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I. Introduction

The extraordinary level of controversy surrounding the National Bankruptcy Review Commission's (the "Commission") consumer bankruptcy recommendations[1] tells us something very

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* Professor of Law, New York Law School. This article is the text of a presentation at the *Dickinson Law Review* Symposium titled "The National Bankruptcy Review Commission Report: A Commentary on Proposed Change." The author would like to thank Thomas Bauer, NYLS 1998, for his able research assistance. Since the date of the presentation, there have been certain developments in the field of post-discharge agreements. To update readers, these are presented in the post-script to this article. *See infra* pp. 757-60.

1. The Consumer Recommendations appear in Chapter One of the Commission's Final Report issued on October 20, 1997. *See* BANKR. REVIEW COMM'N, 1997 FINAL REPORT, CONSUMER BANKRUPTCY 77-302 (1997). There was a lack of consensus among the Commission membership, as evidenced by the overtly vituperative dissents issued by several of the Commissioners, most particularly the Honorable Edith Hollan Jones and Commissioner James Shepard. *See* BANKR. REVIEW COMM'N, 1997 FINAL REPORT, RECOMMENDATIONS FOR REFORM OF CONSUMER BANKRUPTCY LAW BY FOUR DISSENTING COMMISSIONERS 1043-1117; BANKR. REVIEW COMM'N, 1997 FINAL REPORT, ADDITIONAL DISSENT TO RECOMMENDATIONS FOR REFORM OF CONSUMER BANKRUPTCY LAW 1123-96; BANKR. REVIEW COMM'N, 1997 FINAL REPORT, DISSENT FROM THE PROCESS OF WRITING THE COMMISSION'S REPORT 1309-11. Evidence of the controversy is demonstrated by the high level of legislative activity, first in anticipation of the Commission's Final Report in the form of a bill introduced by Representatives McCollum and Boucher on September 18, 1997. *See* H.R. 2500, 105th Cong. (1997); 143 CONG. REC. S10899 (daily ed. Oct. 21, 1997) (statements of Senators Grassley and Durbin). Furthermore, Representative Gekas, and three other representatives including Representative McCollum, introduced the Bankruptcy Reform Act of 1998 on February 3, 1998. *See* H.R. 3150, 105th Cong. (1998) [hereinafter Gekas bill]. On the same date, Representative Nadler introduced a bill titled "The Consumer Lenders and Borrowers Bankruptcy Accountability Act of 1998." *See* H.R. 3146, 105th Cong. (1998) [hereinafter Nadler bill]. Commentary on the Commission Report, the McCollum and Grassley bills, and now the Gekas and Nadler bills has generated a plethora of media attention. *See, e.g., Dueling Bankruptcy Measures Set Stage for House Fight*, NAT'L J.'S CONG. DAILY, Feb. 3, 1998; Lawrence Chimerine, *Bankruptcy Reform: Worse Than Nothing*, BANKING STRATEGIES, Jan./Feb. 1998; Melanie McManus, *Bankruptcy Reform—Not*, UMI, INC., Jan. 1998, at 42; *Consumer Group Comes Out Against H.R. 2500*, CONSUMER BANKR. NEWS, Jan. 29, 1998; *Take It Personally*, CNNFN, Jan. 16, 1998 (Transcript No. 97011602FN-108); *CU's Lobby for Tougher Bankruptcy Bill*, AM. BANKER-BOND BUYER, Jan. 12, 1998, at 1; *House Panel's Consumer Views Split on Party Lines*, CONSUMER BANKR. NEWS, Dec. 18, 1997.

important: consumer bankruptcy is big business, the economic stakes are high, the solutions will be hard fought, and the prospects for consensus are dubious. Reasonable people certainly can, and will, differ on and debate about how our legal system should treat individuals whose failure manifests itself in economic terms.[2]

Undeterred by the controversy, in these brief remarks, I would like to focus on an area of consumer bankruptcy that has not received a great deal of attention: post-discharge "reaffirmation" agreements. Alerting readers to this area of consumer law accomplishes two goals: first, it highlights the importance of legislative reform on this issue; and second, it focuses us on the (and one would hope non-controversial) need for post-filing debtor education. The Commission's Final Report addressed post-filing "reaffirmation" agreements; however, as more fully described,[3] the Commission's recommendations do not go far enough in protecting debtors post-discharge. And, while the Commission's Final Report thankfully endorses financial education, a link does not exist between such education and post-filing reaffirmation agreements. Linking these two seemingly disparate topics reinforces the significance of reform with respect to both issues.

