IMPROVING OUTCOMES IN CHAPTER 13 CASES[1]

I. Introduction

Post-BAPCPA[2], criticism of chapter 13 has flourished. Chapter 13's defenders and detractors debate the utility of chapter 13 as compared to chapter 7, the appropriate measure of "success" in a chapter 13 case, what Congress should do to "fix" chapter 13, etc. This paper is not intended to weigh in on any of these debates but, instead, starts with the (hopefully) non-controversial proposition that improving outcomes in chapter 13 is a worthwhile endeavor.[3]

More than two years ago, the American Bankruptcy Institute (the "ABI") formed the ABI Commission on Consumer Bankruptcy (the "ABI Commission") for the purpose of "recommending improvements to the consumer bankruptcy system that can be implemented within its existing structure[,] . . . includ[ing] amendments to the Bankruptcy Code, changes to the Federal Rules of Bankruptcy Procedure, administrative rules or actions, recommendations on proper interpretations of existing law, and other best practices that judges, trustees, and lawyers can implement."[4] Recently, the ABI Commission released its final report and recommendations (the "ABI Report"). This paper will highlight some of the recommendations that do not require changes

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[1] Presentation materials prepared by Judge Jennifer H. Henderson and Karin Wolfe, Law Clerk to Judge Jennifer Henderson, for the 32nd Annual Seminar of the Alabama State Bar Bankruptcy & Commercial Law Section (June 7-8, 2019).

[2] As used herein "BAPCPA" refers to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (enacted April 20, 2005).

[3] According to the Administrative Office of the United States Courts, less than half (48%) of the chapter 13 cases closed in 2017 were closed because the debtors were discharged after completing repayment plans, which is a reduction from 52% in 2016. Administrative Office of the United States Courts, *BAPCPA Report – 2017: 2017 Report of Statistics Required by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, https://www.uscourts.gov/statistics-reports/bapcpa-report-2017. The Administrative Office of the Courts compiles statistics in bankruptcy cases including "statistics regarding debtors who are individuals with primarily consumer debts seeking relief under chapters 7, 11, and 13 of title 11." 28 U.S.C. § 159(c). One academic analysis reported even lower discharge rates. *See* Sara S. Greene, Parina Patel & Katherine Porter, *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 MINN. L. REV. 1031, 1032 (2017) ("[O]nly about one-third of consumers who enter chapter 13 complete their repayment plans and therefore receive a discharge of remaining unsecured debts.").

[4] American Bankruptcy Institute Commission on Consumer Bankruptcy, *Final Report of the ABI Commission on Consumer Bankruptcy* (2019) at VIII, https://www.abi.org/education-events/sessions/abi-consumer-commission-final-report.

to the Bankruptcy Code or Rules (or other legislative action) and provides some suggestions for implementing these recommendations. The paper concludes with some other suggestions for handling issues that can impede a successful reorganization under chapter 13.

II. Select Recommendations from the ABI Report (and Ideas for Implementation)

A. Work to Reduce Implicit Bias

The ABI Report concludes, based on empirical evidence, "that African American bankruptcy debtors are both disproportionately more likely to file chapter 13 cases than debtors of other races and disproportionately less likely to obtain a discharge."[5] Although the studies of chapter 13 discussed in the ABI Report focus primarily on the role of attorneys, the ABI Report acknowledges that "one group of actors cannot be driving the entire effect" and that "[i]t may be the complex interactions among debtors, attorneys, trustees, judges, and other system actors that are creating the context for the disparities."[6] The ABI Report goes on to state that "[n]one of the studies discussed [in the ABI Report] have identified conscious racism as the culprit for the disparities. Rather, implicit racial bias may lie beneath the disparities observed in the studies."[7] Implicit bias refers to "unconscious attitudes and stereotypes."[8] In other words, bias that "function[s] automatically, including in ways that the person would not endorse as appropriate if he or she did have conscious awareness."[9]

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[5] ABI Report at 159; *see also* Dov Cohen, Robert M. Lawless & Faith Shin, *Opposite of Correct: Inverted Insider Perceptions of Race and Bankruptcy*, 91 AM. BANKR. L.J. 623 (2017); Jean Braucher, Dov Cohen & Robert M. Lawless, *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 J. EMPIRICAL LEGAL STUD. 393 (2012).
[6] ABI Report at 164.
[7] *Id*. at 165.
[8] *Id*. at 165.
[9] Jerry Kang, Judge Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 U.C.L.A. L. REV. 1124, 1129 (2012).

