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**Making Debtor Remedies More Effective**

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## **I. Introduction**

A reference to remedies in debtor-creditor law usually conjures up images of the rights of creditors to enforce obligations when debtors default. Whether due to policymakers' interest in robust credit markets or political economy, creditors in the U.S. have considerable power to direct state actors and resources toward collecting and enforcing private debts. Nonetheless, debtor-creditor law must and does include protections for borrowers, especially consumer borrowers. Furthermore, these remedies are available even when – and often especially when – a debtor indisputably is in default.

Reform efforts have varied in their aims to alter the level of protection to defaulting debtors. Many attempts to enhance consumer debtor remedies have failed in the last two decades. Consumer protection provisions in early drafts of revised Article 9 of the Uniform Commercial Code, which governs security interests in personal property, were stripped or diluted by the time of revised Article 9's enactment.<sup>1</sup> Rejecting proposals by the National Bankruptcy Review Commission to strengthen the debt relief offered in the bankruptcy system, Congress instead reduced debtor protection in literally dozens of ways, including adding exceptions to discharge, permitting more debt collection activity, and generally raising the price of accessing bankruptcy relief.<sup>2</sup> Although rising foreclosures and the financial crisis initially renewed interest in restoring or enhancing debtor remedies, financial institutions successfully lobbied against many of these ideas. For example, to date Congress has not been able to pass amendments to the Bankruptcy Code that would permit modification of home mortgages without lender consent.

This paper is directed to those who are, in fact, interested in making debtor remedies more effective.<sup>3</sup> The thesis of this paper, which proceeds in the “law and society” tradition, is that the location of a remedial right within the debtor-creditor system substantially affects the costs and benefits of the remedy for debtors, creditors, the system, and society. In other words, merely adding specific substantive provisions does not directly translate into actual protection.<sup>4</sup> Relatedly, policymakers must recognize that lawyers and other intermediaries tend to specialize in particular kinds of debtor remedies to the exclusion of others. They have a particularly profound influence over the extent to which consumer debtors can actually obtain the relief that

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1 Janger (1997).

2 Jacoby (2005).

3 This paper does not discuss the values by which optimal remedial policy is or should be developed and does not compare and contrast various regulatory theories.

4 E.g., Whitford (1981); Sullivan, Warren & Westbrook (1994).

formal law offers.<sup>5</sup> Thus, again, the system structure or the incentives of gatekeepers may have a greater impact than addition or subtraction of substantive remedies.

This paper proceeds as follows. Part II starts by identifying the various *sources* of formal debtor remedies. These include uniform state law, non-uniform state law, and federal law, as well as privately-ordered remedies that supplement the formal remedies and are often structured in their shadow. Part II then delineates three crude categories of remedies by function: damages and specific performance, protection of future income and assets, and retention of property subject to security interests. This discussion demonstrates how functionally similar remedies are dispersed across different parts of the debtor-creditor system and associated with varying bundles of rights and obligations that may have little to do with the specific problem requiring redress. Part II dissects several challenges connected to repeat-player intermediaries associated with debtor remedies. Part III discusses policy implications. The parts, taken together, can be represented as follows in Figure 1.

Figure 1: Landscape of Debtor Remedies

Channels of production of existing formal law	Consumer lawyer sub-specialization	Functional categories of debtor remedies spread over channels of production & lawyer sub-specialization
<b>Federal</b> •Chapter 7 bankruptcy •Chapter 13 bankruptcy •Wage garnishment limit •Consumer credit/protection	•Chapter 7 lawyers •Chapter 13 lawyers •Other consumer lawyers	• Preserve assets & future income ( <i>partly bundled</i> ) •Retention of property subject to consensual security interest ( <i>mostly bundled</i> ) •Traditional litigation
<b>Local/diverse</b> •Real estate foreclosure •Property exemptions •Wage garnishment •Consumer credit/protection	•Real estate foreclosure lawyers •Other consumer lawyers	•Retention of (real) property subject to consensual security interest ( <i>limited</i> ) •Preservation of assets & future income •Traditional litigation
<b>Uniform state law</b> •Uniform Commercial Code •Restatements of Law (e.g., contract, mortgage, restitution)	•Other consumer or commercial lawyers	• Retention of property subject to consensual security interest ( <i>but limited</i> ) •Traditional litigation

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5 LoPucki (1997); Sullivan, Warren & Westbrook (1994).

## **II. The Nature of Debtor Remedies in Debtor-Creditor Law**

### **Sources of Debtor Remedies**

Debtors' remedies are spread throughout disparate legal regimes. This section considers the three primary formal law options available to consumers, as well as the private law production of remedies in the shadow of formal law.<sup>6</sup>

#### ***Federal Law***

Federal law is the source of the Bankruptcy Code that, at least on paper, provides the most generous formal system of debt relief in the world. Bankruptcy law is especially significant because its discharge of debt is used as a blunt remedy for a wide variety of debtor-creditor problems.<sup>7</sup> Although the Bankruptcy Code is best known for the discharge of unsecured debt, it contains other important debtor remedies that relate to the treatment of consensual security interests in real and personal property to be discussed later. Federal law also supplements state law in providing debtors with private rights of action for violations of consumer protection laws and in setting a floor on the proportion of wages that may be garnished.

#### ***Non-Uniform State Law***

Real estate foreclosure remains an important example of non-uniform debtor-creditor law. Although federal law is certainly relevant to housing issues and credit markets, state law continues to supply most of the baseline rights for debtors who have defaulted on their mortgages.<sup>8</sup> Some real property experts have sought greater uniformity in foreclosure law – but, thus far, unsuccessfully – through the uniform state law movement, American Law Institute Restatement projects, or federalization of foreclosure law and procedures.<sup>9</sup>

Beyond the mortgage context, non-uniform state laws protect wages from garnishment beyond a federal floor, supply consumer protection laws, and establish exemptions that shield individual debtors' property from court judgment enforcement by creditors.<sup>10</sup> The extent of the non-uniformity in property exemptions is notable: some state laws exempt unlimited value for

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6 For pressure to internationalize commercial law in the business context, see Boss (2007).

7 Whitford (1994); Kovac (1991).

8 Federal law does preempt state foreclosure law for some mortgage loans held by U.S. Department of Housing and Urban Development. Furthermore, as will be discussed, the Bankruptcy Code, a federal law, includes features that substantively should count as mortgagor protection.

