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Veryl Victoria Miles

The Catholic University of America, Columbus School of Law

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Fairness, Responsibility, and Efficiency in the Bankruptcy Discharge: Are the Commission’s Recommendations Enough?

Veryl Victoria Miles*

I. Introduction

The expectant companion to any national study or report calling for review and recommendations for change to federal law is a nation-wide critique and commentary of the merits of such a report. This progression of study and reflection of legal reform may be arduous at times, but is nevertheless an important part of the process for a thorough and thoughtful discussion of the opinions of all interested parties engaged in the debate it will foster. Accordingly, the following is intended to provide a modest offering to this process of review.

It is the report of the National Bankruptcy Review Commission1 that is the subject of this commentary. Although the report engages a wide range of issues concerning bankruptcy law and

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* Associate Dean of Academic Affairs and Professor of Law, The Columbus School of Law of The Catholic University of America. The author would like to express her appreciation of the Dickinson Law Review for providing the opportunity to participate in their law review symposium, “National Bankruptcy Review Commission Report: A Commentary on the Proposed Changes.” Special thanks also goes to Mr. Matthew R. Moetzinger of the Columbus School of Law, class of 1998, for his research and editorial assistance.

1. The National Bankruptcy Review Commission was created under the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4107 (1994), and was assigned the task “to investigate and study issues and problems relating to title 11, United States Code” (commonly known as the “Bankruptcy Code”) and to provide “proposals and current arrangements” to addresses the identified issues and problems. Id. at 4147. The membership of the commission included: Brady C. Williamson, serving as the Chairman; Judge Robert E. Ginsberg, serving as the Vice Chairman; Jay Alix; M. Caldwell Butler; Babette A. Ceccotti; John A. Gose; Jeffery J. Hartley; Judge Edith Jones; and James I. Shepard. The Commission’s report was submitted to Congress on October 20, 1997. See BANKRUPTCY: THE NEXT TWENTY YEARS, NATIONAL BANKRUPTCY REVIEW COMMISSION, FINAL REPORT (Oct. 20, 1997) [hereinafter COMMISSION REPORT].
procedure, this paper is limited to the Commission's findings on the
treatment of consumer bankruptcy discharge under the Bankruptcy
Code. In fact, the Commission went so far as to describe its study
as providing the "single most concentrated national dialogue on
consumer bankruptcy in history." It must be noted that this dialogue on consumer bankruptcy
was contentious at times and resulted in several dissenting reports
filed by and on behalf of the participating commissioners. Moreover, it appears that the commissioners were very divided on
the recommendations concerning consumer bankruptcy as a whole,
with the votes approving the recommendations reflecting a very
small majority of five to four. Accordingly, in order to present a
full appreciation of the different views of the commissioners on the
consumer bankruptcy discharge, this paper will include references
to the dissenting views expressed by Judge Edith H. Jones, James
I. Shepard, and John A. Gose where relevant. These views are
striking and worth sharing because of the different perspectives
they provide and the concerns that are raised about the Commis-
sion Report recommendations. An additional factor that appears
to have had an impact on the consumer discharge portion of the
Commissions Report was a memorandum submitted by Judges
Samuel Bufford and Eugene Wedoff and Professors Margaret

2. See COMMISSION REPORT, supra note 1, at 179-231, 287-90 (reporting Chapter 1
recommendations for consumer bankruptcy).
3. Id. at 78.
4. A Dissenting Report submitted by several commissioners stated:
Largely created by the reporter, the report contains many interpretations and
characterizations which often do not reflect the Commission's work. The report,
for instance, does not reveal that the Commission never voted to endorse any
theory for the increase in consumer bankruptcy filings and, in fac [sic], split five
to four on most consumer recommendations; or that meaningful debate on many
significant issues was very limited or nonexistent—the "Consumer Framework"
was presented as a "take-it-or-leave-it" package, with no opportunity to identify
discrete problems and proposed solutions.
Id. ch. 5, at 2 (containing the Individual Commissioner Views, Dissent from the Process of
Writing the Commission's Report, submitted by John A. Gose, Edith H. Jones, and James I.
Shepard); see also id. at vi, 95 (listing references to the 5 to 4 vote on the consumer
bankruptcy recommendations).
5. Chapter 5 of the Commission Report is comprised of the individual commissioner's
views. Judge Jones and Commissioner Shepard offer the most thorough set of comments and
criticisms of that portion of the report addressing the bankruptcy discharge. See id. ch. 5, at
50-74 (Individual Commissioner Views, Additional Dissent to Recommendations for Reform
of Consumer Bankruptcy Law) [hereinafter Dissenting Commissioners].
Howard and Jeffrey Morris ("The Bufford Group"). This memorandum was prepared at the request of the Commission Reporter, Professor Elizabeth Warren, and was offered to help facilitate the Commission's discussion of discharge. Several of the recommendations offered by The Bufford Group parallel the recommendations of the Commission, although the suggested changes made by The Bufford Group are far more extensive than those found in the Commission Report.

II. The Commission: Mission and Objectives

The Commission Report immediately begins with a statement of what has happened in the world of bankruptcy since the enactment of the Bankruptcy Code in 1978. It reminds its audience that the Code, as enacted, was faithfully premised on the fundamental principles of its predecessor, the Bankruptcy Act of 1898. That is, it was designed to provide "fair treatment of creditors" in the bankruptcy process and to provide the honest debtor with a "fresh start" after he or she emerges from the

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6. See COMMISSION REPORT, supra note 1, at appendix G.1.c. (Memorandum, May 30, 1997, To: National Bankruptcy Review Commission, From: Judge Samuel L. Bufford, Professor Margaret Howard, Professor Jeffrey W. Morris, and Judge Eugene R. Wedoff; Re: Discharge and Dischargeability in Consumer Bankruptcy) [hereinafter Bufford Group Memorandum].

7. The introduction of the Bufford Group Memorandum provides:

   At the request of Professor Elizabeth Warren, we have reviewed various materials and discussed among ourselves many of the issues regarding dischargeability of debt in consumer bankruptcies, with the aim of presenting to the Commission a set of recommendations that can form the basis for discussion of this topic. After presenting an initial draft of recommendations to the Commission, we prepared the following revised discussion paper, reflecting various ideas raised at the Commission meeting.

Bufford Group Memorandum, supra note 6, at 1.