II. Post-Discharge "Reaffirmation" Agreements

The Commission's Final Report makes a series of recommendations[4] regarding reaffirmation agreements.[5] Concerned about,

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2. An example of this debate is highlighted in the most recent issue of the *American Bankruptcy Law Journal* where Judge Robert D. Martin and Professors Kenneth N. Klee, Lynn M. LoPucki, and Elizabeth Warren proffer suggestions for how to treat consumer debtors. *See* Elizabeth Warren, *A Principled Approach to Consumer Bankruptcy*, 71 AM. BANKR. L.J. 483 (1997); Lynn M. LoPucki, *Common Sense Consumer Bankruptcy*, 71 AM. BANKR. L.J. 461 (1997); Robert D. Martin, *A Riposte to Klee*, 71 AM. BANKR. L.J. 453 (1997); Kenneth N. Klee, *Restructuring Individual Debts*, 71 AM. BANKR. L.J. 431 (1997). I, too, have entered that debate, most recently in my book. *See* KAREN GROSS, FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSYTEM (1997). What is important to me is that debate be "on the merits," recognizing the legitimate differences in perspective that can be brought to bear. What troubles me is that the debate regularly plunges into the gutter, leading to ad hominem attacks that not only have no place in the world of intellectual exchange but are unproductive. Specific examples available upon request.

3. *See* discussion *infra* notes 6-30.

4. Originally, the majority of the Commissioners had adopted an approach less favorable to reaffirmation agreements. However, a compromise was ultimately reached on August 12, 1997 based on recommendations of Commissioner Caldwell Butler.

5. *See* BANKR. REVIEW COMM'N, 1997 FINAL REPORT, RECOMMENDATIONS TO CONGRESS 145-74 [hereinafter RECOMMENDATIONS TO CONGRESS]. The term "reaffirmation agreement" does not actually appear in the Bankruptcy Code itself. *See* 11 U.S.C. § 524

among other things, the number of debtors reaffirming unsecured debts, the Commission recommended eliminating unsecured reaffirmation agreements and certain secured reaffirmation agreements where the value of the collateral was less than five hundred dollars.[6] The Commission also recommended a strengthening of the procedural hurdles that needed to be satisfied if a reaffirmation agreement were to be permitted.[7] Clearly, the concern about reaffirmation agreements was heightened by the very public debacle involving Sears Roebuck, and the revelation that Sears had obtained numerous reaffirmations that were never filed with the bankruptcy court, in direct contravention of the provisions of the Bankruptcy Code.[8] Whether or not the Commission has drawn the line in the proper place for improving the reaffirmation process,[9] this area unquestionably needs reform; indeed, we are only now beginning to uncover both the magnitude of pre-discharge reaffirmation, formal and informal,[10] and the improper conduct of creditors with respect to such reaffirmation.[11]

What has received remarkably little attention is Commission Recommendation 1.3.2, which states that section 524 should be amended to include an added subsection:

> . . . to provide that the court shall grant a judgment in favor of an individual who has received a discharge . . . for costs and attorneys fee, plus treble damages, from a creditor who threatens, files suit, or

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(1994). However, the term is used in the legislative history and Federal Rule of Bankruptcy Procedure 4008. It is also a term that appears commonly in cases, everyday bankruptcy practice, and treatises.

6. *See* RECOMMENDATION TO CONGRESS, *supra* note 5, at 145-74.

7. *See id.* More specifically, Recommendation 1.31 sets out the details of what must be in the motion for approval (such as the underlying contract documents, security agreements, and evidence of perfection). That recommendation also sets out the details of when a hearing is (and is not) required.

8. The Sears story is detailed in *In re Latanowich*, 207 B.R. 326 (Bankr. D. Mass. 1997). Press coverage was extensive, but, for the most detailed account, see Barnaby J. Feder, *The Harder Side of Sears*, N.Y. TIMES, July 20, 1997, at C1.

9. With some minor variations, I am in favor of the Commission approach.

10. Regrettably, data are not compiled on the number of reaffirmation agreements either filed with the court or approved pursuant to a hearing. *See* Karen Gross, *Perceptions and Misperceptions of Reaffirmation Agreements*, 102 COMM. L.J. 339, 346-49 (1998). Clearly, reaffirmations as to which there is neither a hearing nor a filing fall off the data radar screen. The paucity of bankruptcy data, and the richness of what we could learn if we had them, are a story for another day. *See id.* at 360-73.

11. *See id.* (detailing the empirical work of Professors Culhane and White and noting the growing list of alleged wrongdoers).

> otherwise seeks to collect any debt that was discharged in bankruptcy and was not the subject of an agreement in accordance with subsections (c) and (d) of section 524.[12]

In support of this provision, the Commission Report details the number of unfiled reaffirmation agreements and the very active efforts of creditors to collect from debtors[13] post-discharge.[14] The Commission Report goes on to state that nothing in this recommendation prevents "a debtor from making voluntary repayments on a discharged debt,"[15] a statement that is fully consistent with the wording of section 524(f).[16] The Commission Recommendation also serves two key functions: it creates a remedy for non-compliance with the discharge injunction;[17] and, at least

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12. RECOMMENDATIONS TO CONGRESS, *supra* note 5, at 161-62 (emphasis added).