9 Nelson & Whitman (2004, p. 1408).

10 State property exemptions apply in federal bankruptcy cases as well either exclusively or concurrently with federal bankruptcy exemptions. See 11 U.S.C. § 522.

certain categories of property, while others protect almost nothing,<sup>11</sup> and some states periodically update their laws with respect to both types of property and value,<sup>12</sup> while others retain rather archaic categories of property and limited sums. The interstate variations in property exemptions tend not to rationally reflect differentials in economic conditions.<sup>13</sup>

### ***Uniform State Law***

A significant portion of commercial law is implemented through the uniform law process.<sup>14</sup> The Uniform Commercial Code (UCC) is a joint product of the American Law Institute – a private organization of several thousand lawyers, judges and academics – and uniform law commissioners from each state.<sup>15</sup> Restatements of the law, also developed by the American Law Institute, are sometimes used to promote uniformity but through a different and less comprehensive channel, namely state court adoption of particular legal principles that happen to arise in discrete disputes.<sup>16</sup>

The UCC's Article 9, originally drafted in the 1950s, governs security interests in personal property in both household and business contexts. After a decade-long reform effort, all states and the District of Columbia enacted a substantially revised version of Article 9 and made it effective in 2001.<sup>17</sup> Currently, the American Law Institute is undertaking a modest technical revisions project for Article 9.<sup>18</sup>

Part 6 of Article 9 is most directly relevant to remedies. Part 6 governs the remedies a creditor may exercise against a debtor and collateral upon default as determined by contract law.<sup>19</sup> But it also protects debtors in the process and makes most debtor protections non-waivable in advance of default.<sup>20</sup>

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11 NBRC Report (1997).

12 For example, North Carolina and Delaware have recently updated and expanded the value of property exemptions for debtors. In North Carolina, a bar association successfully initiated and pursued the effort.

13 NBRC Report (1997).

14 A uniform act is a model statute designed to harmonize the law of many jurisdictions with the goal of achieving enactment by all state legislatures.

15 Janger (1998).

16 Nelson & Whitman (2004, p. 1409) (discussing state court adoption of Restatement (Third) of Property: Mortgages). Other important examples for this context include the Restatement (Second) of Contracts and the Restatement (Third) of Restitution and Unjust Enrichment that the ALI is currently considering.

17 Some experts originally sought federalization of the law of security interests of personal property rather than uniform (or non-uniform) state law. Boss (2007, pp. 352-355).

18 UCC Article 9 Review Committee, [http://www.ali.org/index.cfm?fuseaction=projects.proj\\_ip&projectid=21](http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=21).

19 E.g., UCC 9-601 (setting forth menu of creditor options upon debtor default).

20 E.g., UCC 9-602 (identifying nonwaivable protections for debtors and third parties in Part 6); 9-624 (governing post-default waivers of sale notice, mandatory disposition, and redemption rights).

### *A Note on Private Ordering*

Formal law creates the conditions under which lenders offer enhanced or restricted debtor remedies in both the beginning and in the breakdown of debtor-creditor relationships. For example, lending agreements might give borrowers rights to reinstate defaulted mortgages and to cure the arrearage.<sup>21</sup> Ex ante waivers of debtor remedies upon default are often unenforceable. Thus, lenders' efforts to contractually structure the remedial process will often be technically unenforceable.

After a debtor has defaulted, creditors might conduct loss mitigation or private workouts or consent to arrangements by credit counselors.<sup>22</sup> They also may seek post-default waivers of some debtor remedies as part of their workouts. As has been exhaustively discussed in the past two years, insufficient incentives or authority for loan servicers and concerns about cost-effectiveness have blocked or deterred a higher volume of truly private workouts.<sup>23</sup> These circumstances may shift more debtors into the consumer bankruptcy system than would otherwise be the case.

### **Types of Substantive Remedies**

The state and federal laws that regulate similar issues tend not to be integrated in any intentional way, which complicates consumers' access to appropriate relief. This next section discusses three functional categories of consumer debtor remedies.

#### *Money damages, specific performance, and related defenses to formal action*

Many federal and state statutes or common law doctrines offer relief in the form of money damages or specific performance.<sup>24</sup> Damages might be compensatory, punitive, and/or include attorneys' fees for a prevailing debtor.<sup>25</sup> As one example of statutory authorization, Article 9 of the UCC explicitly authorizes damages for a debtor if a secured creditor fails to comply with Article 9's requirements such as conducting a commercially reasonable foreclosure sale, providing

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21 Fannie Mae and Freddie Mac mortgages provide an example.

22 Lander (1999, p. 177); Jacoby (2008); Levine (2003), p. 715) (discussing how foreclosure defense lawyers who know what they are doing can resolve foreclosures without formal process).

23 Beyond the mortgage context, there has long been anecdotal evidence that many financial institutions are unwilling to do private workouts with consumers on small unsecured debts.

24 Whitford (1981, p. 1026-1041); Budnitz (2008); Gilles (2009).

25 Whitford (1981, pp.1029-1032); see also 11 U.S.C. § 523(d) (shifting fees to creditors in non-dischargeability actions in bankruptcy under some circumstances).

reasonable notice of the sale, and not breaching the peace during any self-help repossession of collateral.<sup>26</sup> Eligibility for damages arises even when the debtor's breach is undisputed.

Scholars and advocates have long recognized a variety of impediments to consumers' effective use of these kinds of remedies. Many consumers with viable claims do not seek advice from lawyers or others on pursuing such claims offensively or defensively.<sup>27</sup> Or, if they do, they wait until it is too late. Consumers have trouble getting legal representation for many consumer remedies that, in an absolute sense, represent small value disputes.<sup>28</sup> This is a problem even if a statute seeks to magnify the value of the litigation through authorizing treble damages to a victorious plaintiff or other similar means.<sup>29</sup> Although Congress and state legislatures contemplated that litigants with small claims could join forces and bring their claims collectively,<sup>30</sup> it remains difficult to obtain certification of a consumer class action.<sup>31</sup> Also, even when statutory schemes provide for fee-shifting to defendants, such incentives may not increase access to justice for consumers.<sup>32</sup> In addition, in some contexts, doctrines such as the holder in due course limit the ability to pursue a damage remedy or present a related defense to nonpayment.<sup>33</sup>

### ***Protection of general debtor assets and future income***

A variety of legal tools prevent creditors from satisfying their claims against debtors out of particular assets or future income. Examples include limits or bans on deficiency judgments in foreclosure actions,<sup>34</sup> limits or bans on wage garnishment, and property exemptions from

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26 E.g., UCC 9-625(a) ("If it is established that a secured party is not proceeding in accordance with [article 9], a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions"); 9-625(b) ("Subject to subsections . . . a personal is liable for damages in the amount of any loss caused by a failure to comply with this article. Loss caused by a failure to comply may include loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing"); 9-625(c) (providing enhanced statutory damages in consumer-goods transactions). A damage or injunctive remedy in the Article 9 regime substitutes for invalidation of a foreclosure sale that state real property law permits -- although such remedies occur rarely due to costs and barriers to foreclosure defendants actively engaging in litigation.