8. The Bufford Group studied the "overall structure of dischargeability" including: each of the eighteen categories of nondischargeable debts under section 523(a), as well as subparagraphs (b), (c), (d), and (e) of section 523; several clarifications to section 727; the superdischarge of chapter 13 as provided under section 1328(a); and Chapter 13 unsecured debt eligibility limits under section 109(e). See id.


bankruptcy system: a system where the burden of financial calamity is to be shared by debtors and creditors fairly and with balance.11

However, the Commission noted that, since 1978, the bankruptcy system has become the subject of great concern as it has experienced an increase in the number of consumer bankruptcies that is seven times the number in 1978.12 The Commission reported that bankruptcy "has become a part of the changing world of consumer credit."13 Yet, with a very strong economy, with both low inflation rates and low percentages of unemployment, there is grave concern about the seemingly ready use of bankruptcy relief by consumers.14 Does this phenomenon reflect abuse by a society of individuals that shows little pause in avoiding their obligations?15 Is this phenomenon reflective of a more pervasive problem that requires an in-depth and critical look at the kind of debt structure Americans have allowed themselves to be drawn into—that is, the ready availability of consumer credit—whereby "[n]on-mortgage consumer debt, from all sources, stands at $1.7 trillion?"16 And so the question that was invariably raised in the debate about this extraordinary increase in consumer bankruptcy filings is, "Who is responsible?" The Commission quickly noted that it must be borne by both creditors and debtors because there is enough blame to be shared by all.17

The Commission Report provided an analysis of the reason for increased consumer bankruptcy.18 The report indicated that the increase in consumer bankruptcy filings is not a question of increasing numbers of debtors in the system trying to take advantage of it with the purpose to avoid paying their financial

11. See COMMISSION REPORT, supra note 1, at i.-ii. The legislative history of the Bankruptcy Reform Act clearly reflects the basic goal of bankruptcy law:
   The overall objectives of [the Reform Act legislation] are to make bankruptcy procedures more efficient, to balance more equitably the interest of different creditors, to give greater recognition to the interest of the assets of the debtor's estate, and to give the debtor a less encumbered "fresh start" after bankruptcy.
12. See COMMISSION REPORT, supra note 1, at ii.
13. Id. at 77.
14. See id. at ii; see also id. at 84.
15. Cf. id. at 82-86.
16. Id. at ii.
17. See COMMISSION REPORT, supra note 1, at 82.
18. See id. at iv. But see supra note 4 and accompanying text (noting lack of consensus view among Commission members on causes for recent rise in consumer bankruptcy filings).
obligations. According to the report, "statistical evidence suggests that consumers who file for bankruptcy today, as a group, are experiencing a financial crisis similar to the crisis faced by families when filing rates were only a fraction of their present levels." The statistics used in the Commission Report showed that debtors in 1997 had income, assets, and debt ratios similar to the debtors twenty years ago when filings were significantly less. Therefore, it concluded that the system is not used largely by well off debtors trying to abuse it. Most of the debtors "come to bankruptcy courts as they have for many years—seeking relief from debts they have virtually no hope of repaying."

The Commission asked the question, "Why are so many Americans in financial trouble?" It noted the answer is difficult—the problems that lead to bankruptcy vary in terms of the unanticipated calamities, increased financial burdens, and "the increase in consumer credit." According to the Report, between 1977 and 1997 this country experienced a seven hundred percent increase in consumer debt. Thus, based on a variety of sources of data, the Commission Report concluded that consumer bankruptcy is largely due to high levels of consumer credit indebtedness.

The Commission Report described its overall goal to recommend changes to the law that will "improve the integrity, the accountability and efficiency [of our bankruptcy] system." The system must be fair. Critical to the achievement of fairness of

19. See COMMISSION REPORT, supra note 1, at 82.
20. Id.
21. See id. at 83.
22. Id.
23. Id. at 84.
24. COMMISSION REPORT, supra note 1, at 84-87.
25. See id. at 84.
26. The Commission Report stated:
   A number of factors may influence the decision to file bankruptcy, and changing attitudes undoubtedly affect a family's decision to seek legal help in the face of financial distress. As more families amass overwhelming debts, attitudes toward bankruptcy well may change. A debtor working two jobs to recover from a period of unemployment and facing a foreclosure may decide that bankruptcy is not as onerous as the alternatives. But the empirical studies seem to indicate that the sharp rises in consumer bankruptcy—27% last year alone—may be more a function of a changing debt picture than of a sudden willingness to take advantage of the bankruptcy system.
   Id. at 87.
27. Id. at i.
course is balance: that is, balance between the debtor’s obtaining a “fresh start;” the need to pay the debtor’s obligations to creditors; and the need for balance between competing creditors. The Commission intends for its recommendations to provide a means of achieving a bankruptcy system that has more incentives for individuals to avoid bankruptcy; or, in cases where bankruptcy becomes a necessary form of relief, the system available will enable debtors to “repay more of their debts to more of these creditors.” However, the audience is cautioned that the Commission’s mandate from Congress was to leave the basic tenets of the Code “intact,” because of Congress’ general satisfaction “with the basic framework established in the current Bankruptcy Code.” Accordingly, what the Commission provides are a set of recommendations that do not include any “radical or architectural change[s]” to existing bankruptcy law and procedure.

III. Discharge, Exceptions to Discharge, and Objections to Discharge: Are the Commission’s Recommendations Enough?

The Commission’s goal to improve “integrity, accountability and efficiency” in the system and to provide for a system that is balanced should raise the question whether this can be achieved without some radical changes or, at the least, a set of bolder recommendations than the Commission made in its report. This is an appropriate question when one considers the importance of the concept of discharge in bankruptcy and the way that it has evolved since the enactment of the Code in 1978.

As the Commission looked back on what has happened within the bankruptcy system during the last twenty years since the enactment of the Bankruptcy Code, it is also worth noting that the list of debts excepted from discharge under section 523(a) grew from nine to eighteen by 1997. This is quite remarkable given

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28. See id.
29. COMMISSION REPORT, supra note 1, at iii.
30. Id. at iv.
31. Id.
32. It is important to note that in the preface of the Commission Report, comments by Senator Charles E. Grassley were described reflecting his view that the Commission should be “bold” and “adventuresome” in its work. See id. at v.
33. This fact was recognized by the Commission:

When the Bankruptcy Code initially was enacted, section 523 contained a short list of exceptions for certain types of wrongdoing, such as fraud, defalcation,
the fact that the number of debts excepted from discharge under the Bankruptcy Act of 1898 was limited to eight categories of debts and would only be increased by one with the enactment of the Bankruptcy Code in 1978.34

What did this remarkable growth in nondischargeable debt categories signify? What was this growing list of nondischargeable debts in response to, and how did this growth support the basic goals and tenets of bankruptcy relief? What did the growing list of debts indicate in terms of a trend that was being created and the tone it set? What impact did this have on the integrity, accountability, and efficiency of the bankruptcy system? How did this increase in the categories of nondischargeable debts support the notion of fairness and balance in the bankruptcy system?

and intentional torts. The list of exceptions has grown to nearly twenty, in addition to those exceptions contained in other portions of the United States Code. Some of these exceptions provide overlapping grounds for dischargeability and are the result of special interest amendments. While the Commission did not whittle down the list to its original form, as some commentators have advocated, the Commission recommends certain specific clarifications and amendments to enhance fairness to all parties and to alleviate litigation, confusion and nonuniformity.

Id. at 180 (reporting on exceptions to discharge in consumer bankruptcy).

34. As originally enacted, the Bankruptcy Act of 1898 included four categories of debts that were excepted from discharge. These categories were expanded several times, and, by the 1970s, there were eight categories of debts that were deemed nondischargeable. These categories of debts were the following: (1) taxes; (2) liabilities for obtaining money or property through false pretenses or false representations or false written statements regarding one’s financial condition, or liabilities for willful conversion of the property of another; (3) liabilities that were not scheduled to allow a creditor to make a timely proof of claim; (4) liabilities based on a debtor’s fraud, embezzlement, misappropriation, or defalcation as a fiduciary; (5) unpaid wages due an employee; (6) wages retained by an employer to secure an employee’s promise of faithful performance of the terms of an employment contract; (7) alimony, child support or liabilities for the seduction of an unmarried female, or for breach of promise of marriage, or criminal conversion; and (8) liabilities for willful and malicious injury to person or property of another other than conversion. See § 17(a), 30 Stat. 544 (1898).

