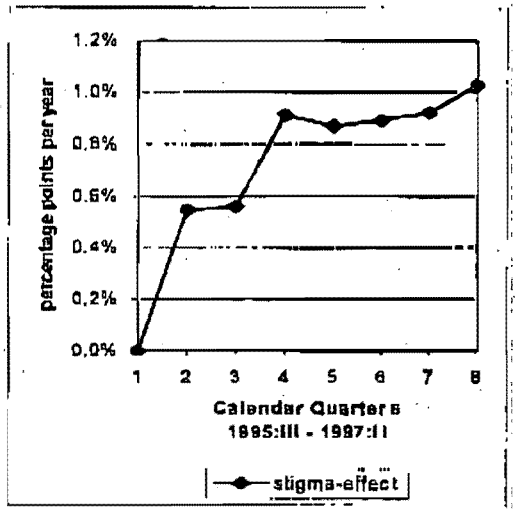
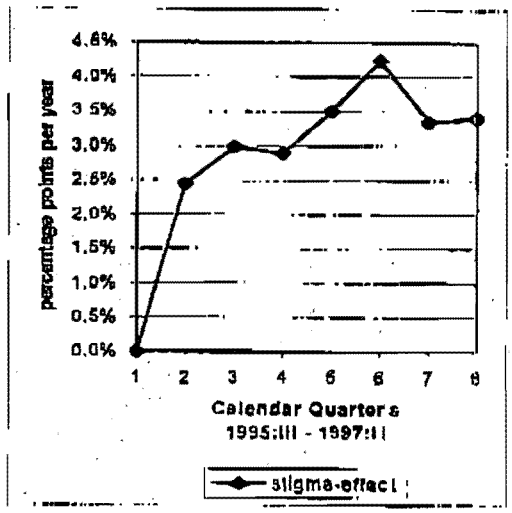


Figure 2: Delinquency



credit card holders had become one standard deviation riskier between 1995 and 1997, as measured by credit risk scores.

The estimated magnitudes for the stigma effect account for almost all of the changes in default rates in the sample. In contrast, changes in risk-composition have little net effect. Falling unemployment rates and seasoning of card portfolios offset any other worsening in risk-composition. In particular, increases in credit lines during the sample period did not raise default rates, because issuers concentrated their credit line increases on less risky cardholders.

The results in this paper are consistent with the stigma effect. Given the large number of people who could potentially benefit from filing for bankruptcy, even relatively small drops in stigma can generate the observed effects on default. Note that this analysis does not identify what caused the estimated change in stigma. Indeed, the stigma and risk effects can be interrelated. It is possible that a change in risk-composition or economic fundamentals caused a critical mass of people to declare bankruptcy, leading to the reduction in stigma that we estimate. Furthermore, our analysis does not provide a forecast about the future path of stigma. Nevertheless, if the drop in stigma is due to a reduction in social opprobrium or to an increase in information, it would most likely be difficult to reverse. And if stigma does in turn decrease with the number of people that have defaulted, future recessions could ratchet up default rates. These possibilities might argue for legal changes that increase the perceived costs of default.

2 - FACTOR

DRAFT

11 U.S.C.A. § 707

Redlined and Italics = in the Senate bill
Redlined and no Italics = Administration Proposal

UNITED STATES CODE ANNOTATED
TITLE 11. BANKRUPTCY
CHAPTER 7--LIQUIDATION
SUBCHAPTER I--OFFICERS AND ADMINISTRATION

§ 707. ~~Dismissal~~ *Dismissal of a case or conversion to a case under chapter 13*

(a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including--

(1) unreasonable delay by the debtor that is prejudicial to creditors;

(2) nonpayment of any fees or charges required under chapter 123 of title 28; and

(3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.

(b) Dismissal or Conversion for Abuse

(1) After notice and a hearing, the court~~, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest,~~ may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts *or, with the debtor's consent, convert such a case to a case under chapter 13 of this title,* if it finds that the granting of relief would be an ~~substantial~~ abuse of the provisions of this chapter. ~~There shall be a presumption in favor of granting the relief requested by the debtor.~~

(2) Indications of Abuse

(A) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall consider:

(I) whether the debtor filed a petition for relief in bad faith; or

(II) whether

(1) the debtor and the debtor's spouse combined, as of the date of the order for relief, have a current monthly total income greater than the national median household monthly income calculated on a

monthly basis for a household of equal size (for a household of more than 4 individuals the median income shall be that of a household of 4 individuals plus $583 for each additional member of that household); and

(2) under section 1325(b)(1), on the basis of the current income of the debtor, the debtor could pay an amount greater than or equal to:

(i) $5,000; or

(ii) 35 percent of unsecured claims that are not considered to be priority claims (as determined under subchapter I of chapter 5).