27 E.g., Sovern (1993, pp. 25, 83).

28 Sovern (1993, p. 85).

29 Weidemaier (2007, p.78).

30 Budnitz (2008, p. 664).

31 Gilles (2009); Weidemaier (2007, pp. 79-80) ("[C]lass certification is far from common. Class actions run counter to a strong individualist streak in American law, which demands respect for the individual litigant's right to control his or her own claim, and which, by and large, requires individualized proof of facts unique to each claimant. Because of the need for such proof, class actions seeking damages may generally be certified only where, among other things, common questions of law or fact predominate over questions affecting only individual class members. This balancing act leads courts to deny certification to many proposed consumer classes.") (footnotes omitted).

32 For discussions, see Whitford (1981); Whitford (1994); Levine (2003); Weidemaier (2007, pp.78-79).

33 As McCoy and Renuart have explained, this doctrine "shields securitized trusts from most claims and defenses to nonpayment that the borrower has against the lender based on unconscionability, breach of contract, and most types of fraud." McCoy & Renuart (2008, p. 37). McCoy and Renuart go on to explain how one qualifies for protection under this doctrine: "First, it must meet the definition of a 'holder' of a negotiable note. In addition, the trust must have taken the note: (2) for value; (3) in good faith; and (4) without notice that the note contained certain defects." Id. (2008, pp. 37-38).

34 E.g., UCC 9-626 (describing circumstances under which personal property security deficiency judgments can be limited in non-consumer transactions, and leaving deficiency judgment limitation for consumer transactions to the courts); Jacoby (2008, p. 2272)(describing state and federal laws that functionally limit deficiency judgments in real property foreclosure actions).



judgment lien enforcement. Bankruptcy law contains additional and especially important examples. Chapter 7 is the type of bankruptcy case filed by the majority of individual filers nationally. This type of bankruptcy expressly excludes a debtor's future income from the property that can be used to satisfy prior debts.<sup>35</sup> The filing of a bankruptcy case usually triggers a temporary injunction – the “automatic stay” – to protect a debtor and her property from collection attempts.<sup>36</sup> At the end of most chapter 7 cases, a discharge injunction permanently enjoins creditors' efforts to collect many prepetition personal liabilities.<sup>37</sup> The discharge enjoins collection of unsecured debt as well as of deficiency judgments stemming from foreclosure actions. Thus, in effect, even in states without anti-deficiency laws, homeowners have anti-deficiency protection if they are willing to file (and are eligible) for bankruptcy.<sup>38</sup>

Decades ago, Vern Countryman identified the discharge of debt, which functionally protects future assets and income, as the most important feature of a personal bankruptcy law,<sup>39</sup> and it remains so today. More recently, William Whitford observed the special significance of consumer bankruptcy discharge in light of the weaknesses in pursuing consumer justice through traditional litigation.<sup>40</sup>

The remedial role of the bankruptcy discharge cannot be taken for granted, however. Lawmakers have continued to limit the discharge's scope in recent years by rendering more debts nondischargeable – even private student loans and some credit card debts.<sup>41</sup> Congress also has increased the substantive and financial hurdles to filing for bankruptcy, especially chapter 7.<sup>42</sup> Even absent formal law changes that reduce the protection offered in bankruptcy, local norms in some regions steer more debtors into chapter 13 cases, which require higher fees and repayment plans, where they are less likely to receive a discharge.<sup>43</sup> Particularly where chapter 13 filings are prevalent, a substantial number of debtors do not receive the primary form of debtor protection that bankruptcy offers.<sup>44</sup> In addition, various companies engage in the bulk purchase of defaulted and discharged debts; the fact that sophisticated parties are willing to

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35 11 U.S.C. § 541(a)(6).

36 11 U.S.C. § 362(a).

37 11 U.S.C. § 524(a).

38 Jacoby (2008). If debtors want to keep property subject to a security interest, however, they will usually need to look to other remedies and tools explored in the next section.

39 Countryman (1960).

40 “It is time for consumer advocates to think of consumer bankruptcy as a primary vehicle for delivering the elusive goal of consumer justice. Bankruptcy is capable of providing real relief with respect to unsecured credit.” Whitford (1994, p. 401).

41 11 U.S.C. §§ 524(a), 523.

42 Jacoby (2005).

43 Chapter 13 generally suspends the discharge of debt pending plan completion. 11 U.S.C. 1328. Empirical research has consistently demonstrated that the majority of debtors do not complete their plans. Jacoby (2001) (reviewing studies).

44 Whitford (1994).

invest in discharged debt, even at pennies on the dollar, suggests that some efforts are being made to encourage debtors to repay legally unenforceable financial obligations after their bankruptcy cases are over. Although holders of these claims have been sanctioned in the past when such abuses have come to light, it is likely that most violations of the discharge injunction go unreported.

### ***Retention of property subject to a security interest***

The asset protection remedies described above have a far more limited direct effect on consensual secured creditors, including for personal property such as automobiles. Thus, for example, property exemptions do not bar consensual creditors from reaching asset value. Similarly, a debtor who wishes to keep encumbered property after bankruptcy over the objection of a lender cannot merely rely on the discharge of personal liability to facilitate this arrangement.

Tools to retain collateral subject to a security interest are of considerable interest to many consumer debtors, but also to policymakers who are concerned about the broader impact of the loss of homeownership or other property rights. The following discussion divides the tools into several categories.

### ***Redemption of property.***

A baseline protection of all foreclosure law is to permit debtors in default to redeem collateral prior to a foreclosure sale by paying the debt plus a lender's costs in a lump sum. This pre-foreclosure redemption right is available for both real property and personal property.<sup>45</sup> Some states permit post-sale redemption of real property, and sometimes for the price fetched at the foreclosure sale. Article 9, applicable to personal property security interests, contains no parallel right, which increases the finality of those dispositions.

For personal property only, bankruptcy law sets a lower price for lump sum redemption.<sup>46</sup> Specifically, the price is the value of the collateral rather than the amount of the debt plus costs. For debtors who can find financing or can liquidate exempt assets,<sup>47</sup> the bankruptcy redemption right is advantageous for undersecured property. However, bankruptcy redemption's value must be assessed in the context of the full costs of a chapter 7 case. Costs include participating in, and

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<sup>45</sup> Jacoby (2008) (discussing real property); UCC 9-623 (providing pre-disposition redemption right for personal property).

<sup>46</sup> 11 U.S.C. § 722.

<sup>47</sup> Some lenders offer redemption funding. See Warren & Westbrook (2009); [http://www.722redemption.com/auto\\_dealer.aspx](http://www.722redemption.com/auto_dealer.aspx); <http://www.freshstartloans.com/fslc/home.asp>.

paying for, a now-mandatory credit counseling briefing before bankruptcy;<sup>48</sup> participating in and paying for a financial management course, which is now an express condition to discharge for individuals in all chapters;<sup>49</sup> a filing fee of nearly \$300 unless a debtor is eligible for a fee waiver; attorneys' fees;<sup>50</sup> and a decline in creditworthiness.