Studies indicate that implicit bias is widespread and associated with discriminatory outcomes in the federal and state judicial systems.[10] All bankruptcy professionals—including judges, trustees, attorneys, court clerks, and their respective staff—must continually strive to ensure equal access to justice for all persons. To that end, the ABI Report recommends "that bankruptcy organizations conduct sessions on implicit racial bias as part of their continuing legal education offerings."[11]

Awareness is critical to combatting implicit bias. A helpful tool for identifying implicit bias is the Implicit Association Test, available at https://implicit.harvard.edu/implicit/education.html. It is also important to develop strategies to guard against implicit bias. The American Bar Association Section of Litigation has developed an implicit bias "Toolbox," which includes a self-guided presentation with visual aids, suggestions for how to address implicit bias, and an annotated bibliography for further reading.[12] Other resources regarding implicit bias are available at www.perception.org.

Strategies for reducing implicit bias include:

1. "replacing stereotypical responses for non-stereotypical responses;"
2. "imagining in detail counter-stereotypic others;"
3. "obtaining specific information about group members;"
4. "taking the perspective in the first person of a member of a stereotyped group;" and
5. "seeking opportunities to encounter and engage in positive interactions with out-group members."[13]

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[10] *See* ABI Report at 165 (citing Patricia G. Devine, Patrick S. Forscher, Anthony J. Austin, & William T.L. Cox, *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 EXPERIMENTAL SOC. PYSCHOL. 1267, 1267 (2012) and Kang, et al., *Implicit Bias in the Courtroom*, *supra* note 9).
[11] ABI Report at 165.
[12] Implicit Bias Initiative, https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/.
[13] Devine, et al., *Long-Term Reduction in Implicit Race Bias*, *supra* note 10, at 1270-1271.

Hopefully, conferences like this one, will seek out opportunities to provide bankruptcy professionals meaningful implicit bias training.

B. Assist Clients with Loss Mitigation (for an Additional Fee)

A recent study found a direct correlation between a higher amount of secured debt and a lower likelihood of discharge, noting that approximately 30% of chapter 13 cases "were filed by households burdened with unaffordable or severely unaffordable housing."[14] After the housing crisis, another study concluded that "[f]amilies in bankruptcy live in housing that is either unaffordable or severely unaffordable at more than two and a half times the rate of the general population of homeowners. Unaffordable housing is a common problem for American families, but for bankruptcy debtors, it is the norm, rather than an exception."[15]

Lowering a debtor's monthly mortgage payment through a consensual loan modification "obviously improve[s] [the debtor's] chances of rehabilitating a failing mortgage" and could increase the likelihood that the debtor will complete a chapter 13 plan.[16] Accordingly, the ABI Report supports the use of loan modifications in bankruptcy and includes a discussion of consensual mortgage loan modifications in chapter 13 cases.[17] Notably, the ABI Report states that

[14] Greene, et al., *Cracking the Code*, *supra* note 3, at 1054. *See also* John Eggum, Katherine Porter & Tara Twomey, *Saving Homes in Bankruptcy: Housing Affordability and Loan Modification*, 2008 UTAH L. REV. 1123, 1127, 1130 (2008) (noting that an underlying assumption in chapter 13 is that the debtor has sufficient income to make mortgage payments and meet living expenses and that "[b]ecause families remain obligated to make their future mortgage payments according to the original loan terms, those who have severely unaffordable mortgage loans may be more likely to fail in chapter 13 bankruptcy").