(3) The court may initiate a proceeding under paragraph (1) on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, except that a party in interest may move the court to initiate a proceeding under paragraph (1) based on evidence demonstrating that paragraph (2)(a)(II) is applicable to the debtor.

(34)(A) If a panel trustee appointed under section 586(a)(1) of title 28 brings a motion for dismissal or conversion under this subsection and the court grants that motion and finds that the action of the counsel for the debtor in filing under this chapter was not substantially justified, the court shall order the counsel for the debtor to reimburse the trustee for all reasonable costs in prosecuting the motion, including reasonable attorneys' fees.

(B) If the court finds that the attorney for the debtor violated Rule 9011, at a minimum, the court shall order —

(i) the assessment of an appropriate civil penalty against the counsel for the debtor; and
(ii) the payment of the civil penalty to the panel trustee or the United States trustee.

(C) In the case of a petition referred to in subparagraph (B), the signature of an attorney shall constitute a certificate that the attorney has —

(i) performed a reasonable investigation into the circumstances that gave rise to the petition; and

(ii) determined that the petition —

(I) is well grounded in fact; and

(II) is warranted by existing law or a good faith argument for the extension modification, or reversal of existing law and does not constitute an abuse under paragraph (1) of this subsection.

(4)(A) Except as provided in subparagraph (B), the court may award a debtor all reasonable costs in contesting a motion brought by a party in interest (other than a panel trustee) under this subsection (including reasonable attorneys' fees) if –

(i) the court does not grant the motion; and

(ii) the court finds that –

(I) the position of the party that brought the motion was not substantially justified; or

(II) the party brought the motion solely for the purpose of coercing a debtor into waiving a right guaranteed to the debtor under this title.

(B) A party in interest that has a claim of an aggregate amount less than $1,000 shall not be subject to paragraph (A).

~~(5) However, a party in interest may not bring a motion under this section if the debtor and the debtor's spouse combined, as of the date of the order for relief, have current monthly total monthly income equal to or less than the national median household income calculated on a monthly basis for a household of equal size. However, for a household of more than 4 individuals, the median income shall be that of a household of 4 individuals plus $583 for each additional member of that household.~~

4- FACTOR

11 U.S.C.A. § 707

DRAFT

Redlined and Italics = in the Senate bill
Redlined and no Italics = Administration Proposal

UNITED STATES CODE ANNOTATED
TITLE 11. BANKRUPTCY
CHAPTER 7--LIQUIDATION
SUBCHAPTER I--OFFICERS AND ADMINISTRATION

§ 707. ~~Dismissal~~ *Dismissal of a case or conversion to a case under chapter 13*

(a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including--

(1) unreasonable delay by the debtor that is prejudicial to creditors;

(2) nonpayment of any fees or charges required under chapter 123 of title 28; and

(3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.

(b) Dismissal or Conversion for Abuse

(1) After notice and a hearing, the court~~, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest,~~ may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts *or, with the debtor's consent, convert such a case to a case under chapter 13 of this title,* if it finds that the granting of relief would be an ~~substantial~~ abuse of the provisions of this chapter. ~~There shall be a presumption in favor of granting the relief requested by the debtor.~~

(2) Indications of Abuse

(A) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall consider:

(i) whether the debtor filed a petition for relief in bad faith; or

(ii) whether

(I) the debtor and the debtor's spouse combined, as of the date of the order for relief have a current monthly total income greater than the national median household monthly income calculated on a

monthly basis for a household of equal size (for a household of more than 4 individuals the median income shall be that of a household of 4 individuals plus $583 for each additional member of that household); and

(2) under section 1325(b)(1), on the basis of the current income of the debtor, the debtor could pay an amount greater than or equal to:

(i) $5,000; or

(ii) 35 percent of unsecured claims that are not considered to be priority claims (as determined under subchapter I of chapter 5).