### *De-accelerate, cure, and reinstate mortgages.*

Some laws permit borrowers to retain property if they cure the arrears and pay associated legal costs and fees, notwithstanding lender objections and contract terms.<sup>51</sup> State laws that offer reinstatement generally require lump sum payment of the debt in arrears plus costs. Examples of states with such laws include California, Illinois, New Jersey, Ohio, Oregon, and Washington.<sup>52</sup> Given that these laws require debtors to cure their arrearages in a lump sum, taking advantage of this right is a challenge for financially strapped households.<sup>53</sup>

Chapter 13 of the Bankruptcy Code offers an alternative cure and reinstatement right for long-term secured debts.<sup>54</sup> It holds appeal for financially struggling homeowners because it permits them to cure the arrearage in installments over several years. Recall, by contrast, that state laws require a lump sum. Private law mitigation programs sometimes permit only several months.<sup>55</sup> The debtor must file for bankruptcy to initiate this process before the property has been sold at a foreclosure sale conducted in accordance with applicable non-bankruptcy law.<sup>56</sup> The debtor's repayment plan must propose to cure the arrearages within a "reasonable time" – a term not defined by the Bankruptcy Code, but in any event less than the repayment plan period.<sup>57</sup>

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48 11 U.S.C. § 109.

49 E.g., 11 U.S.C. § 727.

50 General Accountability Office (2008).

51 As noted earlier, some contracts expressly provide for a post-acceleration cure right. See *supra* note 21.

52 Jacoby (2008).

53 LoPucki & Warren (2009). For a study of the use of this right in Cook County, Illinois, see Stark (1997).

54 11 U.S.C. § 1322(b)(2), (5).

55 Jacoby (2007). Proponents of the use of bankruptcy for installment curing of mortgages have not shown empirically that this substantially improves home retention outcomes in the longer-term. *Id.* at 338.

56 11 U.S.C. § 1322(c). For example, bankruptcy judges in North Carolina have interpreted this provision to mean when the sale process is complete and not the date on which the auction is held. Gibson & Jacoby (2008); *In re Barham*, 193 B.R. 229 (Bankr. E.D.N.C. 1996) (in case filed five days after foreclosure sale took place, concluding property has not been officially sold under North Carolina law until the end of the ten-day upset bid period for deeds of trust as provided in N.C. Gen. Stat. § 45-21.27); *In re Dillard*, 2000 WL 33673760 (Bankr. M.D.N.C. Aug. 22, 2000); *In re Wellington*, 2000 WL 33673782 (Bankr. M.D.N.C. Nov. 7, 2000).

57 11 U.S.C. § 1322(b)(5). Courts have considered a variety of factors to determine whether a proposed period is reasonable. See, e.g., *In re Hence*, 358 B.R. 294, 301-305 (Bankr. S.D. Tex. 2006) (reviewing case law, finding that majority of courts have used flexible case-by-case approach, including consideration of whether cure length represented debtor's best efforts in light of income and circumstances, and have approved terms that range from six months to five years), *aff'd*, 2007 WL 1176787 (S.D. Tex. Apr. 20, 2007), *aff'd*, 2007 WL 3252139 (5th Cir. Nov. 5, 2007); *Campbell v. Countrywide Home Loan, Inc.*, 361 B.R. 831, 846-47 (Bankr. S.D. Tex. 2007) (reviewing case law on what constitutes reasonable time for cure); *In re Ferguson*, 376 B.R. 109, 129 (Bankr. E.D. Pa. 2007) (in context of stay extension request hearing, rejecting lender's contention that curing over full duration of plan was per se unreasonable length of time). One complexity on this duration point is whether a provision from the 2005 Bankruptcy Code amendments requires that secured debt payments be in equal monthly installments through the life of the plan, see 11 U.S.C. §

The exact amount required to cure (and whether it includes attorneys' fees, charges, and interest) depends on applicable non-bankruptcy law and the mortgage contract.<sup>58</sup> This context sometimes becomes a forum for exposing and confronting problems with mortgage origination, servicing and third party interventions.<sup>59</sup>

Debtors who wish to avail themselves of this cure and reinstatement right must be prepared to invest substantial sums in the bankruptcy process overall. Because reinstatement is not available in chapter 7,<sup>60</sup> the debtor must pursue a repayment plan chapter of the Bankruptcy Code. The chapter 13 filing fee is slightly lower than for chapter 7, but chapter 13 debtors' attorney fees are significantly higher – usually several thousand dollars. Many debtors pay substantial portions of those fees through the plan itself, which may make the process appear more feasible at the outset. In addition to the other costs mentioned earlier for a credit counseling briefing and financial education, the debtor's payments must include a trustee's fee (for example, between 6 and 7.5% in North Carolina).<sup>61</sup> The debtor also must commit 100% of her disposable income to repayment of all debts for three to five years.<sup>62</sup> In other words, a debtor who seeks to cure in installments without lender consent may be required to make significant payments beyond the mortgage and related costs.

### ***Secured loan modification.***

Bankruptcy law also permits debtors to make more significant modifications to debts secured by personal property collateral over lenders' objections.<sup>63</sup> A chapter 13 payment plan can reduce the secured debt to the value of the collateral, require the debtor to pay that value with interest, and treat the remainder of the obligation as an unsecured claim that will be paid pro rata with other holders of unsecured claims. In other words, secured loan modification can function as

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1325(a)(5)(B)(iii)(I), but it is likely that this provision either will be interpreted more flexibly or will not frequently be invoked regarding arrearage claims on long term debt.

58 See 11 U.S.C. § 1322(c); *In re Thompson*, 372 B.R. 860 (Bankr. S.D. Ohio 2007). Particularly if the chapter 13 follows many foreclosure attempts over a long period of time, the attorneys' fees and costs that often must be part of the cure under 11 U.S.C. § 1322(e) can equal or even exceed the actual mortgage arrearage. See, e.g., *Gagne v. Countrywide Home Loans, Inc.* (In re *Gagne*), -- B.R.--, 2007 WL 4173492, at \*4 (Bankr. D. N.H. Nov. 21, 2007) (in case involving five foreclosure attempts and a prior bankruptcy case, escrow shortage and attorneys fees and costs exceeded amount of seventeen missed monthly payments).

59 United States Trustee Report (2008, pp.16-18) (reporting on litigation involving mortgage servicer abuse and fraudulent foreclosure rescue operators).