[15] Eggum, et al., *Saving Homes in Bankruptcy*, *supra* note 14, at 1144.

[16] ABI Report at 181. *See also* Eggum, et al., *Saving Homes in Bankruptcy*, *supra* note 14, at 1143 (discussing findings that "[t]he majority of chapter 13 homeowners (over 71%) enter bankruptcy with current housing expenses that are unaffordable or severely unaffordable on their current incomes," that "Chapter 13's requirement of living on a strict budget for three to five years will pose a formidable challenge to families in unaffordable or severely unaffordable housing[,]" and that absent "large increases in income in the next few years, these families will have fixed or escalating housing expenses that limit their flexibility in coping with unexpected expenses"). *See also* Alan M. White, *Does Bankruptcy Save Homes? A Further Look*, 92 AM. BANKR. L. J. 363, 383 (2018) (concluding that debtors "with a mortgage payment exceeding 50% of their reported income had their chapter 13 dismissed in 67% of cases" but that "the dismissal rate for homeowners whose mortgage payment was less than 30% of reported income was only 45%").

[17] ABI Report at 180-184.

"[c]hapter 13 debtors' attorneys should be encouraged to vigorously represent their clients in the loan-modification process" and that "[c]ourts should allow fees for those services…in addition to the fees normally allowed for representing debtors in chapter 13 cases."[18] The ABI Report highlights that loan modification is "complicated, technical[,] and tedious" and that navigating the loan modification process often is "not within the competence of [an] unrepresented debtor."[19] For attorneys in "no-look fee" jurisdictions, the ABI Report may prove useful in supporting an application for allowance of an additional fee for assisting a client with a loan modification.[20]

C. Budget for Savings (and Rethink Tax Refund Treatment in 13)

The ABI Report recommends that, absent amendment of 11 U.S.C. §§ 1322(b) and 1325(b), existing caselaw be interpreted to allow a debtor to set aside funds for an emergency fund to prevent an unexpected expense from destroying the feasibility of a plan.[21] Specifically, for below-median debtors, the ABI Report suggests that payments to an emergency fund roughly the value of one month's scheduled expenses be included as reasonably necessary support expenses under 11 U.S.C. § 1325(b)(2).[22] For above-median debtors, the ABI Reports suggests construing emergency fund payments as itemized additional expenses due to a special circumstance within the meaning of 11 U.S.C. § 707(b)(2)(B) as made applicable to above-median debtors by 11 U.S.C. § 1325(b)(3).[23]

The Southern District of Texas launched a voluntary emergency savings program for chapter 13 debtors in 2015. The program allows a debtor to earmark a small portion of his or her monthly plan payments as savings, and the chapter 13 trustee maintains the savings account. Upon

[18] *Id*. at 183.
[19] *Id*.
[20] *See*, *e.g.*, Bankr. N.D. Ala. R. 2016-1(m).
[21] ABI Report at 171-175.
[22] *Id*. at 175-176.
[23] *Id*. at 176.

application to the court, the debtor may withdraw from the fund, and any remaining amounts are returned to the debtor upon conversion, dismissal, or completion.[24]

In the absence of a court-approved emergency fund savings program, retaining income tax refunds might provide a savings mechanism for chapter 13 debtors (depending on local rules, administrative orders, and judicial rulings). In *Marshall v. Blake*, the Court of Appeals for the Seventh Circuit considered whether a chapter 13 debtor's earned income tax credit was disposable income and whether the debtor had to turnover her tax refund to the trustee.[25] Relying on the definition of current monthly income under 11 U.S.C. § 101(10A)(A), the court agreed with a bankruptcy court and found that the failure of Congress to exclude the earned income tax credit from the definition of current monthly income when it passed BAPCPA indicated that tax credits are disposable income under the Bankruptcy Code.[26] However, citing the holding of *Hamilton v. Lanning*, 560 U.S. 505 (2010), which allows for adjustments to projected disposable income "'in exceptional cases, where significant changes in a debtor's financial circumstances are known or