(3) The court may initiate a proceeding under paragraph (1) on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, except that a party in interest may move the court to initiate a proceeding under paragraph (1) based on evidence demonstrating that paragraph (2)(a)(II) is applicable to the debtor.

(34)(A) If a panel trustee appointed under section 586(a)(1) of title 28 brings a motion for dismissal or conversion under this subsection and the court grants that motion and finds that the action of the counsel for the debtor in filing under this chapter was not substantially justified, the court shall order the counsel for the debtor to reimburse the trustee for all reasonable costs in prosecuting the motion, including reasonable attorneys' fees.

(B) If the court finds that the attorney for the debtor violated Rule 9011, at a minimum, the court shall order –

(i) the assessment of an appropriate civil penalty against the counsel for the debtor; and
(ii) the payment of the civil penalty to the panel trustee or the United States trustee.

(C) In the case of a petition referred to in subparagraph (B), the signature of an attorney shall constitute a certificate that the attorney has –

(I) performed a reasonable investigation into the circumstances that gave rise to the petition; and

(ii) determined that the petition –

(I) is well grounded in fact; and

monthly basis for a household of equal size (for a household of more than 4 individuals the median income shall be that of a household of 4 individuals plus $583 for each additional member of that household); and

(2) under section 1325(b)(1), on the basis of the current income of the debtor, the debtor could pay an amount greater than or equal to:

(i) $5,000; or

(ii) 35 percent of unsecured claims that are not considered to be priority claims (as determined under subchapter I of chapter 5); or

(III) the debtor, on or within one year before the date of the filing of the petition, shifted into property exempt from property of the estate under section 522 of this title assets not exempt under that section worth $50,000 or more; or

(IV) whether the debtor, within one year before the date of the filing of the petition, incurred a debt to pay a debt that is nondischargeable by reason of section 523, 727, 1141, 1228(a) or (b) or 1328(b).

(3) The court may initiate a proceeding under paragraph (1) on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, except that a party in interest may move the court to initiate a proceeding under paragraph (1) based on evidence demonstrating that paragraphs (2)(a)(II), (III) or (IV) are applicable to the debtor.

(3A)(A) If a panel trustee appointed under section 586(a)(1) of title 28 brings a motion for dismissal or conversion under this subsection and the court grants that motion and finds that the action of the counsel for the debtor in filing under this chapter was not substantially justified, the court shall order the counsel for the debtor to reimburse the trustee for all reasonable costs in prosecuting the motion, including reasonable attorneys' fees.

(B) If the court finds that the attorney for the debtor violated Rule 9011, at a minimum, the court shall order—

(i) the assessment of an appropriate civil penalty against the counsel for the debtor; and
(ii) the payment of the civil penalty to the panel trustee or the United States trustee.

(C) In the case of a petition referred to in subparagraph (B), the signature of an attorney

shall constitute a certificate that the attorney has –

(i) performed a reasonable investigation into the circumstances that gave rise to the petition; and

(ii) determined that the petition –

(I) is well grounded in fact; and

(II) is warranted by existing law or a good faith argument for the extension modification, or reversal of existing law and does not constitute an abuse under paragraph (1) of this subsection.

(45)(A) Except as provided in subparagraph (B), the court may award a debtor all reasonable costs in contesting a motion brought by a party in interest (other than a panel trustee) under this subsection (including reasonable attorneys' fees) if –

(i) the court does not grant the motion; and

(ii) the court finds that –

(I) the position of the party that brought the motion was not substantially justified; or

(II) the party brought the motion solely for the purpose of coercing a debtor into waiving a right guaranteed to the debtor under this title.

(B) A party in interest that has a claim of an aggregate amount less than $1,000 shall not be subject to paragraph (A).

~~(5) However, a party in interest may not bring a motion under this section if the debtor and the debtor's spouse combined, as of the date of the order for relief, have current monthly total monthly income equal to or less than the national median household income calculated on a monthly basis for a household of equal size. However, for a household of more than 4 individuals, the median income shall be that of a household of 4 individuals plus $583 for each additional member of that household.~~

11 USCA s 524
11 U.S.C.A. § 524

DRAFT

UNITED STATES CODE ANNOTATED
TITLE 11. BANKRUPTCY
CHAPTER 5--CREDITORS, THE DEBTOR, AND THE ESTATE
SUBCHAPTER II--DEBTOR'S DUTIES AND BENEFITS