13. There is an important issue of terminology here. Is an individual whose debts have been discharged in bankruptcy still a debtor? A related issue arose in *Perovich v. Humphrey,* No. 97C3209, 1997 WL 674975 (N.D. Ill. Oct. 28, 1997), where the court questioned whether a discharged debt was a "debt" within the meaning of the Fair Debt Collection Practices Act and determined that it was. *See id.* at *1. I use the terms "debtor" and "former debtor" interchangeably in referring to individuals whose bankruptcy case is closed and their debts discharged. On a related note, is an entity that acquires a creditor's claim a "creditor?"

14. William Mapother provides various sample letters creditors can send to debtors. He also has a sample form that he recommends creditors prepare for the debtor that the debtor, in turn, is supposed to send to the creditor. Titled "Informal Repayment Statement," the form, which has been adopted by several creditors based on my own review of correspondence received by debtors, is an effort to circumvent the strictures of section 524(a)(2), (c), and (d) and fit within the parameters of section 524(f). The letter provides, in relevant part:

> Because I want to maintain my good credit standing with you, I wish to voluntarily repay your debt which I included in my bankruptcy . . . . Because I may occasionally forget to make a payment, I want you to send me a reminder if and when I miss a payment. I want you to do this as a service to me, and I am aware that you would not be doing this without my requesting it.

WILLIAM MAPOTHER, WINNING BANKRUPTCY STRATEGIES FOR CONSUMER CREDITORS 210 (1989).

15. *Id.* at 165.

16. Section 524(f) was added as part of the 1984 Amendments to the Bankruptcy Code. In a sense, the provision was intended to counterbalance the stringent requirements regarding reaffirmations that also were added in 1984. The absence of a provision relating to voluntary repayment does not suggest, I believe, that such payments were prohibited under the Code or its predecessor, the Bankruptcy Act. Rather, it is to clarify what is permissible in view of the added standards for reaffirmation. However, even without an express provision, repayments still had to be voluntary. *See In re* Lillie, 12 B.R. 860, 862 (Bankr. N.D. Ohio 1981).

17. At present, the Code is silent on a remedy for a violation of the discharge injunction.

arguably, it accords debtors a private right of action for a section 524(a)(2) violation.[18]

Although alluded to in the footnotes to this Recommendation,[19] the discussion in the Commission's Final Report fails to address one of the rapidly growing aspects of consumer bankruptcy: the buying and selling of consumer debts.[20] Although those familiar with Chapter 11 have been dealing for some time with the buying and selling of claims and the problems associated with such practice,[21] little attention has been paid to how that issue plays out in the consumer arena.[22] Indeed, until recently, many people were unaware that acquisition of consumer debt, such as charged-off debt, Chapter 13 debt, and discharged debt, was lucrative.[23]

I am most concerned, in this context, with the purchase and sale of discharged debt for pennies on the dollar. Why would someone seek to acquire discharged debt, particularly in view of the section 524(a)(2) injunction? One possibility is that this acquisition is an inexpensive way to acquire a mailing list. Furthermore, what does the acquirer intend to do with this mailing list? On the surface, obtaining mailing lists is a perfectly acceptable thing; it happens every day. One, however, should think about why one would want a list of discharged debtors. Certainly, if the acquirer can get a former debtor to repay even pennies on the dollar of the discharged debt, the acquisition becomes profitable. Moreover, if the acquirer can get the former debtor to enter into

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18. The court in *Perovich* questioned whether such a right exists, though noting cases where damages were awarded. *See Perovich*, 1997 WL 674975, at *4.

19. *See* MATHOPER, *supra* note 14, at 164 nn.362-63.

20. *See* Gross, *supra* note 10, at 349-51.

21. *See* Frederick Tung, *Confirmation and Claims Trading*, 90 NW. U. L. REV. 1684 (1996); W. Andrew Logan III, *Claims Trading: The Need for Further Amending Federal Rule of Bankruptcy Procedure 3001(e)(2)*, 2 AM. BANKR. INST. L. REV. 495 (1994); Chaim J. Fortgang & Thomas Moers Mayer, *Developments in Trading Claims: Participations and Disputed Claims*, 15 CARDOZO L. REV. 733 (1993); Joy Flowers Conti et al., *Claims Trafficking in Chapter 11—Has the Pendulum Swung Too Far?*, 9 BANKR. DEV. J. 281 (1992).

22. I question whether we should treat and protect claim transferees in the same manner as original creditors. *See* GROSS, *supra* note 2, at 184-90. Certainly, when the Code was drafted and creditor protections inserted, thought was not given to the possibility (now reality) that numerous original creditors would no longer be in the picture. Sophisticated investors have replaced the unsecured creditor with tennis shoes from Kansas. Whether the purchase and sale of consumer debts should alter the balance between debtors and creditors rights in the consumer context remains a troubling and open issue for me.

23. There are whole conferences dedicated to this issue. For a relevant website (and sponsor of programs), see http://www.debtormarketplace.com.

a new credit relationship or to purchase a new item, the acquisition makes even more economic sense.