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[24] *See* Sec. 22 of the local Uniform Plan and Motion for Valuation of Collateral of the United States Bankruptcy Court for the Southern District of Texas (Aug. 21, 2018), available at https://www.txs.uscourts.gov/bankruptcy/bankruptcy-forms-filing-fees. Sixty months have not elapsed since the introduction of the savings plan and the impact on plan completion and discharge rates is not yet known. However, a study conducted by the Chief Judge of chapter 13 cases in which the debtors utilized the emergency savings fund option found that the emergency fund increased the feasibility of the plans. David R. Jones, *Savings: The Missing Element in Chapter 13 Bankruptcy Cases?*, 26 AM. BANKR. INST. L. REV. 243, 271 (2018).

[25] 885 F.3d 1065 (7th Cir. 2018).

[26] *Id*. at 1074. Notably, a tax credit, such as the earned income tax credit at issue in *Marshall v. Blake*, may be exempted under Alabama state law. Alabama Code § 38-4-8 provides that "[a]ll amounts paid or payable as public assistance to needy persons . . . in the case of bankruptcy, shall not pass to the trustee or other person acting on behalf of the creditors of the recipient of public assistance." In *In re James*, 406 F.3d 1340 (11th Cir. 2005), the Eleventh Circuit considered a chapter 7 case and held that "the plain meaning of the language of § 38-4-8, standing alone, indicates that [earned income tax credit] payments, which constitute public assistance payments to needy persons, shall not pass to the trustee in the case of a bankruptcy" and that whether issued as "a credit, a refund, or an overpayment does not affect the fact that it is 'public assistance' for purposes of Alabama Code § 38-4-8 and is therefore exempt". 406 F.3d 1340, 1344-1346; *see also In re Brasher*, 253 B.R. 484, 486-489 (M.D. Ala. 2000) (Judge Thompson) (reversing the bankruptcy court and holding that a federal earned income tax credit was "public assistance" within the meaning of Alabama Code § 38-4-8 and could be exempted by a chapter 7 debtor). However, as in *Marshall v. Blake*, Eleventh Circuit bankruptcy courts have required debtors to account for the portion of a tax refund attributable to an earned income tax credit in calculating the debtor's projected disposable income. *See, e.g., In re Cook*, 2013 WL 5574978, at *6 (Bankr. N.D. Ala. Oct. 10, 2013) (Judge Mitchell).

virtually certain,'"[27] the court concluded that the Bankruptcy Code did not require the debtor to turn over her tax credit to the trustee, but allowed her to prorate the expected tax credit over twelve months and to set off any projected expenses against it.[28] Expanding on this reasoning (and that of the ABI Report), a monthly schedule J expense item for emergency savings that offsets (in whole or in part) a monthly schedule I income item for an anticipated tax refund might be a permissible mechanism for earmarking an anticipated refund for emergency savings.

Notably, even some courts that reject the schedule I/J approach ratified by the Seventh Circuit allow chapter 13 debtors to keep at least a portion of their tax refunds, without regard to claimed exemptions. In the Western District of Texas, for instance, the local form plan mandates that a debtor turn over "the aggregate tax refund(s) received for any tax period that exceeds $2,000 . . . as additional disposable income." In reviewing a challenge to that provision, a Western District of Texas bankruptcy court held that allowing a debtor the "unfettered right to retain up to $2,000 of any annual tax refund" was to "assist a debtor with paying for unexpected expenses that invariably occur in chapter 13 cases."[29] That notwithstanding, a tax refund in excess of $2,000 remained disposable income and was subject to turnover to the trustee for distribution to creditors.[30]

D. Consider Conduit Mortgage Payments

Although the ABI Report acknowledges that there does not appear to be a correlation between conduit mortgage payments (i.e., mortgage payments for which the trustee, not the debtor, is the disbursing agent) and higher plan completion/discharge rates,[31] and also recognizes that