The nondischargeable debts enacted under the Bankruptcy Reform Act of 1979 included nine exceptions to discharge; the categories were similar to those under the Bankruptcy Act with some variation. These categories included: (1) taxes; (2) money or property obtained through false pretenses, false representation or actual fraud, or false written statements; (3) unscheduled debts that prevented a creditor from filing a timely proof of claim; (4) debts for fraud, embezzlement, or defalcation by a fiduciary; (5) alimony and child support; (6) debts for willful and malicious injury to the person or property of another; (7) noncompensatory fines, penalties, or forfeitures for the benefit of a governmental unit; and (8) guaranteed student loans. See Bankruptcy Reform Act of 1978, 11 U.S.C. § 523(a) (1978).
As originally promulgated, the debts excepted from discharge under the Bankruptcy Act of 1898 were primarily limited to debts that support the moral and societal obligations one owed to society and to the primary institutions most critical to the welfare of a healthy society. Some examples were: obligations owed to the state through the payment of taxes and obligations a debtor owed to another due to the debtor's dishonesty or wrongful conduct.\(^{35}\) In 1903, the categories for nondischargeable debts were expanded to include alimony and child support.\(^ {36}\) In order to support the fresh start doctrine, the exceptions to discharge are to be applied narrowly and construed in favor of the debtor with the burden of proof falling on the objecting creditor.\(^ {37}\)

What happened under the Code between 1978 and 1997 was the expansion of excepted debts that included categories no longer representative of debts solely characteristic of culpable conduct by the debtor, necessary for the preservation of the public welfare, or representative of compelling moral duties a debtor owed to a particular claimant. Instead, many of these obligations were owed to special interest groups that found a Congress receptive to their appeals for exceptions to discharge. These debts were often justified as being excepted from discharge with less compelling characterizations of culpable conduct and public policy concerns than the original categories of nondischargeable debts; or, the debts were ones that were incurred as a result of culpable conduct.

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35. *See supra* note 34 and accompanying text. The basic policy objective behind nondischargeable debts under section 523(a) is aptly described in a contemporary treatise and reflects the original objectives of the nondischargeable debt under the Bankruptcy Act of 1898:

[The two bases of policy upon which exceptions of section 523 of the Code appear to be founded are: (1) that the debtor should not be relieved of his financial responsibility to those who have a high moral claim upon him due to their dependence upon him or their weak bargaining position in relation to him or perhaps both; and (2) that the relief of discharge is intended for the honest and thus certain debts created by the debtor's unlawful or oppressive conduct should remain his obligation.]  


36. Liabilities for the seduction of an unmarried female and criminal conversion also were included in the 1903 amendments to the Bankruptcy Act. *See* § 17(a)(2), 30 Stat. at 544 (amended by Act of Feb. 5, 1903, Pub. L. No. 57-62, 32 Stat. 797 (1903)). For a brief legislative history of nondischargeable debts, see 4 Collier on Bankruptcy § 523 (15th ed. 1996).

covered under the original exceptions to discharge that required proof of common law notions of fraud, misrepresentation, and willful and intentional behavior.

Examples of how the nondischargeable debt categories expanded to include debts where no culpable conduct is required, and where compelling public policy concerns are not apparent, include sections 523(a)(2)(C), 523(a)(14) and 523(a)(16).\(^{38}\) Section 523(a)(2)(C), supported by banking and retail industry associations, was added to section 523(a)(2) in 1984 to make cash advances and credit card purchases of luxury goods for one thousand dollars or more, incurred by a debtor within sixty days of filing a petition in bankruptcy, *presumptively* nondischargeable.\(^{39}\) Under section 523(a)(14), cash advances and credit card debts incurred by a debtor to pay federal income taxes that would have been nondischargeable under section 523(a)(1) also are nondischargeable.\(^{40}\) Both of these provisions offer protection to the credit card industry and involve no proof of intentional wrongdoing by the debtor who

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39. Section 523(a)(2)(C) provides:

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

*Id.* § 523(a)(2)(C) (emphasis added).

This provision was first added to the Code pursuant to the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353 (1984). It was subsequently, amended under the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 306, 108 Stat. 4107 (1994), to expand the period for nondischargeability from 40 to 60 days and to increase the amounts from $500 to $1000. The interest groups supporting the addition of this provision included the American Bankers Association, the Consumer Bankers Association, and the American Retail Federation. *See Oversight Hearings on Personal Bankruptcy: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 97th Cong. 812-26 (1981-1982) (statements of A. Thomas Small, American Bankers Association and the Consumer Bankers Association and Robert D. Ranck, the American Retail Federation).*

40. Section 523(a)(14) provides that debts "incurred to pay a tax to the United States that would be nondischargeable pursuant to paragraph (1) [section 523(a)(1)]" are nondischargeable. This provision was added to the Code pursuant to the Bankruptcy Reform Act of 1994. *See § 221, 108 Stat. at 4107.*
incurred the obligation.\textsuperscript{41} Moreover, there are no compelling public policy concerns addressed by these provisions. While it is suggested that section 523(a)(14) "facilitates" the payment of federal taxes through the availability of credit cards, this is only incidental to the provision's main purpose which is to protect the interest of the credit card industry. Similarly, section 523(a)(16) makes all pre-petition condominium association fees or assessments that become due post-petition nondischargeable without any requirement that the claimant show wrongful conduct by the debtor and void of any compelling public policy considerations.\textsuperscript{42}

Examples of provisions added to section 523(a) that were lobbied for by special interest groups and were covered by original provisions of 523(a) to address the wrongful conduct by a debtor are sections 523(a)(9), 523(a)(11) and (12).\textsuperscript{43} Section 523(a)(9), which was heavily lobbied for by Mothers Against Drunk Driving, was added to the Code in 1984 to make debts incurred by a debtor while legally intoxicated in the operation of a motor vehicle to be nondischargeable.\textsuperscript{44} Prior to the enactment of this provision,

\begin{itemize}
\item \textsuperscript{41} The credit card industry supported this legislation, including testimony submitted in favor of the provision from MasterCard and VISA. \textit{See Bankruptcy Reform: Hearing Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary, 103d Cong. 520, 523-25 (1994) (statements of MasterCard International, Inc. and VISA U.S.A. Inc.).}
\item \textsuperscript{42} Section 523(a)(16) provides for the following to be nondischargeable:
[A] fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a dwelling unit that has condominium ownership or in a share of a cooperative housing corporation, but only if such fee or assessment is payable for a period during which—
\begin{enumerate}
\item the debtor physically occupied a dwelling unit in the condominium or cooperative project; or
\item the debtor rented the dwelling unit to a tenant and received payments from the for such period.
\end{enumerate}
11 U.S.C. § 523(a)(16). This provision was added to the Code pursuant the Bankruptcy Reform Act of 1994. \textit{See § 309, 108 Stat. at 4107. It was opposed by the National Association of Consumer Bankruptcy Attorneys for the same reasons expressed above: NACBA opposed this provision. Historically, nondischargeability of debts has been limited to wrongful conduct by the debtor or protection of important governmental interests. Expansion of nondischargeability to include condominium fees is a major change in bankruptcy policy to benefit a special interest group. This change will erode the "fresh start" concept in bankruptcy. Bankruptcy Reform, supra note 41 (statement of the NACBA).}
\item \textsuperscript{43} 11 U.S.C. § 523(a)(9), (11), (12).
\item \textsuperscript{44} Section 523(a)(9) provides that a debt incurred "for death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance" will be deemed
many of these debts were found nondischargeable under section 523(a)(6) as indebtedness resulting from the willful and malicious injury of another or the property of another by the debtor.45 Sections 523(a)(11) and (12) were added to the Code in 1990 to make debt judgments against the debtor due to fraud, defalcation, or malicious or reckless conduct for operating a failed financial institution as a fiduciary nondischargeable.46 This kind of liability could have been appropriately covered under section 523(a)(2), (4) or (6) which addresses the liabilities against a debtor due to the non-