Two recent examples are instructive. In a class action captioned *Kim v. Fayazi*,[24] an entity known as Amcredit solicited an individual who had been a debtor. That solicitation indicates that Amcredit acquired the individual's discharged debt from Chemical Bank. If the debtor were willing to repay the discharged debt voluntarily, Amcredit would give the individual a new Visa credit card with a limit of 110% of what was repaid.[25] Stated more simply, the former debtor was agreeing to repay discharged debt to garner a new credit card. Although the documents are not abundantly clear on this point, it does appear as if Amcredit would charge interest on *both* the newly used credit, from the Visa card, and the previously discharged debt. Additionally, payments for both debts were to be automatically deducted from the debtor's bank account.[26]

In *Perovich*,[27] an entity known as National Legal Recovery Service sought to recover allegedly secured merchandise from a discharged debtor. Apparently, the debtor had discharged unsecured debts, but, according to the court, the "security interest in the bed appears to have survived."[28] The original creditor, Craftmatic Adjustable Bed, had sold its interest to National Legal Recovery Service. Although the district court opinion is focused largely on procedural issues, albeit interesting ones like whether the district court or the bankruptcy court has jurisdiction of a section 524 action when the bankruptcy case is closed and whether a

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24. This case is pending in the United States District Court for the Northern District of Illinois, Eastern Division, Case No. 96 C 6966, before Judge Williams and Magistrate Judge Guzman. According to counsel for Bestbank, the case is presently in the discovery stage. The docket sheet on file with author.

25. The solicitation material indicated that after six months of payments, the credit can increase to 150% of the repayment amount. However, this added "benefit" is only available to individuals who agreed to the "automatic payment program." That program permits the claims acquirer to make automatic deductions from the former debtor's bank account.

26. The transaction documents are on file with author. The Second Amended Complaint makes this assertion in paragraphs 42, 55, 56, and 63.

27. This case also is pending in the United States District Court for the Northern District of Illinois before Judge Zagel. *See* Perovich v. Humphrey, No. 97C3209, 1997 WL 674975 (N.D. Ill. Oct. 28, 1997). A motion to reconsider part of the October 28th decision was denied and the rejection of the certification of the class was affirmed. The plaintiffs in *Kim* and *Perovich* are represented by Daniel A. Edelman of Edelman & Combs in Chicago, Illinois.

28. *Id.* at *1.

private right of action exists under section 524, the substantive issues surface. The question remains whether a debtor can be pursued post-petition by a claim transferee.[29]

III. Statutory Gaps

Two points can be made immediately. First, whatever agreement a debtor enters into with a claims acquirer, it is *not* a reaffirmation agreement. Section 524(c)(1) specifically provides that its coverage is for agreements "made before the granting of a discharge." Despite the clarity of this language, a number of courts have treated post-discharge agreements as if they were reaffirmation agreements, either ignoring or glossing over the post-discharge nature of the arrangement.[30] The Commission's Final Report specifically notes that the new subsection relates to agreements *not* covered by sections 524(c) or (d).

Second, if post-discharge agreements are *not* reaffirmation agreements, then the procedural safeguards established by section 524(c) and (d) are inapplicable. These agreements can arise "off the radar screen" in the sense that they are not subject to court approval, they do not need to be filed with the bankruptcy court, and the debtor is frequently *not* represented by counsel post-discharge.[31] So, what we have is a type of interaction between former debtors and claims acquirers that is bounded by non-bankruptcy law[32] and whatever protection the discharge injunction in section 524(a)(2) provides. Additionally, there is the omnipresent issue of section 524(f). There is, then, a gap.

Claims acquirers clearly find comfort supporting their contact with former debtors in section 524(f) which, as noted earlier, permits a debtor to repay voluntarily discharged debt. So, the

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29. I assume the debtor was not in default on payments of the secured portion of the debt. Moreover, although I have not seen the complaint, perhaps National Recovery Services thought it could induce payments from the debtor by suggesting its power to repossess the collateral.

30. *See, e.g.*, Arnold v. Stevenson Fed. Credit Union, 206 B.R. 560 (Bankr. N.D. Ala. 1997). In that case, as well as others, the court fails to distinguish between post-filing and post-discharge.

31. In a way, this raises a problem similar to that of informal reaffirmation agreements or the non-filed agreements. These are activities that fall off the radar screen, and, hence, no court is in a position to know about or consider such activities.

32. Possible federal and state laws violated include the Fair Debt Collection Practices Act, *see* 15 U.S.C. § 1692 (1994), the Truth in Lending Act, *see id.* §§ 1601-1677, the state version of the Uniform Consumer Credit Code, and RICO.

argument goes, the discharge injunction is not violated if the debtor voluntarily repays the discharged debt. The question then inevitably hinges on the definition of "voluntary repayment." Not surprisingly, the issue is not made clear in the Code or the accompanying legislative history. But, to my surprise, there are remarkably few cases addressing the meaning of voluntariness for purposes of section 524(f),[33] and those that exist are not consistent each with the other.[34]

Several examples suffice. In *Van Meter v. American State Bank*,[35] a bank sought to require a debtor to repay his discharged

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33. For a sampling, see *In re Arnold*, 206 B.R. 560, 566 (Bankr. N.D. Ala. 1997); *In re Smurzynski*, 72 B.R. 368, 370 (Bankr. N.D. Ill. 1987).