60 The bankruptcy discharge does not affect in rem rights against collateral. Thus, chapter 7 debtors who are delinquent on a home mortgages or car loans need to make arrangements with lenders or they likely will lose the property. Debtors can sign binding "reaffirmation" agreements to retain personal liability on these debts if lenders so agree.

61 Gibson & Jacoby (2008).

62 Since 2005, the method of calculation of disposable income has been dependent on the debtor's income level. A formula is used for higher income debtors, and a more traditional discretionary test is used for lower income debtors.

63 11 U.S.C. § 1325(a)(5).

installment redemption. The same cost caveats apply as above. For example, filers must commit substantial additional funds to the bankruptcy in order to obtain this modification right.

Bankruptcy law limits the scope of this right – often referred to as stripdown or cramdown – in several respects. In 2005, Congress further restricted debtors’ ability to restructure debts secured by cars or other personal property incurred relatively soon before the bankruptcy filing.<sup>64</sup> Filers may not modify home mortgages on principal residences. This means that under current law, it often is not possible to strike prepayment penalties, propose an alteration to the interest rate, change the amortization schedule, or strip an undersecured mortgage debt to the value of the home over the objection of a lender.<sup>65</sup> The 2005 amendments expanded the circumstances under which a home mortgage and security interests in mobile homes are unmodifiable in chapter 13.<sup>66</sup>

Some exceptions to these rules do remain even after the 2005 amendments. Individuals who meet the statutory definition of “family farmer” may modify mortgages under chapter 12 of the Bankruptcy Code.<sup>67</sup> Loans can be modified if they are secured by real property that is not the debtor’s principal residence, or if the loan is secured by a variety of collateral not limited to the home or property incidental to the home.<sup>68</sup> Also, most courts interpret the Bankruptcy Code to permit modification of a mortgage for which the last payment becomes due during the life of the plan.<sup>69</sup> Finally, some courts hold that second mortgages may be treated as unsecured (and thus need not be paid in full to retain the property) if first priority mortgages entirely consume the value of the collateral.<sup>70</sup> As a foreclosure management effort, members of Congress have attempted to expand the circumstances under which at least high-risk mortgages may be modified in chapter 13.<sup>71</sup>

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64 11 U.S.C. § 1325(a).

65 11 U.S.C. § 1322(b)(2); *In re Litton*, 330 F.3d 636, 640, 643 (4th Cir. 2003).

66 11 U.S.C. § 101(13A).

67 11 U.S.C. § 1222(a)(5), (b)(9).

68 11 U.S.C. §§ 101(13A), 1322(b)(2).

69 *American General Finance, Inc. v. Paschen* (*In re Paschen*), 296 F.3d 1203 (11th Cir. 2002) (interpreting 11 U.S.C. § 1322(c)(2)); but see *Witt v. United Co. Lending Corp.*, 508 F.3d 508 (4th Cir. 1997) (reaching different, and minority, interpretation).

70 *In re Kidd*, 161 B.R. 769 (E.D.N.C. Bankr. 1993); *Collier on Bankruptcy* ¶ 1322.06 (15th Ed. Rev. 2006) (collecting cases in favor of this interpretation); *In re Bartee*, 212 F.3d 717, 288-289 (5th Cir. 2000) (collecting cases going both ways).

71 H.R. 200, *Helping Families Save their Homes in Bankruptcy Act of 2009* (111th Cong. 2009); Senate Bill 3690, *Homeowners Assistance and Taxpayer Protection Act* (110th Cong. 2008); H.R. 7328, *Homeowners’ Protection Act of 2008* (110th Cong. 2008); H.R. 3609 *The Emergency Home Ownership and Mortgage Equity Protection Act of 2007* (110th Cong. 2007).

### ***“Avoidance” of mortgages or security interests.***

Home or other property retention is also occasionally accomplished through lien avoidance powers. For example, a trustee in bankruptcy steps into the shoes of a hypothetical bona fide purchaser and may seek to strip a mortgage off of property if a bona fide purchaser would have had rights superior to those of the mortgagee.<sup>72</sup> Generally, this power is used to police compliance with state law formalities for “perfecting” security interests and mortgages that maximize creditor protection.<sup>73</sup> Alternatively, a trustee may seek to avoid a mortgage as a preferential transfer of an interest in the debtor’s property.<sup>74</sup> Preference law allows the bankruptcy trustee to recover a transfer of an interest in the debtor’s property to a creditor within ninety days before the filing of a bankruptcy petition if other statutory requirements are met.<sup>75</sup> Even a mortgage granted outside of the ninety-day preference period may be deemed an avoidable transfer if the lender failed to record the mortgage in the real property records within thirty days after the mortgage is granted.<sup>76</sup>

Notably, avoidance rights depend on significant lender mistakes or omissions. Needs of the debtor or misbehavior of the creditor are not relevant to the legal analysis. Also, the power to pursue lien avoidance in consumer cases generally lies with the trustee rather than the debtor and her lawyer.

### **Intermediaries, Repeat Players, and Access to Remedies**

In the 1970s, law professor Stewart Macaulay set out to study Wisconsin lawyers’ use of the Magnuson-Moss Warranty Act. A federal law enacted in 1975, Magnuson-Moss had been widely touted in the national news media as a boon for consumer protection. Macaulay’s project

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72 11 U.S.C. § 544(a)(3).

73 See, e.g., *Gregory v. Ocwen Fed. Bank (In re Biggs)*, 377 F.3d 515 (6th Cir. 2004) (upholding avoidance of deed of trust due to defective acknowledgment under Tennessee law); *In re Cocanougher*, -- B.R. --, 2007 WL 3355491 (6th Cir. BAP Nov. 14, 2007) (under Kentucky law, upholding avoidance of mortgage now owned by CitiFinancial).

74 11 U.S.C. § 547.

75 11 U.S.C. § 547(b). Additionally, the transfer must be of an interest in property to or for the benefit of a creditor, on account of an antecedent debt, made while the debtor was insolvent, which improves the position of the creditor. The preference period is one year for “insiders.” 11 U.S.C. § 547(b).