[27] *Marshall v. Blake*, 885 F.3d at 1077 (quoting *Hamilton*, 560 U.S. at 513).
[28] *Id*. at 1078-1081. The court goes on to hold that this proposed treatment of the tax credit complies with the good faith requirement of 11 U.S.C. § 1325(a)(3) and the feasibility requirement of 11 U.S.C. § 1325(a)(6). *See* 885 F.3d at 1081-1084.
[29] *In re Orozco*, 2018 WL 2425971, at *6 (Bankr. W.D. Tex. May 10, 2018) (Judge Gargotta).
[30] *Id*. at *7.
[31] ABI Report at 184-185.

conduit payments come with a price,[32] the ABI Report nevertheless recommends utilizing conduit payments for mortgages because they "allow chapter 13 trustees to have accurate recordkeeping regarding the postpetition payments for what is almost certainly the debtor's largest obligation."[33] As the ABI Report observes, "[t]he chapter 13 trustee's records are likely to be more accurate than the debtor's records or recall without records. The oversight from a chapter 13 trustee means fewer motions for relief from stay and greater scrutiny of postpetition fees, costs, and charges assessed by mortgage servicers."[34]

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[32] *Id*. at 186-187.

[33] *Id*. at 186.

[34] Rule 3002.1(b)(2) and (e), along with 11. U.S.C. § 1322(b)(5), provide an avenue to challenge fees, expenses, and charges added by a notice of payment change related to the debtor's primary residence. Both the requirement to pay the fee, expense, or charge pursuant to the underlying security instrument and the reasonableness of the fees can be contested. *See* Enslen Crowe & Thomas Humphries, *Allowance of Post-Petition Fees under Rule 3002.1—An Alabama Controversy*, 31 NAT'L ASS'N OF CHAP. 13 TRUSTEE'S QUARTERLY 15 (2019). For example, in *In re England*, Judge William R. Sawyer addressed challenges to attorney's fees for plan and claim review imposed through notices of payment change on mortgaged real property located in Alabama in two separate chapter 13 cases. 586 B.R. 795 (Bankr. M.D. Ala. 2018). The court held that the lender could "recover reasonable fees incurred in connection with the enforcement of a mortgage only where the mortgage contractually imposes a duty on the mortgagor to pay those fees" and that any contractual provisions allowing for fees "must be unambiguous and will only be enforced to the extent so provided for by the language of the mortgage." *Id*. at 800. Further, the court held the reasonableness of the fees was subject to review on a case-by-case basis. *Id*. at 800-802 (relying on ALA. RULE OF PROF. CONDUCT 1.5; *Bivins v. Wrap It Up, Inc. v. Nature's Way Café Franchising, LLC*, 548 F.3d 1348, 1351-1352 (11th Cir. 2008); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974); and *Peebles v. Miley*, 439 So.2d 137, 140-141 (Ala. 1983)). In the first case, the court denied attorney's fees because the mortgage provided for fees only in the event of foreclosure. *In re England*, 586 B.R. at 801. *See also In re Clark*, 593 B.R. 661, 663 (Bankr. S.D. Ala. 2018) (Judge Oldshue) (holding that, because the subject mortgage limited advances to protect the mortgaged property in the event of bankruptcy to the payment of taxes and hazard insurance, the lender could not recover attorney's fees). *Compare In re Mandeville*, 596 B.R. 750, 755-760 (Bankr. N.D. Ala. 2019) (Chief Judge Robinson) (holding that a mortgage provision that permitted the lender to recover amounts disbursed "to protect the value of the Property and Lender's rights in the Property" was broad enough to provide for the recovery of attorney's fees in bankruptcy). In the second case at issue in *In re England*, although the mortgage did provide for an award of fees, the court rejected a $500 fee for filing a proof of claim as excessive and unreasonable: "Loan documents and payment history are regularly kept in the ordinary course of business. Filing a proof of claim should merely require transcribing information, which is already available to the lender, to a proof of claim form." 586 B.R. at 802. *Compare In re Mandeville*, 596 B.R. at 761-766 (holding "that preparing, signing, and filing a proof of claim for a residential mortgage creditor is not an inconsequential ministerial task" and finding $300 fee for review of petition, schedules, and plan reasonable) (collecting cases).