34. There is clearly a wealth of literature discussing the meaning of voluntariness in non-bankruptcy contexts, such as criminal law, which would enrich the analysis. *See, e.g.*, Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105 (1997) (arguing that due process mandates the prohibition of interrogation techniques that likely lead to false confessions); Richard A. Leo, *Criminal Law: The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621 (1996) (summarizing and analyzing the impact of *Miranda* on police interrogation methods); John R. Silber, *Being and Doing: A Study of Status Responsibility and Voluntary Responsibility*, 35 U. CHI. L. REV. 47 (1967) (discussing the relationship between legal responsibility for criminal conduct and moral philosophy). As expressed in *Schneckloth v. Bustamonte*, 412 U.S. 218, 224 (1973) (quoting Paul M. Bator & James Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 72-73 (1966)),

> Except where a person is unconscious . . . , all incriminating statements—even those made under brutal treatment—are "voluntary" in the sense of representing a choice of alternatives. On the other hand, if "voluntariness" incorporates notions of "but for" cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement would be voluntary . . . . It is thus evident that neither linguistics nor epistemology will provide a ready definition of the meaning of "voluntariness."

Id. This is not, by the way, a suggestion that the bankruptcy law involves criminal conduct, and hence we should look to criminal law by way of analogy.

While not within the purview of this paper, application of some of the non-bankruptcy caselaw and literature on voluntariness to the bankruptcy debate surrounding section 524(f) would be instructive. For an example of applying other non-bankruptcy literature to the bankruptcy context, see GROSS, *supra* note 2, at 142-44 (applying constitutional law analysis of the meaning of equality); Susan Block-Lieb, *Congress' Temptation to Defect: A Political and Economic Theory of Legislative Change to Financial Common Pool Problems*, 39 ARIZ. L. REV. 801 (1997) (applying game theory and public choice theory to our understanding of bankruptcy); Lynn M. LoPucki & George G. Triantis, *A Systems Approach to Comparing United States and Canadian Reorganization of Financially Distressed Companies*, 35 HARV. INT'L L.J. 267 (1994) (applying systems analysis to bankruptcy data collection efforts).

35. 89 B.R. 32 (Bankr. W.D. Ark. 1988).

debt from several years back[36] as a precondition to obtaining a new mortgage. The court eloquently distinguishes between "spontaneous" voluntariness[37] and "exogenous" voluntariness,[38] the latter being murkier. The court concludes that Congress intended to preclude all *creditor* initiated post-discharge agreements.[39] Other courts are less concerned with spontaneous voluntariness; these courts focus instead on creditor behavior.[40]

Interestingly, the Court in *Van Meter* includes what turns out to be a prescient footnote for our purposes; it states:

> It is, of course, theoretically possible that a repayment might be due to duress on the part of someone other than the creditor not acting as an agent of the creditor.[41] Probably such repayments would not be voluntary within the meaning of § 524(f), and the problem of third party duress is not presented in this case and this is best left to another day.[42]

A claim transferee, such as Amcredit or National Recovery Services, would be just such a third party. What this footnote suggests is that we need to look closely at the wording of section 524(a)(2), (f), and any new subsection that might be added to insure that the discharge injunction extends to third parties and that a true voluntary payment could be made to a third party as well as a creditor.[43]

In *In re Bowling*,[44] the court highlighted a central feature of voluntariness: for something to be voluntary, the debtor could not be obligated to repay either in actuality or belief. Thus, if a debtor sought a new loan and a creditor agreed to provide the same if the debtor entered into a promissory note to repay discharged debt, the

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36. Although not addressed directly, section 524(f) was not in effect when the debtor sought bankruptcy relief and obtained his discharge of the bank debt.

37. *See Van Meter*, 89 B.R. at 34.

38. *See id.*

39. *See id.* I am not sure this is the correct viewpoint. Is it possible that a debtor might agree to a creditor initiated request and be doing so voluntarily? It seems excessively paternalistic/maternalistic to assume that a debtor could never act voluntarily unless he/she is the mover in the transaction.

40. *See, e.g., In re* Arnold, 206 B.R. 560, 567 (Bankr. N.D. Ala. 1997).

41. This would be, to my mind, the claim acquirer.

42. *See Van Meter*, 89 B.R. at 34 n.3.

43. This assumes that there is no support for an outright ban of all post-discharge repayment to a non-creditor party, whether voluntary in a spontaneous or exogenous manner.

44. 116 B.R. 659, 664 (Bankr. S.D. Ind. 1990).

repayment was not voluntary. The result would be the same regardless of whether it was the debtor or the creditor who suggested linking the new and the discharged debt.[45] *Bowling*, like *Van Meter*, involved the original creditor, not a claim transferee.