§ 524. Effect of discharge

(a) A discharge in a case under this title--

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1) of this title, or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

(b) Subsection (a)(3) of this section does not apply if--

(1)(A) the debtor's spouse is a debtor in a case under this title, or a bankrupt or a debtor in a case under the Bankruptcy Act, commenced within six years of the date of the filing of the petition in the case concerning the debtor; and

(B) the court does not grant the debtor's spouse a discharge in such case concerning the debtor's spouse; or

(2)(A) the court would not grant the debtor's spouse a discharge in a case under chapter 7 of this title concerning such spouse commenced on the date of the filing of the petition in the case concerning the debtor; and

(B) a determination that the court would not so grant such discharge is made by the bankruptcy

court within the time and in the manner provided for a determination under section 727 of this title of whether a debtor is granted a discharge.

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if--

(1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;

(2)(A) such agreement contains a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim; and

(B) such agreement contains a clear and conspicuous statement which advises the debtor that such agreement is not required under this title, under nonbankruptcy law, or under any agreement not in accordance with the provisions of this subsection;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that--

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of--

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such an agreement;

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; ~~and~~

(6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as--

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is an unsecured consumer debt or a consumer debt secured by real property.; and

(7) in a case concerning an individual, if the consideration for such agreement is based in whole or in part on an unsecured consumer debt, the court, based on clear and convincing evidence, approves such agreement as –

(i) not imposing an undue hardship on the debtor or a dependent of the debtor;

(ii) in the best interest of the debtor; and

(iii) not requiring the debtor to pay the creditor's attorney's fees, expenses or other costs relating to the collection of the debt.

(d) In a case concerning an individual, when the court has determined whether to grant or not to grant a discharge under section 727, 1141, 1228, or 1328 of this title, the court may hold a hearing at which the debtor shall appear in person. At any such hearing, the court shall inform the debtor that a discharge has been granted or the reason why a discharge has not been granted. If a discharge has been granted and if the debtor desires to make an agreement of the kind specified in subsection (c) of this section and was not represented by an attorney during the course of negotiating such agreement, then the court shall hold a hearing at which the debtor shall appear in person and at such hearing the court shall--

(1) inform the debtor--

(A) that such an agreement is not required under this title, under nonbankruptcy law, or under any agreement not made in accordance with the provisions of subsection (c) of this section; and

(B) of the legal effect and consequences of--

(i) an agreement of the kind specified in subsection (c) of this section; and

(ii) a default under such an agreement; and

(2) determine whether the agreement that the debtor desires to make complies with the requirements of subsections (c)(6) and (c)(7) of this section, ~~if the consideration for such agreement is based in whole or in part on a consumer debt that is not secured by real property of the debtor~~ as applicable;

(e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

(f) Nothing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt.

[Subsection (g) and (h) relate to Chapter 11 plans of reorganization and are not relevant].

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11 U.S.C.A. § 362

UNITED STATES CODE ANNOTATED
TITLE 11. BANKRUPTCY
CHAPTER 3--CASE ADMINISTRATION
SUBCHAPTER IV--ADMINISTRATIVE POWERS

§ 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; ~~and~~

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor;

(9) any communication by a creditor to a debtor threatening or otherwise indicating an intent to file a motion under section 707(b) of this title; and

(10) any act to solicit or obtain from the debtor an agreement subject to approval under section 524(c)(7) of this title.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay--

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section--

(A) of the commencement or continuation of an action or proceeding for--

(i) the establishment of paternity; or

(ii) the establishment or modification of an order for alimony, maintenance, or support; or

(B) of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101, 741, or 761 of

this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of--

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which

was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt and claim under or in connection with any swap agreement that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash, securities, or other property of the debtor held by or due from such swap participant to guarantee, secure or settle any swap agreement; or

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax imposed by the District of Columbia, or a political subdivision of a State, if such tax comes due after the filing of the petition.

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

[Remaining subsections not relevant]

DRAFT REAFFIRMATION PROVISIONS

SEC. 203. EFFECT OF DISCHARGE.

DRAFT

(a) Section 524(c), title 11, United States Code, is amended –

(1) in paragraph (5), by striking "and" at the end;

(2) in paragraph (6), by inserting "an unsecured consumer debt or" before "a consumer debt" and by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following:

"(7) in a case concerning an individual, if the consideration for such agreement is based in whole or in part on an unsecured consumer debt, the court, based on clear and convincing evidence, approves such agreement as –

(i) not imposing an undue hardship on the debtor or a dependent of the debtor;

(ii) in the best interest of the debtor; and

(iii) not requiring the debtor to pay the creditor's attorney's fees, expenses or other costs relating to the collection of the debt.".