III. Other Suggestions

A. Routinely Consider Post-Confirmation Plan Modifications

Post-confirmation modifications under 11 U.S.C. § 1329 may make the difference between dismissal and plan completion and discharge. Nationwide, of the chapter 13 cases completed in 2017, approximately 78% had no modifications, approximately 15% had one modification, approximately 5% had two modifications, approximately 1.5% had three modifications, approximately 0.6% had four modifications, and approximately 0.4% had five or more modifications.[35] In the Northern District of Alabama, approximately 49% had no modifications, approximately 26% had one modification, approximately 13% had two modifications, approximately 6% had three modification, approximately 3% had four modifications, and approximately 3% had five or more modifications.[36] Modifications to surrender collateral, to reduce plan payments and/or distributions to unsecured creditors based on changed circumstances (including lower income), to extend or reduce plan terms, and to account for changes necessitated by mortgage loan modifications all can help address feasibility issues that arise over the life of a chapter 13 case. When faced with a chapter 13 trustee motion to modify or to dismiss, it important to evaluate for necessary claim objections (such as to late filed deficiency claims) as well as to consider possible plan modifications.

[35] Administrative Office of the United States Courts, Table 6: Chapter 13 Cases Closed by Dismissal or Plan Completion and Plan Modifications to Administrative Office of the United States Courts, *BAPCPA Report – 2017: 2017 Report of Statistics Required by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, https://www.uscourts.gov/statistics-reports/bapcpa-report-2017. All percentages are approximate and rounded.

[36] *Id*. All percentages are approximate and rounded. To put these numbers in context, for the 12-month period ending March 31, 2019, 7,182 chapter 13 cases were commenced in the Northern District. Administrative Office of the United States Courts, *Table F-2: U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commended, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending March 31, 2019*, https://www.uscourts.gov/news/2019/04/22/bankruptcy-filings-continue-decline.

B. Do Your Due Diligence

It is no secret that collecting necessary documents and identifying creditors in advance of a bankruptcy filing leads to a smoother and shorter confirmation process and a more successful plan. Often, however, a debtor's records are incomplete. Fortunately, the internet proves a useful tool for collecting information at little or no cost. For instance, for those ever problematic 11 U.S.C. § 1308 tax returns, the Internal Revenue Service maintains a website entitled "Get Transcript"[37] that provides step-by-step instructions and guidance on requesting tax transcripts online and by mail.[38] The State of Alabama maintains several websites that allow for immediate lien searches, including Uniform Commercial Code filings[39] and vehicle titles.[40] Some counties have online search options for real property records.[41] Prior and current lawsuit information is available online for Alabama[42] and nationwide on both the federal[43] and state level.[44]

Including all known and possible creditors on the original creditor matrix for a case prevents delays and avoids the discharge and plan issues that arise when creditors who did not receive adequate notice of the case file untimely proofs of claim. Common creditors you might consider adding to all matrices, regardless of a known claim, are local utilities and governmental taxing authorities. Additionally, the inclusion of co-debtors, landlords, homeowner's associations, and other interested parties will help ensure adequate notice is given.

[37] Available at https://www.irs.gov/individuals/get-transcript.
[38] To prepare for this presentation, Judge Henderson requested a transcript of her 2015 federal tax return online. Submitting the request took only a few minutes, and she received the transcript by mail in six days at no cost.
[39] Alabama Secretary of State, available at https://www.sos.alabama.gov/government-records/ucc-records.
[40] Alabama Department of Revenue, available at https://revenue.alabama.gov/motor-vehicle/obtain-motor-vehicle-information/.
[41] *E.g.*, Tuscaloosa County, available at https://probate.tuscco.com/ProbateRecords/.
[42] State of Alabama Unified Judicial System's State Judicial Information System, available at www.alacourt.com.
[43] Administrative Office of the United States Courts Public Access to Court Electronic Records, available at www.pacer.gov.
[44] Both Westlaw, available at www.westlaw.com, and Lexis Advance, available at www.lexisadvance.com, maintain databases of state court dockets and filings.