45. Prior to the addition of section 523(a)(9) to the Code, the nondischargeability of debts owed to another due to injuries caused by a debtor's operation of a motor vehicle while intoxicated was determined under section 523(a)(6). In such cases the creditor had to satisfy the burden of proving the debtor engaged in "willful and malicious" conduct. The creditors' success in such actions varied depending on how the courts interpreted the "willful and malicious" requirement. In some courts, creditors need to prove the debtor actually intended to injure the claimant; in other courts, the creditor only needed to show the debtor intended to engage in the conduct that caused the injury. Section 523(a)(9) was added to eliminate this burden of proving "willful and malicious" conduct. For a discussion of the evolution of section 523(a)(9), see Veryl V. Miles, Interpreting the Nondischargeability of Drunk Driving Debts Under Section 523(a)(9) of the Bankruptcy Code: A Case of Judicial Legislation, 49 MD. L. REV. 156, 162-63 (1990).

46. Sections 523(a)(11) and (12) provide for the nondischargeability of a debt:

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

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

debtor's fraudulent conduct, embezzlement, or willful and malicious injury. This provision found its support and promotion coming from the banking regulatory agencies that prosecuted officers and directors of failed financial institutions.\textsuperscript{47}

The growth in the excepted debts reflects an ever expanding wedge separating groups of creditors and disrupts the concept of balance in the Code's treatment of claims between creditors. Moreover, the integrity of the system becomes more susceptible to question as the exceptions from discharge reflect preferential treatment of special groups of creditors as opposed to a set of exceptions designed to preserve moral and societal norms. This expansion of the categories of nondischargeable debts also has an impact on the efficiency of discharge, as the courts become increasingly burdened by having to hear more adversary claims by creditors as categories of nondischargeable debts increased, not to mention the confusion and perplexities caused by overlapping provisions and the invariable need to find distinctions between them. In essence, section 523(a) becomes a forum for special interests, becomes increasingly distanced from the original objectives and goals that nondischargeable debts were designed to address, and becomes more removed from the principles of fairness and balance that bankruptcy law was intended to embody.

As noted above, the Commission was encouraged to be "bold" and even "adventuresome" in its mission to enhance balance and to restore integrity to the bankruptcy system.\textsuperscript{48} One might reasonably expect that a complete overhaul of the discharge provisions, along the magnitude of those offered by The Bufford Group, would be necessary to fully achieve the Commission's mission and to rectify the adverse impact of twenty years of "special interest law" that is so characteristic of many post-1978 amendments to section 523(a). While it is unlikely that there would ever be a complete repeal of all of the "special interest" nondischargeable debts under section 523(a), such a move would be in accord with the Commission's mission. It would also reflect

\textsuperscript{47} See 136 CONG. REC. 13,288, 13,289 (1990); see also Federal Efforts to Combat Fraud, Abuse, and Misconduct in the Nation's S & L's and Banks and to Implement the Criminal and Civil Enforcement Provisions of FIRREA: Hearings Before the Commerce, Consumer, and Monetary Affairs Subcomm. of the House Comm. on Government Operations, 101st Cong. 135-36 (1990) (statements of the FDIC and Resolution Trust Corporation).

\textsuperscript{48} See supra note 34 and accompanying text (examining the original discharge exceptions).
a return to equity and justice in bankruptcy law relief, and provide a remedy that considers the common good of the community of creditors and claimants affected by one individual's bankruptcy, a kind of law that cannot exist in tandem with selected "special interest" provisions. The Commission Report recommendations are not so all encompassing. There are proposed changes to selected provisions of section 523(a), several clarifications to sections 523(c) and 727, and a recommendation that the super discharge under section 1328(a) of Chapter 13 remain unchanged. Yet, when one considers the volume of disagreement and debate regarding the "abuse of bankruptcy discharge" and the controversy that the staggering rise in consumer bankruptcy filings has precipitated, the changes actually recommended by the Commission are quite courageous.

Accordingly, this commentary will consider the most controversial recommendations of the Commission report concerning discharge. In considering the individual recommendations the discussion will include a description of (1) the recommendation; (2) the Commissions' justification for the recommendation; (3) comments of the Dissenting Commissioners in response to the Commissions’ Recommendations;49 (4) any similar or dissimilar recommendations made by The Bufford Group;50 (5) assess the

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49. As noted, Commissioners Edith H. Jones and James I. Shepard provided a dissenting document that was included in the Commission Report Appendix specifically addressing the discharge recommendations. See supra note 5 and accompanying text. In this dissent, the changes recommended by the Commission were viewed as "reveal[ing] a noticeable shift in the present balance of law to a decidedly anti-creditor position" and that, while the changes work toward achieving uniformity in standards applied, the cost of doing this is too great "to creditors and to society as a whole." Because of the controversy surrounding many of the consumer bankruptcy recommendations, it is important to include discussion of these dissenting views. See Dissenting Commissioners, supra note 5, at 50.

50. The Bufford Group offered a more comprehensive set of suggested changes to the discharge provisions of the Code. This set of proposed changes was made on the premise that "exceptions to discharge should not be enacted if they deal only with discrete types of claims faced by specific creditors and lack sufficient justification in fundamental bankruptcy policy.” In taking this approach they focused their recommendations on limiting the nondischargeability of debts to those involving culpable conduct and debts that have a societal benefit. Again, it is this approach that confronts the discharge concerns directly in addressing the growing problem of preferential treatment of creditors whose debts are no more compelling than other creditors and the adverse impact that increasing numbers of nondischargeable debts have on the discharge of the honest but unfortunate debtor. These recommendations were provided as a framework for the Commission's discussion of discharge at the request of the Commission Reporter, Professor Elizabeth Warren. Accordingly, this will provide additional insight to many of the recommendations made by the Commission and are included in the discussion of this paper. See generally Bufford
extent to which the Commission goals to achieve integrity, accountability, efficiency, fairness, and balance in the bankruptcy system can be realized through its recommendations. In addition, because legislative proposals concerning Bankruptcy Code revision have surfaced since the Commission began work and subsequent to its completion, such proposals will be compared and analyzed to the extent that they relate to questions concerning bankruptcy discharge.51

IV. Credit Card Debts

The first recommendation of the Commission concerning nondischargeable debts goes to the most critical issue facing consumer debtors and the bankruptcy system, and that involves the nondischargeability of credit card indebtedness. This recommendation provides:

Except for credit card debts that are excepted from discharge under section 523(a)(2)(B) (for materially false written statements respecting the debtor’s financial condition) and section 523(a)(14), (debts incurred to pay nondischargeable taxes to the United States), debts incurred on a credit card issued to the debtor that did not exceed the debtor’s credit limit should be dischargeable unless they were incurred within 30 days before the order for relief under title 11.52