Hudson v. Central Bank[46] is a case involving a debtor who erroneously[47] made repeated payments to his creditor bank post-petition.[48] The bank never informed that debtor that he did not need to make payment; indeed, the debtor had been in Saudi Arabia during his actual bankruptcy case so he was uninformed as to his options. While the creditor bank in *Hudson* did not actually seek to collect, it did permit the debtor to live under the illusion that payment was required. Stated differently, the creditor had no duty to inform the debtor that he was not obligated to repay despite the fact that the debtor asked direct questions regarding his repayments. This decision troubles me.[49] In contract law, we consider a contract voidable on the basis of misrepresentation if a party failed to disclose a material fact when asked.[50] Also, the sin of omission can be as grave as the sin of commission.[51] This is not to say that a creditor must volunteer to teach debtors their rights. However, if debtors ask why a creditor is keeping their money post-discharge, it is not acceptable or clever for a creditor to "play cute."

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45. Regrettably, the court treated the post-discharge agreement as a "reaffirmation agreement" even though it was entered post-discharge. *See id.* at 663. Moreover, the court observed that the post-discharge agreement would need to comply with section 524(c) and (d). *See id.* at 664.

46. 168 B.R. 368 (Bankr. S.D. Ill. 1994).

47. In the court's mind, repeated mistaken payments did not obligate the debtor to keep making payments. *See id.* at 371 n.1.

48. The case expressly rejects the "spontaneous" test of voluntariness adopted in *Van Meter*. *See id.* at 371.

49. The Commission's Report could be read to support the *Hudson* decision when it states, "Creditors are free to keep payments that the debtor willingly remits." BANKR. REVIEW COMM'N, 1997 FINAL REPORT 165 (1997). Maybe one could argue that the debtor payments in *Hudson* were not willingly remitted. I would prefer that the debate on the topic be closed altogether.

50. *See* Kannavos v. Annino, 247 N.E.2d 708, 711 (Mass. 1969).

51. *See* Holcomb v. Zinke, 365 N.W.2d 507, 511-12 (N.D. 1985); Weintraub v. Krobatsch, 317 A.2d 68, 74 (N.J. 1974).

IV. Commission Recommendation and Other Alternatives

Unfortunately, the Commission Recommendation 1.3.2 misses the opportunity to address certain specific issues raised by the new industry of buying and selling consumer debt. Stated differently, the Commission Recommendation is fine as far as it goes by serving three functions: it recognizes the problems of creditors seeking to collect post-discharge; it provides a remedy for non-compliance with the discharge injunction; and it seemingly creates a private right of action.[52] However, Commission Recommendation 1.3.2 does not go far enough to protect the debtor.[53]

First, the Commission preserves section 524(f) which permits debtors to repay if they choose to do so voluntarily, but it does not clarify the meaning of this subsection, most particularly the meaning of "voluntariness."[54]

Second, the Commission Recommendation uses terminology that leaves key issues open to debate. It specifically speaks of "creditor" action. While a claims acquirer may be a "creditor" within the meaning of section 101(10), the debt in question has been discharged. Thus, at least arguably, the "claim" did not arise at the time of or before the entry of the order for relief. The term "creditor" is, then, too narrow. Additionally, the Recommendation speaks to "debts," a particularly problematic term in the post-discharge context.[55]

Third, Commission Recommendation 1.3.2 limits its scope to creditors who "seek to collect." Curtailing this particular creditor behavior leaves many other offending behavior outside the scope of the Recommendation, and it leads us back, yet again, to a discussion of the meaning of "voluntariness." For example, the creditor conduct in *Hudson* would not fall within the Commission's

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52. The Nadler bill, *supra* note 1, in section 4, subpart a, creates sanctions for "creditor abuses." Included is a remedy for a violation of the discharge injunction. *See id.* § 4(a)(3). It also seems to include a provision that would expressly prohibit the conduct of the claims transferee in *Perovich*. *See id.* § 4(c)(4).

53. Regrettably, the plethora of bankruptcy bills introduced in the 105th Congress, *see supra* note 1, suffer from a similar infirmity. Somehow, the state of the industry has outpaced the drafters.

54. The examples in the text of the Commission's Final Report of voluntary repayment are narrow. *See* BANKR. REVIEW COMM'N, 1997 FINAL REPORT 165. However, there is nothing in the Code itself to reinforce this narrow interpretation.

55. *See supra* note 14 and accompanying text. *See also* Perovich v. Humphrey, No. 97C3209, 1997 WL 674975 (N.D. Ill. Oct. 28, 1997).

proffered language since the creditor was silent and arguably did not "seek to collect."[56] Claim acquirers who offer new credit in exchange for debt repayment are arguably not "seeking to collect;" they are seeking to give. Thus, the language needs to be expanded to control behavior not within the ambit of "seeking to collect."