(b) Section 524(d) of title 11, United States Code, is amended by striking paragraph (2) and inserting the following:

"(2) determine whether the agreement that the debtor desires to make complies with the requirements of subsections (c)(6) and (c)(7) of this section, as applicable;"

(c) Section 524 .... **[include language in current section 203 of the bill]**

SEC. 204 AUTOMATIC STAY.

(a) Section 362(a) of title 11, United States Code, is amended –

(1) in paragraph (8), by striking the period at the end and inserting "; and"; and

(2) by adding at the end the following:

"(9) any communication by a creditor to a debtor threatening or otherwise indicating an intent to file a motion under section 707(b) of this title; and

1 *(10) any act to solicit or obtain from the debtor an agreement subject to approval under*
2 *section 524(c)(7) of this title."*

3 (b) Section 362 (h) .... **[include language in current section 204 of the bill]**

From: Ingrid M. Schroeder on 08/31/98 10:23:22 AM

Record Type: Record

To: Sarah Rosen/OPD/EOP

cc: Ronald E. Jones/OMB/EOP, Jeffrey A. Weinberg/OMB/EOP
Subject: Bankruptcy

CQ's WASHINGTON ALERT 08/31/98

BANKRUPTCY BILL'S FATE STILL UNCERTAIN AS SENATE RETURNS
Pulse of Congress/Insight
(NEWS 08/31/98; 59 lines)
Item Key: 14904
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BANKRUPTCY BILL'S FATE STILL UNCERTAIN AS SENATE RETURNS

By Lori Nitschke, CQ Staff Writer

As the Senate returns to work this week for the closing push of the 105th Congress, lobbyists on both sides of a bill to overhaul the consumer bankruptcy system will be waiting tensely for some signs of the measure's fate.

Staff for Majority Leader Trent Lott, R-Miss., said last week that the bill (S1301) sponsored by Chuck Grassley, R-Iowa, is tentatively scheduled for the floor at the end of this week or the beginning of the next, but its prospects remain highly questionable.

A spokesman said Ted Kennedy, D-Mass., still plans to attempt to attach a minimum wage increase to the bill. Other senators may try to add new rules for credit card companies, such as requiring them to more fully disclose how long it would take a cardholder to pay off all debt by making minimum payments each month. And Banking Committee Chairman Al D'Amato, R-N.Y., is likely to try to attach his plan to curb fees at automated teller machines.

These efforts could easily kill an already controversial measure -- the bill would require judges to take into consideration whether a debtor could pay off 20 percent of his unsecured debts, such as credit cards, when determining if his debts should be absolved -- and it is not clear if Lott is prepared to go through a cloture battle and long floor fight.

Ken Klee of the National Bankruptcy Conference, a group of judges and others involved in the bankruptcy system who question many of the Senate and House bill provisions, said he still sees a "45 percent chance" that a major change to consumer bankruptcy laws can be enacted this year.

But Sam Gerdano, executive director of the American Bankruptcy Institute, a non-partisan group of bankruptcy officials that has not taken a stance on the legislation, is skeptical. "It's going to be impossible to get a time agreement" in the Senate, he said.

Still, Gerdano thinks some bankruptcy legislation will clear this year -- most likely a measure to reauthorize Chapter 12, the bankruptcy system for family farmers.

A reauthorization of Chapter 12 is included in Grassley's broader bill. But if it becomes clear that the broad measure is dead, Gerdano, who was Grassley's counsel on the Judiciary Committee from 1985 to 1991, said his former boss will do everything in his power to keep the farmer-friendly Chapter 12 program from lapsing, especially in a year that has been rough for many farmers in the Upper Midwest.

The Senate passed a stand-alone farm bankruptcy bill (S1024) on Oct. 30, 1997. The House has never acted on that measure but could call it up at the last minute if it becomes clear that no other bankruptcy bill will clear.

But passage would not be without drama, Gerdano predicted. "It will be an absolutely down to the wire, rescue-it-on-the-railroad-tracks kind of deal," he said, "It's not for the faint of heart."