This recommendation essentially makes all credit card debts dischargeable to the extent they do not exceed the maximum credit card dollar limits and were incurred at least thirty days before the filing of the petition in bankruptcy. The nondischargeability of credit card debt would include cases (1) where the creditor is able to offer proof that the debt should be nondischargeable based on false written statements regarding the debtor’s financial condition under section 523(a)(2)(B) (i.e., false statements made in the credit card application); (2) where the debt was incurred to pay nondischargeable federal taxes pursuant to section 523(a)(14); (3) where the debt exceeds the dollar limits of the credit agreement with


52. COMMISSION REPORT, supra note 1, at 180.
proof of fraud or false representations under section 523(a)(2)(A); or (4) where the debt was incurred within thirty days of the filing of the petition in bankruptcy.\textsuperscript{53} The effect of this recommendation is twofold: (1) it repeals the use of 523(a)(2)(C), which makes credit card debts presumptively nondischargeable if the debts exceeded one thousand dollars, were incurred within sixty days of the petition, and were for the purchase of luxury goods and services; and (2) it virtually eliminates the use of section 523(a)(2)-(A) in dealing with credit card debt purchases where a showing of fraud and intentional misrepresentation by the debtor is required, as well as proof of justifiable reliance by the creditor on such representations.\textsuperscript{54}

The Commission describes its justifications for each recommendation throughout the report. With respect to this recommendation, it was the inconsistent application of section 523(a)(2)(A) as a means of determining the nondischargeability of credit card debts by the courts that was the primary justification for its proposal. Section 523(a)(2)(A) requires proof of fraud by the debtor when the debt was incurred.\textsuperscript{55} In a majority of the credit card debt cases decided under section 523(a)(2)(A), engagement in actual fraud was difficult to prove. Thus, many determinations of nondischargeability under this provision were based on evidence that did not show actual fraud.\textsuperscript{56}

In discussing the problems of section 523(a)(2)(A) in determining the nondischargeability of credit card debts, it was noted that bankruptcy courts have identified creditor abuse in using this

\textsuperscript{53} See id. at 182.

\textsuperscript{54} See id.

\textsuperscript{55} Section 523(a)(2)(A) provides that the following type of debt is nondischargeable:

\[ (A) \text{false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition} \ldots \]


provision by filing complaints for determinations under section 523(a)(2)(A) that were often followed by settlements and/or reaffirmations.\(^\text{57}\) It has been the view of the courts that these creditors have alleged fraud, and debtors responded by settling or reaffirming the debts because of their inability to defend such actions due to limited resources to pay for continued legal counsel.\(^\text{58}\) The courts have expressed “concern and outrage about these practices” and the failure of creditors to investigate the facts to support their actions.\(^\text{59}\) The resulting response in some bankruptcy districts has been (1) the creation of local rules that require “hearings in settlements for pro se debtors and [to] impose standards parallel to the reaffirmation requirements”; and (2) to use section 523(d)\(^\text{60}\) to provide debtors a means for successful challenges to nondischargeability claims (however, this has been used with mixed success due to the requirement under section 523(d) that the creditor action is found not to be substantially justified).\(^\text{61}\)

Accordingly, the Commission recommended its thirty-day “bright-line test” to enhance efficiency and certainty in the determination of dischargeability of credit card indebtedness. It was argued that this test also would reduce litigation by creditors and protect debtors who cannot afford a defense from being prey to creditor threats. The benefits the Commission identified in this

\(^{57}\) See COMMISSION REPORT, supra note 1, at 191-92.

\(^{58}\) See id.

\(^{59}\) Id. at 192.

\(^{60}\) Section 523(d) provides the following remedy to debtors successful in challenging claims of nondischargeability under section 523(a)(2):

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


It is important to note that the Consumer Bankruptcy Reform Act of 1997, S. 1301, 105th Cong. § 202 (1997), includes a proposed amendment to section 523(d) that will allow debtors who are successful in challenging a nondischargeability determination under section 523(a)(2) to receive attorney’s fees and costs. This represents a change that will benefit debtors because they will no longer be required to show the creditor’s claim was “not substantially justified” before receiving an award of attorney’s fees and costs. Moreover, under this proposed amendment, the debtor could receive damages in addition to attorney’s fees and costs if the debtor is able to establish that the creditor’s claim was not substantially justified.

\(^{61}\) See COMMISSION REPORT, supra note 1, at 192-93.
test are that it is less harsh than the debtor having to settle nondischargeability actions that are not meritorious; and it avoids the uncertainties of a 523(a)(2)(A).  

While the recommendation would achieve uniformity through a significant reduction in the use of 523(a)(2)(A) and avoid the disparate standards of section 523(a)(2)(A) application in determining the nondischargeability of credit card indebtedness—and a "bright-line test" is more likely to be efficient and reduce nondischargeability of credit card debt litigation—it raises other concerns and leaves several matters unresolved. It does not address the availability of discharge of the credit card debt incurred by the honest debtor who happens to make credit card charges within the thirty-day period before the filing of the bankruptcy petition. Moreover, the recommendation is a continuation of preferential treatment of the credit card industry over other creditors in that it makes such debts incurred within the thirty-day period absolutely nondischargeable without regard to the debtor's conduct.

The bright-line test also does not specifically impose or require any responsibility on the part of the lender to monitor or be accountable for the amount of credit available to a debtor who clearly is a credit risk. While there has been great discussion

62. See id. at 190-94.
63. In its discussion of the 30-day bright line test, the Commission recognized this weakness:

The Proposal reflects the view that 30 days is the outside edge for the length of time that this inference may be supported. Every day that the nondischargeability period is extended, it becomes less probable that the debts were incurred in contemplation of bankruptcy and increasingly difficult to rationalize the preferential treatment of credit card debts over other unsecured debts. A 60-day lookback period would have to be presumptive, which would provoke the same litigation problems facing the current system. Even with a 30-day rule, some debtors who have used their credit cards within the month before bankruptcy will not have done so in contemplation of bankruptcy . . . . Excepting debts from discharge based on bright line tests, such as the recommended 30 days, does not isolate only those debts incurred with ill-intent. Therefore, this approach arguably conflicts with discharge policy.

Id. at 195.
64. The Commission Report noted this limitation in the recommendation:

This Proposal does not affirmatively disrupt credit granting practices; unlike the approaches taken by some courts, it does not condition creditors' relief on the rigor of their initial scrutiny of borrowers. However, as a consequence of the Proposal's design, the bankruptcy system would not provide an additional safeguard for all improvident lending decisions that lenders might have addressed themselves. As such, while credit card lenders would receive preferential treatment over other creditors for the last 30 days of credit extended before
about the need to educate debtors to be more responsible about consumer debt, there also needs to be some requirement of creditor accountability in this area.\textsuperscript{65} The question needs to be addressed as to who should bear the risk of loss of these debts in bankruptcy, and, more to the point, who is in the best position to avoid the loss? Although the thirty-day rule would have the effect of making virtually all credit card debts incurred prior to the thirty days before the filing of the bankruptcy petition nondischargeable and, thus, be an incentive to the credit card industry to exercise greater scrutiny in their lending practices, the explicit imposition of some standard of care on the part of the credit card industry should be included in any amendment to the Code given the significance of this kind of consumer debt in the rise of consumer bankruptcy filings.