It is certainly easier to criticize language limitations than to make suggestions of one's own. I remain troubled by the vagaries of section 524(f); while I am not in favor necessarily of defining "voluntariness," I think we need a better understanding regarding what is meant by this section. Clearly, what constitutes a voluntary payment for a discharged debtor should not hinge on where one happens to reside. Moreover, I am troubled by discharged debtors acting when they do not know or understand their rights. Certainly, we could give former debtors a cooling off period before a post-discharge agreement became enforceable, as done in other areas of consumer law. Or, we could require that the creditor or claims acquirer inform the former debtor of his/her rights in a writing that would need to be signed by the debtor, rights such as the right not to make repayment. Whether, as an empirical matter, added disclosure and signing actually assists debtors is an open issue for me. Furthermore, we could make explicit that the bankruptcy court retains jurisdiction for purposes of enforcing the discharge injunction.[57]

I am struck, however, by a systematic and systemic change that would improve this area, as well as others—post-filing consumer debtor education. As the Commission recognized in Commission Recommendation 1.1.5, part of the dilemma for post-filing debtors is that they emerge from the bankruptcy system no better able to re-enter the credit marketplace. They emerge with few, if any, of the financial management skills necessary to avoid economic distress in the future. A very real and urgent need exists to educate debtors about their rights and responsibilities.[58] The

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56. *In re Hudson*, 168 B.R. 368, 370-71 (Bankr. S.D. Ill. 1994).

57. The Commission Recommendation quite correctly provides for sanctions for non-compliance which should create an incentive for compliance.

58. The Coalition for Consumer Bankruptcy Debtor Education, a not-for-profit organization composed of a group of individuals representing diverse constituencies, was recently formed. The Coalition's initial Board of Directors is composed of debtor representatives, creditor representatives, judges, government officials, legal and non-legal educators, credit reporting representatives, psychologists, trustees, and credit counseling services. The Coalition is dedicated to the development of widely available, cost-effective post-filing education programs for the over one million individual debtors seeking bankruptcy

frequency with which debtors enter into reaffirmation agreements during their cases and respond positively to post-discharge collections efforts, whether by creditors or claims acquirers, are but two indicators that debtors do not truly understand their rights.

Therefore, if we are truly to provide debtors with a fresh start, we need to give them more than a legal discharge of their obligations; we need to give them the tools to be knowledgeable participants in our market-based economy and to provide them with education. This is not a new idea,[59] and it should not be a controversial one.[60] While we can certainly differ over course content, pedagogy, teachers, costs, and testing, we should be able to agree that quality education for debtors, wherever they reside, is a good thing. And, we should be able to agree that such programs cannot be developed on an ad hoc basis; they need to be carefully planned and developed in some organized and systematic way. So, while it is unrealistic to assume that partisanship will fall by the wayside on most of the consumer issues, perhaps we can achieve agreement on this: debtor education makes sense; it will improve the lives of debtors, and it will benefit present and future creditors and society. Agreement on that issue would not be a bad beginning.

V. Postscript

Since February of 1998 (when this presentation was made), the number of published decisions in the post-discharge arena has grown.[61] These cases all wrestle with the issues developed in this piece and should serve to remind readers that the topic is not only alive and well but growing.

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relief. The Coalition's first set is to develop and test a pilot program. Information about the Coalition is available from the author.

59. *See* Karen Gross, *Introducing a Debtor Education Program into the U.S. Bankruptcy System: A Roadmap for Change*, submitted to the National Bankruptcy Review Commission on July 7, 1997 and appearing in the Appendix to the Commission Report.

60. *See* Gekas bill, *supra* note 1, § 112 (containing a provision for debtor education, including a pilot project).

61. *See In re Wiley*, 224 B.R. 58 (N.D. Il. 1998); *In re Armstead*, 1997 Bankr. LEXIS 2166 (Bankr. E.D. Pa.); *In re Brown*, 220 B.R. 101 (Bankr. C.D. Ca. 1998); *In re Smith*, 224 B.R. 388 (Bankr. N.D. Il. 1998); *In re Stevens*, 217 B.R. 757 (Bankr. D. Md. 1998); *In re Bryer*, 216 B.R. 755 (Bankr. E.D. Pa. 1998). Consistent with the observations in this paper, there have also been numerous decisions dealing with reaffirmation agreements (in the pre-discharge context). A recent LEXIS search of cases thus far in 1998 revealed over 50 cases on this topic.

The best discussion of the multiple meanings of voluntariness can be found in *In re Armstead*.[62] Noting that courts should look to exogenous voluntariness, Judge Diane Weiss Sigmund determined that the creditor's efforts to get the debtor to repay obligations for furniture and carpet violated Section 524(f).[63] An interesting and troubling twist on the issue of voluntariness is found in the District Court opinion in *In re Wiley*[64] where the court found that a debtor's payments were voluntary based on imputing to the debtor knowledge in the hands of the debtor's lawyer. Since the debtor's lawyer knew the reaffirmation agreement had never been filed (indeed, it was intentionally kept by the lawyer in her own files for a significant period), her client had to know that payments under that non-filed agreement were not required; hence, if payments were being made to the creditor, they were voluntary.[65] There were at least two decisions involving third party creditors—*In re Armstead*[66] and *In re Brown*.[67] In *Brown*,[68] the Court lashed out at the claims acquirer for wilfully violating the discharge injunction and awarded sanctions (albeit small). What apparently so angered the judge was that the claims acquirer had tried, unsuccessfully, to get the debtor to reaffirm the debt; when the debtor refused to do so, the claim transferee did not give up and continued to pursue the debtor post-discharge. Two of the new cases, *In re Smith*[69] and *In re Stevens*,[70] specifically address what quantum of new consideration is needed to make a post-discharge agreement permissible and not an improper "reaffirmation" agreement. Both cases make it clear that the "new consideration" argument cannot be a way of circumventing the requirements of Section 524(c) and (d); accordingly, the effort to refinance is simply not enough—even when the lender dismissed a foreclosure action and elected not to pursue a personal deficiency against a non-filing spouse.