76 11 U.S.C. § 547(e)(2). Essentially, if the mortgage was not recorded before the bankruptcy or was recorded more than thirty days after the actual transfer, the rule characterizes the timing of the transaction as follows: the debtor incurred the debt upon disbursement of the loan, but is deemed to have later made a transfer of the mortgage on account of the debt. In a recent case, a debtor granted Wells Fargo a mortgage on his home in May 2003, but the mortgage was never recorded in the real property records. When the debtor later filed a chapter 7 petition in 2005, he listed Wells Fargo as a secured creditor, allowing Wells Fargo to retain and eventually sell the mortgage. The trustee subsequently discovered that the mortgage was unrecorded and filed suit to avoid the mortgage transfer as preferential. The court held that the transfer was deemed to have occurred immediately before the filing of the petition since it was not recorded, and thus could be avoided as a transfer that took place within the preference period, and ordered Wells Fargo to pay the bankruptcy estate. *Wells Fargo Home Mortgage, Inc. v. Lindquist*, 2010 WL 58946 (8th Cir. 2010). See also *In re Lazarus*, 478 F.3d 12 (1st Cir. 2007) (trustee avoided mortgage refinancing transaction deemed to have occurred at time of recording, within preference period).

quickly had to shift gears, however, once he discovered that “most lawyers in Wisconsin knew next to nothing about the Magnuson-Moss Warranty Act – many had never heard of it.”<sup>77</sup> Some lawyers knew little about *any* consumer protection laws. Even those who did largely were familiar with a single state law that addressed debt collection and financing consumer transactions, and, even then, did not always have specific knowledge of such laws.<sup>78</sup> On the question of consumer protection, Macaulay concludes: “if awareness of a more empirically accurate view of legal practice is not developed, reformers are likely to go on creating individual rights which have little chance of being vindicated, and, as a result, they may fail to achieve their ends repeatedly.”<sup>79</sup> This story is emblematic of persistent challenges in facilitating access to consumer debtor remedies. Macaulay’s study has been a model for researchers seeking to understand the delivery of legal services to overindebted families.<sup>80</sup>

The challenges connected to access and the role of intermediaries take several interrelated forms.

### ***Complexity and the Need for Intermediaries***

Some debtors access remedies *pro se*. But the dispersed structure and substance of remedies make navigation quite difficult without assistance. Furthermore, lawmakers’ fears of debtor moral hazard has led to them to reject proposals to simplify remedies and instead to add more restrictions, eligibility requirements, paperwork and twists and turns over time, particularly to bankruptcy law. Such changes further reduce the feasibility of accessing remedies without representation.

### ***Real and constructed limitations on qualified intermediaries***

Due to the use of consumer credit counseling, non-lawyers play a somewhat greater role regarding debtor remedies than in other fields of law that affect consumers.<sup>81</sup> Still, the legal profession has incentives to limit the extent to which non-lawyers independently assist consumers with financial problems.<sup>82</sup> At the same time, most legal work is not directed toward

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77 Macaulay (1979, p.118).

78 Such lawyers nonetheless had a variety of practical techniques for dealing with consumer complaints even though they were not familiar with the relevant formal laws’ details. Macaulay (1979, pp.118, 130) (discussing practical limits to the development of expertise in various components of consumer protection).

79 Macaulay (1979, p.161).

80 Braucher (1993).

81 Lander (1999). Non-lawyers also are employed by lawyers to screen debtors and have them fill out forms. Mund (1994).

82 Rhode (2004, p. 405). For small-claims courts that do not permit consumers to be legally represented, see Weidemaier (2007, p. 79).

representing families of modest means in debtor-related disputes.<sup>83</sup> Although circumstances vary, civil legal aid providers may have limited capacity to pursue debtor remedies even though they aim to serve low-income individuals overall.<sup>84</sup> Consistent with Macaulay's earlier observation of Wisconsin lawyers, the legal bar does not actively serve the individualized pursuit of consumer debtor remedies at affordable prices.<sup>85</sup>

### *Narrow specialization among consumer lawyers*

Lawyers who practice some kind of consumer law often specialize. Those who practice debtor-side consumer bankruptcy comprise one of the biggest and most developed consumer bars in the country (although, as explained later, even this group can be subdivided into more specific specialties).<sup>86</sup> As another prominent example, some lawyers specialize in foreclosure defense.<sup>87</sup> The lawyers who do each type of work are probably not spread in a geographically even fashion, with bankruptcy lawyers likely to cluster around the limited locations of federal bankruptcy courts.<sup>88</sup>

Bankruptcy lawyers may not be uniformly up to speed on alternatives; this may affect how they advise their clients.<sup>89</sup> Debtors have important choices to make even within the bankruptcy system, such as deciding what chapter to file. Legal scholars long have questioned whether bankruptcy lawyers are helping debtors make educated decisions about chapter selection.<sup>90</sup> Some studies suggest that factors other than consumers' best interests affect which chapter of bankruptcy they file.<sup>91</sup> Coupling empirical studies of consumer bankruptcy filers with interviews with repeat players in the consumer bankruptcy system, Sullivan, Warren and Westbrook found that chapter 7-13 ratios and variation of intra-jurisdictional filing rates cannot

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83 Rhode (2004, pp. 373, 397) (discussing unmet legal needs of poor and middle class).

84 Abel (1984, pp. 604, 622) (reporting that family law "represents as much as ninety percent of the work of private practitioners under judicare schemes, and even in staffed offices it frequently is the single largest topic. This is neither surprising nor likely to change."); see also Kovac (1991, pp. 749-50, 756) (noting absence of legal aid lawyers from debtor representation in her study of judgment proof filers in Tennessee, and encourage rethinking of legal aid reticence).

85 Sovern (1993, p. 85) (discussing economic impediments to lawyers developing expertise in consumer cases).

86 Whitford (1994, p. 400). Consumer debtor lawyers tend to be a distinct group from business bankruptcy lawyers. LoPucki (1989, p. 308); Ramsay (2000) (discussing studies of U.S. lawyers more generally).

87 Levine (2003, p. 608).

88 LoPucki (1989, pp. 299) ("Nearly every American lives within about 20 miles of a state court of general jurisdiction. But there is a bankruptcy clerk's office in only 165 American cities. Bankruptcy judges ride circuit to an additional 204 cities and towns. This still leaves many parts of the United States 50 to 100 miles from the nearest place where bankruptcy court meets. Not surprisingly, the offices of bankruptcy lawyers are heavily concentrated in the 369 cities where the bankruptcy court meets.")

89 Neustadter (1986, p. 233) (finding that even lawyers who offered more of a client-centered model did not give substantial attention to bankruptcy alternatives).

90 Individuals are potentially eligible for four types of relief under the U.S. Bankruptcy Code: chapters 7 ("liquidation"), 11 ("reorganization"), 12 ("family farmer or fisherman with regular income") and 13 ("individual with regular income"). Chapters 7 and 13 are, by far, the two most prominent choices for filers dealing with consumer debt problems, with wide variations in the ratio by geographical location, and the majority of filings each year nationally are under chapter 7.

91 Braucher (1997 p. 173); Braucher (1993, p. 581); Neustadter (1986, p. 229).



be explained by formal legal or economic factors.<sup>92</sup> They attribute some of these patterns to local legal culture.<sup>93</sup> They conclude that local legal culture “exercises a pervasive, systematic influence on the operation of the bankruptcy system in ways unanticipated by lawmakers or academic researchers.”<sup>94</sup> Although lawyers interact directly with debtors,<sup>95</sup> other “repeat players” such as judges, locally represented creditors, and case trustees also help to shape filing decisions.<sup>96</sup> These findings have led Whitford to observe that chapter choice within the bankruptcy system presents a new consumer protection challenge even as the bankruptcy system fills other consumer protection gaps.<sup>97</sup> The challenge is heightened by the fact that, as previously mentioned, most chapter 13 filers do not complete their plans and thus are unlikely to receive a discharge of debt.