An obvious shortcoming with respect to this recommendation is the fact that debtors would be able to manipulate this provision by delaying their bankruptcy filings for thirty days after the debtor's last use of the credit card.\textsuperscript{66} Is this thirty-day bright-line test just another opportunity for temptation of the debtor to manipulate the rules and exploit the obvious loophole in this recommendation?

The Commission acknowledged many of the concerns raised above.\textsuperscript{67} However, these concerns should not be dismissed. Bankruptcy law does not need another provision that presents blatant opportunity for debtor manipulation. Moreover, the current trend of credit availability needs to be controlled in a bankruptcy, the preference would not extend further to the creditors's earlier lending decisions.

\textit{Id.}

65. \textit{See id. at Appendix G.3 (entitled “Debtor Counseling”).}

66. The Commission acknowledged:

[A] bright-line nondischargeability rule might be perceived as too permissive towards sophisticated debtors who carefully plan the timing of their bankruptcy filings. An individual who can wait 30 days to file will avert the potential nondischargeable status of these debts. To put this consequence in perspective, however, that month's worth of credit debt merely would be treated like all other unsecured debts. Credit card lenders are in a superior position to expand or limit their risks when they determine their standards for lending unsecured debt. Bankruptcy cannot guarantee across the board protection against losses for one type of creditor after the fact.

\textbf{COMMISSION REPORT, supra} note 1, at 196.

manner increasing the burden on creditors and their credit granting practices.\textsuperscript{68} While the merits of the bright-line test seem to be a solution to reducing the use of section 523(a)(2)(A) and the potential for litigation of the nondischargeability of credit card debts by creditors, the concerns that would remain with the Commission's recommendations need to be addressed. In fact, both the comments and alternative recommendations of the Dissenting Commissioners and the Bufford Group offer some responses to these concerns that merit consideration if legislation addressing the nondischargeability of credit card debt is to be considered by Congress.

The Dissenting Commissioners raised several concerns about the thirty-day bright-line test. While they agreed that section 523(a)(2)(A) is not an appropriate vehicle to address credit card fraud use, they did not think that the Commission's report identified the problem it was "trying to remedy."\textsuperscript{69} The "bright-line test" was described as (1) an arbitrary rule and "totally disingenuous" because it does not account for the "honest but unfortunate debtor;" (2) presenting opportunity for abuse and manipulation by debtors; and (3) encouraging a decrease in extensions of credit to marginal borrowers, that is, while the provision is "debtor-friendly, . . . it is in no way consumer-friendly."\textsuperscript{70} The alternative recommended by the Dissenting Commissioners was that (1) the time period for nondischargeability determination be extended to cover indebtedness incurred within sixty days prior to the filing of the petition; (2) the credit card debt

\textsuperscript{68} The Commission Report included a discussion of "Free Market Solution" to the consumer bankruptcy dilemma which noted that:
Independent economists have been almost uniform in their conclusions that changes to the bankruptcy laws by themselves do little to change the overall picture of debt and credit industry losses . . . . They concluded that changes in the law to restrict access to consumer bankruptcy would have no substantial effect on filings . . . . While economists generally agree that any statutory change is unlikely to have a significant effect on family decisions to file for bankruptcy, some have cautioned that tightening the bankruptcy laws could have an unanticipated effect: Two research economists have warned that new restrictions could encourage more lending to customers who are not creditworthy . . . . Changes in credit practices may have more powerful effects. The private market can have a significant influence on debt, default and, for some, bankruptcy . . . . The solution to the bankruptcy problem, say some market analysts, lies within the credit industry—not in federal regulation.

\textsuperscript{69} Dissenting Commissioners, supra note 5, at 60.
\textsuperscript{70} Id. at 60-61.
would be presumed nondischargeable and it could be rebutted by the debtor who proves that, at the time the debt was incurred, the debtor was not contemplating bankruptcy; and (3) "that at the time the debt was incurred a reasonably prudent person [not the debtor] would have expected there was an ability to repay the debt."71

The recommendation by the Bufford Group addressed the culpability element and also provided for a rebuttable presumption of nondischargeability.72 It also addressed the need for creditors to act responsibly and monitor credit card use.73 The reason the Bufford Group recommended a general discharge of credit card debts is that, for the typical debtor, the use of credit cards is not done with an intent not to pay but due to unwise credit choices.74 Therefore, the elements for nondischargeability of credit card debts, as recommended by the Bufford Group, would require the credit card issuer to show that (1) it monitored the credit card use annually (i.e., obtaining information from the debtor and a credit card reporting service about the debtor's earnings and total indebtedness, respectively) and (2) the debt was incurred with the intent not to pay, with a presumption for such intent if the debt was incurred within ninety days of the filing of the petition.75 Once this is satisfied by the creditor, the debtor would then be able to rebut the presumption by showing that the credit information available revealed the debtor's inability to pay the debts and that the credit card issuer "failed to take action necessary to avoid the debts in question."76 To assure administration of this recommendation, the amendment would award attorney's fees for debtors who prevail in rebutting the presumption.77

71. Id. at 63.
72. See Bufford Group Memorandum, supra note 6, at 5-6.
73. See id.
74. The group stated:
Bankruptcy relief has traditionally been available to individuals who incur credit unwisely, undertaking larger obligations than they could reasonably have expected to repay, and there is no reason why credit card debt should be treated differently. Rather, unwise incurring of credit should challenge credit issuers to be more circumspect in lending. Our conclusion is buttressed by the fact that credit card issuers appear to promote use of the card beyond the cardholders' ability to make prompt repayment.
Id. at 5.
75. See id. at 5-6.
76. Id.
77. See Bufford Group Memorandum, supra note 6, at 5-6. The Bufford Group also recommended a separate provision for the nondischargeability of credit card use for
There are some legislative proposals to amend section 523(a)(2). Both the Responsible Borrower Protection Bankruptcy Act\(^7\) and the Bankruptcy Reform Act of 1998\(^9\) include proposals to amend section 523(a)(2)(C) to make “consumer debts owed to a single creditor incurred by an individual debtor on or within 90 days before the order of relief . . . presumed to be nondischargeable.” Unlike the present version of section 523(a)(2)(C), which is limited to credit card purchases of luxury goods and cash withdrawals made within sixty days before the order for relief, this proposed amendment covers all debts incurred within the ninety days before the order for relief. It also is not limited by a minimum dollar amount of purchases like the current section 523(a)(2)(C) which requires a one thousand dollar minimum of purchases made within sixty days before the order for relief. This proposal represents even greater preferential protection for the credit card industry. Like the current version of section 523(a)(2)(C), it does not require proof of actual wrongdoing by the debtor or proof that the debtor had no intention of repaying the debt, and it does not impose any specific requirement of accountability or responsibility on the part of the credit card issuer in the grant of credit to the debtor.

In addition to the proposed amendment to section 523(a)(2)(C), the Bankruptcy Reform Act of 1998 includes proposed amendments to subsections (a)(2)(A) and (B) of section 523. The amendment to subsection (a)(2)(A) would omit the requirement of the creditor providing proof of actual fraud by the debtor when incurring a credit card debt and would replace this with a requirement that the creditor prove the debtor used the credit card “without a reasonable expectation or ability to repay” the debt. Subsection (a)(2)(B) would be amended to make debts incurred or credit obtained by the debtor through false written financial statements “without taking reasonable steps to ensure the accuracy of the statement” nondischargeable. Again, the requirement of proof of the debtor’s fraudulent behavior or intent to deceive would be omitted under this proposed amendment. The proposed

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amendments are strictly pro-creditor. They remove the requirement of proof of the debtor's fraud or intent to deceive and substitute these higher standards of wrongful conduct with lesser requirements of proof of negligence by the debtor and objective evidence of the debtor being unable to repay the debt at the time incurred.