Total Pages: ___

LRM ID: REJ570

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

Friday, August 28, 1998

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below

FROM: Ronald E. Jones (for) Assistant Director for Legislative Reference
OMB CONTACT: Ingrid M. Schroeder
PHONE: (202)395-3883 FAX: (202)395-3109
SUBJECT: **JUSTICE Drafting Service on S1301 Consumer Bankruptcy Reform Act of 1997**

DEADLINE: **Noon Monday, August 31, 1998**

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. **Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.**

COMMENTS: DOJ would like to share the attached language concerning a debtor's reaffirmation of debts with Senate Judiciary Committee staff when they return from the recess.

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LRM ID: REJ570 **SUBJECT:** JUSTICE Drafting Service on S1301 Consumer Bankruptcy Reform Act of 1997

RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

(1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or

(2) sending us a memo or letter

Please include the LRM number shown above, and the subject shown below.

TO: Ingrid M. Schroeder Phone: 395-3883 Fax: 395-3109
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 395-3454

FROM: _____ (Date)

_____ (Name)

_____ (Agency)

_____ (Telephone)

The following is the response of our agency to your request for views on the above-captioned subject:

_____ Concur

_____ No Objection

_____ No Comment

_____ See proposed edits on pages _____

_____ Other: _____

_____ FAX RETURN of ____ pages, attached to this response sheet

DRAFT REAFFIRMATION PROVISIONS

SEC. 203. EFFECT OF DISCHARGE.

(a) Section 524(c), title 11, United States Code, is amended

(1) in paragraph (5), by striking "and" at the end;

(2) in paragraph (6), by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following:

"(7) in a case concerning an individual, if the consideration for such agreement is based in whole or in part on an unsecured consumer debt, the court, based on compelling evidence, approves such agreement as –

(i) not imposing an undue hardship on the debtor;

(ii) in the best interest of the debtor; and

(iii) not requiring the debtor to pay the creditor's attorney's fees, expenses or other costs relating to the collection of the debt.".

(b) Section 524(d) of title 11, United States Code, is amended by striking paragraph (2) and inserting the following:

"(2) determine whether the agreement that the debtor desires to make complies with the requirements of subsections (c)(6) and (c)(7) of this section, as applicable;"

(c) Section 524 .... **[include language in current section 203 of the bill]**

SEC. 204 AUTOMATIC STAY.

(a) Section 362(a) of title 11, United States Code, is amended –

(1) in paragraph (6), by adding at the end the following:

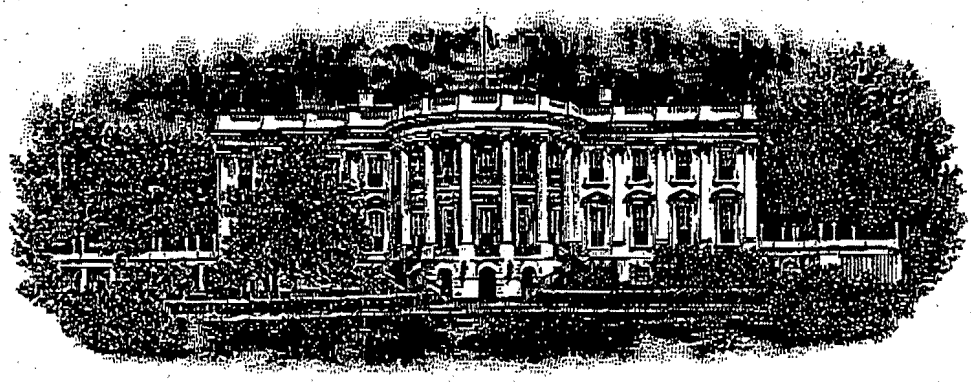
", including any communication by a creditor threatening or otherwise indicating an intent to file a motion under section 707(b) of this title";

(2) in paragraph (8), by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following:

"(9) any act to solicit or obtain from the debtor an agreement subject to approval under section 524(c)(7) of this title.".

(b) Section 362 (h) .... **[include language in current section 204 of the bill]**



THE WHITE HOUSE

SARAH ROSEN
SENIOR ADVISOR
NATIONAL ECONOMIC COUNCIL
(202) 456-2223 (Fax)

TO: See Distribution List

PHONE:

FAX:

DATE: **PAGES TO FOLLOW:** 1

COMMENTS:

Bankruptcy working group meeting on Monday, August 31st at 3:00 pm room 239.