C. Stay Apprised of Changes to Consumer Protection Laws (and Use Them to Your Client's Advantage)

Pursuant to the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C.A. § 2601 *et seq*., and Regulation X, 12 C.F.R. Part 1024, mortgage servicers are required to provide timely and accurate information regarding consumer loans and any available loss mitigation options.[45] Careful review of these responses is warranted and can prove helpful in a variety of bankruptcy contexts—filing claims for creditors, challenging final cure responses, pursuing loan modifications, etc.[46] As consumer protection laws evolve, bankruptcy practitioners should stay apprised of developments and evaluate how to use the protections afforded to facilitate a successful chapter 13 rehabilitation.

D. Be Wary of "Drop Dead" Consent Orders

Bankruptcy courts routinely are asked to approve "conditional denial" orders on trustee motions to dismiss and creditor motions for relief from stay. Frequently, such orders allow for a case to be dismissed or the automatic stay to lift without further hearing if a single payment (to the trustee or creditor) is missed and not cured within a short period of time. As the ABI Report discussed in Part II hereof highlights, any number of circumstances beyond a debtor's control can result in the debtor's missing a single chapter 13 plan payment. While courts, trustees, and attorneys often view "drop dead" orders as a matter of necessity, particularly in jurisdictions with a high volume of chapter 13 cases and large consumer hearing dockets, it is important to remember

[45] 12 C.F.R. §§ 1024.36, 1024.39, 1024.41. For a plain English guide to the history and requirements for lenders under RESPA and its implementing regulations, see CFPB Consumer Laws and Regulations: Regulation X Real Estate Settlement Procedures Act (April 2015), available at https://files.consumerfinance.gov/f/201503_cfpb_regulation-x-real-estate-settlement-procedures-act.pdf.

[46] Notably, RESPA provides for a private right of action: "Whoever fails to comply with any provision of this section shall be liable to the borrower for each such failure in the following amounts: (1) [] In the case of any action by an individual, an amount equal to the sum of--(A) any actual damages to the borrower as a result of the failure; and (B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed $2,000." 12 U.S.C. § 2605(f).

that due process and equity can suffer at the expense of speed and efficiency (and vice versa). Debtors' attorneys should consider asking trustees and creditors for other relief in the event of future default—a "return to docket provision," an opportunity to contest a noticed default, etc.—or ask for a continued setting in lieu of a conditional denial order. If a stay relief motion relates to a debtor's default in direct mortgage payments, the pursuit of loss mitigation (and, if necessary, service of discovery to ascertain information related thereto) may be a preferable to a consensual "Hoggle"[47] order. A plan modification to provide for conduit mortgage payments might also be appropriate. Sometimes, however, there is simply no substitute for litigating a contested matter.

IV. Conclusion

Proposed legislative changes to the bankruptcy system may come to fruition in the foreseeable future. Notably, the Discharge Student Loans in Bankruptcy Act of 2019 (H.R. 770) was introduced in the House on January 24, 2019 and is drafted "[t]o amend title 11 of the United States Code to make student loans dischargeable."[48] Such legislation could have a significant impact on the bankruptcy system. In the meantime, the ABI Report and other resources cited herein may provide useful recommendations, research, and analysis for improving outcomes in chapter 13.

[47] *See In re Hoggle*, 12 F.3d 1008 (11th Cir. 1994).
[48] The Discharge Student Loans in Bankruptcy Act is one in a line of similar proposed legislation. *See*, *e.g.*, Helping Individuals Get a Higher Education while Reducing Education Debt Act (H.R. 5549, 115th Congress).