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62. 1997 Bankr. LEXIS 2166 (Bankr. E.D. Pa. 1997).

63. *Id.* A less debtor friendly approach was taken in *In re Bryer*, 216 B.R. 755 (Bankr. E.D. Pa. 1998) where Judge Scholl found voluntariness.

64. 224 B.R. 58 (N.D. Il. 1998).

65. The case also contains a useful discussion of class certification.

66. 1997 Bankr. LEXIS 2166 (Bankr. E.D. Pa.).

67. 220 B.R. 101 (Bankr. C.D. Ca. 1998).

68. *Supra* note 7.

69. 224 B.R. 388 (Bankr. N.D. Il. 1998).

70. 217 B.R. 757 (Bankr. N.D. Md. 1998).

While these new cases have been developing, there has not been silence on the legislative front. Although major bankruptcy legislation[71] did not make it through the just ended 105th session of Congress, it is clear that bankruptcy reform will be back on the Congressional agenda, perhaps as early as January 1999.[72] And, if the wording of the final incarnation of the legislation is any indicator of what is to come,[73] we should be very worried about how issues of post-discharge agreements and debtor education will be treated.

The proposed legislation did not specifically address the post-discharge issues involving claims acquirers. However, the legislation did create a private right of action for violations by creditors of the discharge injunction;[74] that is a significant improvement and would avoid the repeated litigation over whether a private cause of action exists. However, what the legislation gave with one hand, it took away with another. The legislation did away with all class actions for discharge violations, a proposal that would effectively eliminate one of the most powerful weapons in the consumer debtors' arsenal.[75] Indeed, this provision is so stunning in its pro-creditor orientation that one cannot help but wonder how it found its way into the legislation when it appeared in neither the House nor Senate bills[76] that served as the precursors of the House-Senate conference legislation.

Debtor education was treated in two places in the House-Senate conference legislation.[77] First, there is a reference to pilot education program to be conducted in three regions of the country

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71. Several changes to the Bankruptcy Code have been signed into law over the past several months. *See, e.g.*, Omnibus Consolidated and Emergency Supplemental Appropriations Act (HR 4328-P.L. 105-277), which provides for a six month extension of Chapter 12, retroactive to October 1, 1998; Higher Education Amendments of 1998 (HR 6-P.L. 105-244) which amends section 523(a)(8) to make student loans non-dischargeable except for undue hardship, effective October 7, 1998; Religious Liberty and Charitable Donation Protection Act of 1997 (S. 1244-P.L. 105-183) which enables a debtor to contribute a prescribed percentage of income to charitable organizations without said donations being challenged as fraudulent transfers, effective June 19, 1998.

72. *See, e.g.*, Dawn Kopecki, *"Legislation to Reform Bankruptcy Laws Goes Belly-Up in Senate,"* WASHINGTON TIMES, Oct. 15, 1998, Sec. B, p. 8; *"Attempt to Revive Bankruptcy Bill Fails,"* L.A. TIMES, Oct. 15, 1998, p.4.

73. *See* Conf. Report H. Rept. 105-794.

74. Section 116(j)(1) of H. Rept. 105-794.

75. Section 116(j)(2) of H. Rept. 105-794.

76. *See* H.R. 3150 and S.1301.

77. Sections 104 and 302 of H. Rept. 105-794.

and then evaluated.[78] This provision is virtually identical to the proposal for debtor education in H.R. 3150. While I have minor knit-picks with this proposal, mostly related to proposed timetables, the suggestion is a very good step in the right direction. However, as in the prior example, the pilot program's strength is undermined by a proposal for a mandatory debtor education program that would commence—without preparation, study or funding—immediately upon enactment of the legislation.[79] The proposed legislation specifically links completion of an education project to the bankruptcy discharge in Chapter 7 and 13; unless a financial management course were completed, a debtor could not obtain a bankruptcy discharge. This legislation is evidence of how a very good idea can go very wrong. It is simply premature to institute a mandatory nationwide debtor education program. Canada, which has a mandatory debtor education program, conducted an initial pilot study and even with that, there was a sense that the program moved from study to implementation too quickly. As drafted, the legislation is an invitation for education profiteers; there would be no opportunity to evaluate quality to insure that all debtors, wherever they live, are provided with similar financial management skills.

Taken as a whole, the proposed legislation is yet another example of how to fleece our debtors. That is not a comforting thought.

78. Section 104 of H. Rept. 105-794.
79. Section 302 of H. Rept. 105-794.