Agenda: (1) Status report on expected Senate floor activity for late the week of August 31 - September 4; and (2) pre-clearance review of and comment on draft Senate SAP (to be provided on Monday morning).

Thanks.

If this fax is incomplete or you need to give clearance information for a meeting, please call Sonyia Matthews at 456-5351. Thank you.

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THE WHITE HOUSE

WASHINGTON

August 6, 1998

MEMORANDUM TO CONSUMER FINANCIAL SERVICES WORKING GROUP

FROM: SARAH ROSEN

RE: CONSUMER FINANCIAL SERVICES INITIATIVES

In late June, I convened the members of the Bankruptcy Working Group and other interested parties to create a new working group to consider a wide array of policy issues and initiatives related to financial services and consumers. The work may prove helpful in a number of different arenas. For example, there will be amendments targeted at credit card practices offered if the bankruptcy bill is considered on the Senate floor in September. Similarly, in the context of a Financial Modernization legislation mark-up in September, we anticipate that consumer privacy amendments may be offered. Senator D'Amato has already offered an ATM fee amendment to one bill (which failed) but he has pledged to bring the issue back again. Finally, there is interest in putting together a package of consumer protection initiatives, maybe a consumer financial bill of rights, for later this year, and if not, for use during next February's Consumer Week, which will focus on financial services.

At the last meeting, we decided that it would be best to work in subcommittees on the topics identified below. Subcommittee co-chairs volunteered (or were nominated). However, the press of other work delayed scheduling of these subcommittee meetings.

The subcommittees described below will convene at the dates, times and locations described below to get this effort back in motion. While vacations may make August a difficult time to schedule meetings, the inevitable flurry of activities in September makes it imperative that we make progress now.

Please call the contact name and number given for each subcommittee below to indicate your attendance at the meetings noted. Agencies previously identified as interested in each subcommittee are also noted, but all interested are welcome and encouraged to attend each subcommittee.

Privacy – Wednesday, August 12, 1998 at 4:00 p.m., OEOB, room 239
(Call Sonyia Matthews for clearance at 456-5386.)

Financial privacy issues were considered in the context of a broader NEC working group on privacy which produced recommendations announced by the Vice President last week. However, there is now interest among Senate Democrats in advancing a consumer privacy amendment to the Financial Modernization bill when it is marked up in early September. We met to discuss a response on Wednesday, August 5th and will meet again as noted above to continue the discussion.
Co-Chair – Tom Kalil
Others to include: Treasury, Commerce, FTC, OCC, and OTS.

Changes to TILA Disclosures --Wednesday, August 12, 1998 at 10:00 am., Main Treasury, room 1104
(Call Vinnette Gordon at 622-2610 for clearance.)

We have already decided that we would support a change to credit card disclosures to require disclosure of the time period over which a loan would be repaid if the minimum payment is made. There has been discussion about whether we could recommend other improvements to ensure that consumers best understand the consequences of the credit they assume. Senator Durbin may propose that all consumers get a worksheet with each new credit card that would help them determine how much credit they can afford to use. This group will explore other such options after consultations with Federal Reserve.
Co-Chair: Greg Baer, Treasury
Others to include: DPC and OCC.

ATM and Other Service Fees --Thursday, August 13, 1998 at 10:00 am, Main Treasury, room 1104
(Call Vinnette Gordon at 622-2610 for clearance.)

This group will explore issues involving ATM and other consumer fees.
Co-Chair: Greg Baer, Treasury
Others to include: DoJ, DPC

Consumer Education/Bully Pulpit ---Wednesday, August 12, 1998 at 2:00 pm, Main Treasury, room 3454
(Call Chris Develin at 622-0090 for clearance.)

This group will explore what we can do legislatively and administratively to enhance consumer understanding of the impact of use of credit, the services they receive and the fees they pay, and their rights. The benefits of and concerns about consumer credit counseling agencies will be explored.
Co-Chair: Mark McClellan, Treasury
Others to include: FTC, DPC

Enforcement -- Meeting to occur 3rd week in August
(Notify Fran Allegra's office at 514-2987 if you want to be invited when scheduled.)

This group will explore whether existing laws provide adequate enforcement authority for existing consumer protections involving financial services.
Co-Chair: Fran Allegra
Others to include: OCC and OTS.