V. Credit Card Debts Incurred to Pay Nondischargeable Federal Tax Obligations

Section 523(a)(14) is one of the provisions that the Commission specifically recommended remain unchanged.80 This provision excepts from discharge credit card debts incurred by a debtor for the payment of nondischargeable federal taxes under section 523(a)(1).81 The justification for this recommendation seems to be based on the premise that this provision should be retained to support the nondischargeability of federal taxes under section 523(a)(1) and the debtor's duty to pay taxes.82

The Commission's recommendation with regard to this provision is counterintuitive to its goal to achieve greater balance and integrity in bankruptcy discharge. It apparently benefits one type of creditor, the credit card industry, and does not provide similar benefits to other lenders of the debtor where the proceeds of a loan to the debtor might also be applied toward the payment of nondischargeable federal taxes. Moreover, it allows the credit card issuer to collect on an unsecured debt without proof of wrongdoing by the debtor during incurrence of the debt.

It is particularly worth noting that The Bufford Group recommended section 523(a)(14) elimination because it is rarely used and was added to "facilitate individuals' ability to use their credit cards to pay their Federal taxes."83 They point out that the provision, as originally enacted, presented tracing problems largely because the federal laws did not permit use of credit cards for direct payment of federal taxes and debtors could only make such payments with credit card cash advances that are difficult to

80. See COMMISSION REPORT, supra note 1, at 196.
82. See COMMISSION REPORT, supra note 1, at 197-98.
83. Bufford Group Memorandum, supra note 6, at 19 (quoting Bankruptcy Reform Act of 1994).
It is further noted that the provision provides credit card issuers with an additional means to find a debt nondischargeable and is contrary to the premise that credit card indebtedness should only be nondischargeable for wrongful conduct. An additional postscript to this particular recommendation is the proposed legislative amendments to this provision under the Responsible Borrower Protection Bankruptcy Act and the Bankruptcy Reform Act of 1998. In these bills, it is proposed that section 523(a)(14) be amended to make all debts incurred to pay off any nondischargeable debt similarly nondischargeable. Although this proposed change would address the concern that section 523(a)(14), as it exists, is preferential toward credit card issuers and works against other creditors whose monies might be used to pay a nondischargeable tax liability, the lack of any requirement of culpable conduct by the debtor in his or her dealings with the lender/creditor still makes its justification difficult.

VI. Criminal Restitution Orders

The Commission recommended expanding section 523(a)(13), which makes federally imposed criminal restitution orders nondischargeable, to include all criminal restitution orders. This recommendation is an attempt to clarify the law by eliminating any unnecessary distinctions between federal and state criminal restitution orders.

The response to this recommendation raises some interesting questions about the several nondischargeability provisions that were added to section 523(a) subsequent to its enactment in 1978. One of the arguments against this particular recommendation is that this is an unnecessary clarification because courts have uniformly

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84. See id. Under the Taxpayer Relief Act of 1997, Pub. L. No. 105-34 (1997), direct payment of federal income taxes with credit cards is now permitted and should reduce or eliminate tracing problems.
85. See Bufford Group Memorandum, supra note 6, at 19.
86. See H.R. 2500; H.R. 3150.
87. See H.R. 2500; H.R. 3150.
89. See COMMISSION REPORT, supra note 1, at 198-99.
applied *Kelly v. Robinson*,\textsuperscript{90} the Supreme Court decision which found state criminal restitution orders nondischargeable under section 523(a)(7), to also cover federal criminal restitution orders.\textsuperscript{91} The opponents to this recommendation noted that section 523(a)(6) and (a)(2) can be used to except these restitution orders from discharge and that section 523(a)(13) was essentially a duplication of these provisions.\textsuperscript{92}

This objection to a clarification of section 523(a)(13) illustrates how many of the nondischargeability provisions added to section 523(a) since the enactment of the Code have been the result of excessive lobbying by different groups of creditors to have provisions enacted to address their specific claims. Section 523(a)(13) is an example of a case where the addition of a provision was unnecessary due to the fact that the existing provisions of sections 523(a)(6) and (a)(7) were already adequate to address the question as to the nondischargeability of federal criminal restitution obligations.\textsuperscript{93} Accordingly, the addition of a superfluous provision does nothing more than create confusion, causing one to ponder the distinction between the new provision and existing provisions, and is more clearly a provision that is enacted on the behalf of a particular interest group.

What this provision, and many others that were added to section 523(a) after 1978, seem to suggest is the need for a legislative moratorium on additions to section 523(a). Congress should assure more careful reflection on existing provisions of nondischargeability and whether any proposed amendment to section 523(a) involves conduct already covered by existing

\textsuperscript{90} 479 U.S. 36 (1986) (addressing whether section 523(a)(7) makes state criminal restitution orders nondischargeable). The Court held that such orders were nondischargeable under section 523(a)(7). See id.

\textsuperscript{91} See COMMISSION REPORT, supra note 1, at 199 n.476 (citing In re Gelb, 187 B.R. 87, 90 (Bankr. E.D.N.Y. 1995) (citing cases finding section 523(a)(7) applicable to federal criminal restitution orders)).

\textsuperscript{92} The Commission noted that "because many restitution orders involve conduct that gives rise to a nondischargeable debt under section 523(a)(6) for willful and malicious injury or section 523(a)(2) for fraud, section 523(a)(13) provision duplicates the results of another statutory section as well." Id.

\textsuperscript{93} The Bufford report follows the Commission recommendation to extend 523(a)(13) to all criminal restitution orders. They noted, however, it may be an unnecessary recommendation due to the fact that the conduct attested by a federal criminal restitution order is covered by section 523(a)(7) and interpreted by the case law and by the "willful and malicious" conduct requirement under section 523(a)(6). See Bufford Group Memorandum, supra note 6, at 19.
provisions of section 523(a). There needs to be more careful consideration by Congress as to whether a proposed amendment to section 523(a) represents the kind of obligation that should be nondischargeable, either due to a debtor's culpable conduct or due to a compelling public policy concern. Congress must rationally determine whether the advocates for the nondischargeability of a particular debt represent a special interest group or the interest of society as a whole.