Jean Braucher studied consumer bankruptcy lawyers and likewise concluded that lawyers played a significant role in steering debtors toward repayment plans.<sup>98</sup> Gary Neustadter observed a “product model” of lawyering, in which lawyers primarily “sold” chapter 7s, chapter 13 repayment plans, and only occasionally both.<sup>99</sup> Iain Ramsay observed a similar phenomenon with private “trustees” in Canada.<sup>100</sup> Lawyer Susan Kovac, who conducted an empirical study of “judgment-proof” bankruptcy filers in Tennessee, attributed some use of bankruptcy to the limits of other consumer protections and remedies, but also expressed concern that debtors were not being adequately counseled by lawyers; some in Kovac’s sample might have been getting little economic benefit from bankruptcy relative to its costs.<sup>101</sup>

Far less has been written about the foreclosure defense bar. According to one senior foreclosure defense lawyer in Chicago, a “competent foreclosure defense lawyer must know the entire Federal statutory framework, [Truth in Lending Act, Real Estate Settlement Procedures Act, Home Ownership and Equity Protection Act, Equal Credit Opportunity Act, Community

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92 See generally Sullivan, Warren and Westbrook (1994, p. 811, p.836).

93 Sullivan, Warren and Westbrook define local legal culture as “systematic and persistent variations in local legal practices as a consequence of a complex of perceptions and expectations shared by many practitioners and officials in a particular locality, and differing in identifiable ways from the practices, perceptions, and expectations existing in other localities subject to the same or a similar formal legal regime.” Sullivan, Warren and Westbrook (1994, p.804).

94 Sullivan, Warren and Westbrook (1994, p. 806).

95 Sullivan, Warren and Westbrook (1994, pp. 840, 848, 850) (finding subspecialization of consumer bankruptcy lawyers, including some that did predominantly chapter 13 repayment plans).

96 Sullivan, Warren & Westbrook (1994, pp. 844, 853).

97 Whitford (1994, p. 403).

98 Braucher (1997 p. 173); Braucher (1993, p. 581).

99 Neustadter (1986, p. 232).

100 Ramsay (2000, p. 422) (quoting Canadian trustee saying that they are a “destination vendor rather than a mall. People don’t [come] here because they are wandering around”); id. at 434 (discussing limited role of trustees in giving debtors comparative advice on straight bankruptcy and payment plan “consumer proposals”).

101 Kovac (1991, p. 679-82).

Reinvestment Act,] common law claims and defenses, and that lawyer must have the ability to raise and respond to motions to dismiss, motions for summary judgment and other pleadings including counterclaims, affirmative defense, as well as know the Rules of Evidence and trial procedure.”<sup>102</sup> This lawyer does not include knowledge of bankruptcy on the list even though bankruptcy law contains some of the most potent home retention and deficiency judgment tools.

### ***Consumer debtor representation as a volume business***

Relatedly, legal representation of average-sized consumer debt matters is profitable primarily if handled on a volume basis, hence the discussion of class actions earlier.<sup>103</sup> In the context of remedies that cannot be aggregated formally, such as personal bankruptcy filings, lawyers find other ways to routinize the process and spend minimal time on each case.<sup>104</sup> Some consumer bankruptcy lawyers rely heavily on paralegals for intake work and preparation for filing a case. It is not uncommon for a consumer bankruptcy lawyer to file a case before meeting the client.<sup>105</sup> This translates into relatively little in-depth counseling. It also leads lawyers to avoid legal disputes that would help the client, if successful, but require additional preparation and time in court.<sup>106</sup> For example, a lawyer might encourage a consumer debtor to settle a creditor’s weak allegation that a credit card debt is non-dischargeable. The typical settlement results in the debtor remaining liable on the debt, significantly reducing the debtor’s benefits of having filed for bankruptcy in the first place.

### **III. Assessment and Policy Implications**

Improving debtor remedies is not as simple as identifying discrete enhancements to substantive law. Even if lawmakers were to enact more debtor remedies tomorrow, the level of effectiveness would depend on the placement of remedies within the broader debtor-creditor

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<sup>102</sup> Levine (2003, p. 608).

<sup>103</sup> See supra text associated with notes 24-32.

<sup>104</sup> Whitford (1994, p. 400). In the context of tort “settlement mills,” which also are not formally aggregated, Engstrom writes that “it is assumed that claims will be straightforward. Standardized and routinized procedures are then designed and employed in keeping with that assumption. Efficiency trumps process and quality. Important tasks (such as client screening and, sometimes, actual settlement negotiations) are delegated to non-lawyers. Factual investigations are short-circuited or skipped altogether.” Engstrom (2009, p. 1493).

<sup>105</sup> Mund (1994, p. 338). In such a situation, they probably will first meet at a mandatory post-filing meeting with the case trustee (known as a “341 meeting” after the Bankruptcy Code section that requires it).

<sup>106</sup> Whitford (1994, p. 406). Most chapter 7 consumer bankruptcy cases involve no court appearances at all. Chapter 13 cases require court confirmation of the payment plan. Also, a hearing is involved when chapter 13 plans fail and the automatic stay is lifted or the case is dismissed or converted.

system and the complexity of that system, which in turn affects the role of intermediaries and other people who shape access to and results from the system on an ongoing basis.<sup>107</sup>

A contextual assessment of existing remedies reveals that heavily utilized approaches such as bankruptcy often serve as blunt instruments when more tailored tools are either absent or functionally inaccessible.<sup>108</sup> Chapter 7 is used as a mortgage anti-deficiency law, or a broader wage garnishment restriction,<sup>109</sup> when otherwise applicable laws are insufficiently protective. Chapter 13 has served as a mortgagor protection law, although Congress did not necessarily intend this result, and has combined the mortgagor protection function with unrelated burdens and benefits.<sup>110</sup>

Whitford has reminded readers that “recognition of the practicality of the consumer bankruptcy remedy should not lessen the energy with which we search for other paths to consumer justice, paths that point more directly and exclusively at the merchant-customer transaction that is in dispute.”<sup>111</sup> His point is particularly well taken when bankruptcy becomes more expensive but less effective. Policymakers should consider exporting some of bankruptcy’s tools unrelated to the discharge into other more narrowly tailored schemes. For example, some of federal bankruptcy law’s mortgagor protection rights could be imported into state real property law. Specifically, legal regimes other than chapter 13 could offer mortgage reinstatement rights on an installment basis, enabling a debtor fighting foreclosure to address a mortgage problem directly without invoking the larger apparatus of bankruptcy. A task force in Connecticut included this idea in its 2007 report, albeit without detail or an analysis of the potential legal challenges.<sup>112</sup> As of the initial drafting of this paper, no state has gone so far as to

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107“Year after year, in the law reviews and in the legislatures, most proposals for law reform rest on the premise that a change in formal rules will be sufficient to produce a change in actual practices, through coercion or through a system of incentives and disincentives.” Sullivan, Warren & Westbrook (1994, p.803). “Local legal culture is not just dust in the national legal machine. In fact, it may be a significant element of the legal landscape. Failure to account for it causes policy debates as well as legal reforms to fall wide of their marks.” Sullivan, Warren & Westbrook (1994, p. 865).

108 Whitford (1994, pp. 398-399); Whitford (1981). Beyond bankruptcy, Pettit observed in the early 1980s how debtors and their lawyers use credit disclosure laws primarily as strategic defenses in debt collection actions. Pettit (1981, p. 260-261) (noting practice but that “Congress and the state legislatures did not intend the disclosure statutes to be used primarily for the routine defense of debt collection actions.”); id at 284 (noting desirability of using defenses that include statutory attorneys’ fees for prevailing debtor). He warned that changes to credit disclosure laws to better protect lenders will leave debtors without sufficient debt collection protection because “the right to raise claims effectively in collection actions constitutes the only line of defense for those who fall through the cracks of the consumer protection system.” Pettit (1981, p. 295).

109 Kovac has argued that some use of bankruptcy comes from insufficient income and asset protection through other laws, such as state laws on garnishment. Although her analysis is not universally embraced, her assessment suggests that bankruptcy usage could be decreased by more targeted protection of income from consumer creditors. Kovac (1991, p. 678); Neustadter (1986, p. 250).

110 Jacoby (2007).

111 Whitford (1994, p. 417).

112 Connecticut Sub-Prime Mortgage Task Force (2007, p. 32).

implement such an installment reinstatement right.<sup>113</sup> However, various foreclosure task forces and consumer advocates have recommended the addition of post-acceleration cure and reinstatement rights, and some additional states have codified these recommendations in the wake of the foreclosure crisis.<sup>114</sup> Recent proposals also encourage states to adopt or improve laws that require mortgage holders to provide homeowners with plain language notice of their state law rights to cure and reinstate.<sup>115</sup> Policymakers might give similar thought to whether those using bankruptcy for anti-deficiency protection would be better served by targeted deficiency restrictions in state foreclosure law.<sup>116</sup>

Ensuring the delivery of adequate services to consumers by lawyers and others may require an additional shift in focus. Rather than requiring that lawyers give clients written notice of alternatives to educate clients,<sup>117</sup> policymakers should focus on how to educate the *lawyers* and other intermediaries and, indeed, to “sell” legal changes to these constituencies.<sup>118</sup>

Although this discussion is not meant to preclude the addition of substantive remedies, simplification or reorganization of the existing consumer debtor remedies, coupled with incentivizing lawyers, might be even more beneficial than adding new remedies to the current structure.<sup>119</sup> Simplification might reduce the need for lawyers and the attendant costs,<sup>120</sup> or at least facilitate comparative advice-giving by lawyers who currently do not find it cost effective to remain up to speed on multiple remedial approaches today.

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113 A preliminary search of the relevant legal scholarship, foreclosure task force reports, and policy recommendations of advocacy groups revealed no significant discussions or proposals of a similar nature. An update on the work of the Connecticut Sub-Prime Mortgage Task Force as of 2008 did not mention the previous proposal. Connecticut Sub-Prime Mortgage Task Force (2008).

114 See, e.g., Maryland Homeownership Preservation Task Force, Final Report 39 (2007); Md. Code Ann., Real Property § 7-105.1(h)(1) (2008) (creating a right to cure and reinstate up to one business day before the foreclosure sale). Massachusetts Mortgage Summit Working Groups, Report: Recommended Solutions to Prevent Foreclosure and to Ensure Massachusetts Consumers Maintain the Dream of Homeownership 17 (2007); Mass. Gen. Laws ch. 244 § 35A (2007) (establishing 90-day right to cure and bring current upon receipt of Notice of Default).

115 See Rao & Walsh (2009, pp. 25-29) (asserting the need for meaningful notice to borrowers of state rights to cure and reinstate and describing some related statutes).

116 Although some may not want to make deficiency avoidance any easier for debtors, these concerns need to be counterbalanced with other factors. Such suggestions are often met with the objection that this will raise the cost of credit, but the recent crisis has made especially clear the need to balance credit access issues against a host of other individual and social values. Jacoby (2008); Jacoby (forthcoming 2010).

117 11 U.S.C. § 322 (enacted by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 357) (providing that a lawyer will file a declaration or affidavit stating that she has informed the relief available under both chapters 7 and 13. Recent amendments conditioning bankruptcy eligibility on a credit counseling briefing can be understood as having a similar thrust.

118 Sullivan, Warren & Westbrook (1994, pp. 858,859);Whitford (1994, pp. 398-399) (“Perhaps educational seminars to promote change should become a more standard feature of legal reform”); Kovac (1991, p. 754) (“We believe that amending the Bankruptcy Code to add non-bankruptcy solutions to the options that must be explained to consumer debtors would probably not produce a significant reduction in the personal bankruptcy rate.”); Ramsay (2000, p. 419) (“Most trustees would indicate to consumers their rights in relation to collection practices but only a minority seemed interested in actively providing a consumer with material on how to address harassment.”); Lander (1999, p. 189) (recognizing that likelihood of proper sorting between bankruptcy and credit counseling depends on the availability of legal counsel that is both “competent and affordable.”).

119 Rhode (2004).

120 Ramsay (2000, p. 438) (“If it is difficult to find neutral intermediaries for the delivery of bankruptcy services then one possible solution is greater simplification and routinization and the use of bright line rules which reduces the need for intermediaries.”)

## **Conclusion**

Enhancing protection is not merely a matter of increasing the number of substantive rights in statute books. The placement of rights within different components of the system – which affects whether debtors are easily aware of the rights, how the rights are bundled, and which intermediaries serve as gatekeepers – greatly determines whether debtor remedies are largely a symbolic gesture or a meaningful way to both provide ex post relief to debtors and, for that matter, an ex ante curb on lender behavior. Although the bankruptcy system presents an expeditious forum for debtor remedies due to its established structure, policymakers should consider whether debtors should be channeled into all of the obligations and benefits of bankruptcy to deal with a narrower debt problem. Overall, absent more reflection about ways in which to actually deliver protections, the books will fill with more laws but debtors will continue to struggle.

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