VII. Family Support Obligations

The Commission also focused on the nondischargeability provisions addressing family support obligations arising from divorce or separation. This recommendation provides the following:

Sections 523(a)(5), (a)(15), and (a)(18) should be combined. The revised 523(a)(5) should provide that all debts actually in the nature of support, whether they have been denominated in a prior court order as alimony, maintenance, support, property settlements, or otherwise, are nondischargeable. In addition, debts owed under state law to a state or municipality in the nature of support would be nondischargeable in all chapters.94

Under this recommendation, family obligations such as alimony, child support, and property settlements in the nature of support would continue to be nondischargeable. The goal of this recommendation is to make the law governing the nondischargeability of support obligations and property settlements less burdensome and less confusing and to clarify the law.95

One of the specific changes that is proposed under this recommendation is that section 523(a)(18) be omitted. Section 523(a)(18) excepts from discharge any debt owed to a state or municipality that is in the nature of support.96 The deletion of this provision is recommended due to the fact that these obligations are already covered under section 523(a)(5)(A).97 Moreover,

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94. COMMISSION REPORT, supra note 1, at 199.
95. See id. at 200.
96. Section 523(a)(18) provides that any debt "owed under State law to a State or municipality that is (A) in the nature of support, and (B) enforceable under part D of title IV of the Social Security Act" is nondischargeable. 11 U.S.C. § 523(a)(18) (1994).
97. See COMMISSION REPORT, supra note 1, at 202 ("Section 523(a)(5)(A) already excepts from discharge support obligations that were assigned to a state or political subdivision of a state, and according to Collier on Bankruptcy, there is no legislative history
while support obligations described under section 523(a)(5) also are nondischargeable under chapter 13, that is not the case with 523(a)(18) debts. 98 This recommended change will eliminate redundancy between section 523(a)(5) and (a)(18) and make all of these support obligations nondischargeable under Chapter 13 as well.

The Commission also addressed the issue of family support awards in community property law states. 99 The Commission noted that, in community property law states, divorce or separation awards may not be labeled as alimony, but that such labeling does not preclude the court from making a finding that the obligation is in the nature of support under 523(a)(5). 100 While it was noted that federal circuit courts have reinforced this point, and most lower courts agree in community property states, the Commission thought it is possible that some courts might apply different reasoning. With this possibility in mind, the Commission recommended that section 523(a)(5) be amended to clarify that nondischargeability determinations regarding the nature of a divorce-based debt as a support award should be made in both community property and common law states. 101

The greater issue raised in the Commission's recommendation surrounds section 523(a)(15). The Commission recommended that this provision be omitted so that only property settlements that are for support are nondischargeable. 102 This proposed change would no longer require courts to engage in the balancing of interests between the debtor and the non-debtor spouse that is required under section 523(a)(15). Section 523(a)(15) makes debts nondischargeable that are not in the nature of family support as provided under section 523(a)(5) unless:

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to

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98. See id. at 205-06.
99. See id. at 201-02.
100. The determination of whether a prepetition divorce or separation obligation is support is to be made pursuant to federal law and not state law, allowing the bankruptcy court to make such a determination. See H.R. REP. NO. 95-595, at 353 (1977); S. REP. NO. 95-989, at 77-79 (1978).
101. See id. at 201-02.
be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.\footnote{104}

This provision creates a rebuttable presumption that a property settlement obligation is nondischargeable. The debtor may rebut the presumption by proving that: (1) he or she is unable to pay the obligation or (2) that benefits of a discharge outweigh detriments to the nondebtor spouse.

The Commission noted that this has been a difficult provision to apply for courts; case law reveals the complexity and difficulty of applying and interpreting this provision.\footnote{105} The Commission report stated that the complexity of the provision weakens its intended protection.\footnote{106} The Commission stated that courts, in adjudicating questions concerning the dischargeability of divorce based debts and in trying to decipher whether to use section 523(a)(5) or (a)(15), might tend to lean toward using section 523(a)(15) for debts labeled as support, which could then be found dischargeable where the debtor is able to meet the burden of rebuttal.\footnote{107} The Commission also noted that section 523(a)(15) presents a timeliness issue for the creditor by requiring quick action. The creditor must file for an adversary complaint within sixty days of the first meeting of creditors or be precluded from challenging the dischargeability of the debt; this debt is, in any case, a dischargeable debt under chapter 13.\footnote{108}

The effect of the recommendation is to change 523(a)(5) in a way that the Commission says would make section 523(a)(15)
"superfluous." The recommended provision would make all property settlements that are not for support, without qualification, dischargeable debts. The Commission reported that this would eliminate the need for courts to adjudicate property settlements under section 523(a)(15); however, they would still need to determine if the award were support under section 523(a)(5).

The Commission noted, however, that there were different views about what should be done with section 523(a)(15). Some suggested that work should be done to clarify 523(a)(15) versus omitting it, allowing able debtors to remain liable for nonsupport property settlements. Others took the view that all property settlements should be nondischargeable—eliminating the need for any determination as to whether a debt is in the nature of support versus a property settlement and relieving the claimant from having to litigate the matter at all. In response to this view, the Commission stated that this assumes all property settlements have some element of support and does not address instances where the spouse is "better off financially than the debtor."

The Bufford Group also recommended that 523(a)(18) be incorporated into section 523(a)(5). They also recommended the repeal of section 523(a)(15) based on 6 points: (1) section (a)(15) was enacted to except debts from discharge where section 523(a)(5) had been used or applied improperly and that, if courts applied section 523(a)(5) correctly, no support award, regardless of the prepetition label as property settlement, would be discharged; (2) if section 523(a)(15) is used to except support obligations that have been labeled as property settlements, there is still no guarantee of nondischargeability because debts falling within the category of section 523(a)(15) are dischargeable in chapter 13; (3) if a debt is a property settlement and not support, it should be discharged because it is not a debt incurred due to debtor culpability, eliminating preference for a nondebtor spouse over other unse-
cured creditors; (4) section 523(a)(15) is not an efficient provision due to difficulties in administration; (5) section 523(a)(15) makes section 523(a)(5) ineffective—if judges are not sure if the debt should be deemed support they will treat it as nonsupport and elect to make the determination of dischargeability based on the relative needs requirement of section 523(a)(15); and (6) section 523(a)(15) increases intrusion into family issues that should be within the state court purview. ¹¹⁵

The problem with the Commission’s recommendation and the views expressed by The Bufford Group is their failure to focus fully on the reasons for enactment of section 523(a)(15). Section 523(a)(15) was not enacted solely to respond to the improper use of section 523(a)(5), but to respond to changes in domestic relations law in terms of how divorce and separation agreements were being drafted and to preserve the “equitable distribution schemes” that underlie many divorce-based agreements. ¹¹⁶ A very compelling assessment of the inadequacy of section 523(a)(5), in addressing the significance of divorce-based debts in bankruptcy and the role section 523(a)(15) plays in rectifying this problem, was made by the court in _Dressler v. Dressler:_ ¹¹⁷

> [T]he reality of modern divorce judgments and property settlement agreements is that the characterization of obligations they create is, as often as not, the product of factors not always taken into account in section 523(a)(5) dischargeability determinations. For example, how much child support or alimony one party receives may be a function of the extent and timing of property division payments. One party may bargain to have an obligation (or payment) labeled one way or the other for tax purposes in return for some offsetting concession. Or the parties might sign off on a form agreement without a second thought to the way it characterizes reciprocal rights and obligations. Divorcing couples are generally concerned with the economic consequences of divorce, rather than the labels that attach to the arrangement’s components. For another, Congress perceived that divorce “obligors were able to craftily draft settlement agreements to be in property, rather than in alimony

¹¹⁵ _See id._ at 20-21.

¹¹⁶ _See_ Jana B. Singer, _Divorce Obligations and Bankruptcy Discharge: Rethinking the Support/Property Distinction_, 30 HARV. J. ON LEGIS. 43, 45 (1993).

terms and then discharge their marital obligations in bankruptcy.\textsuperscript{118}

Before section 523(a)(15) is omitted, there needs to be a clearly stated policy determination as to whether all obligations arising from a divorce should be preferred. If the most reasonable view is that all and any kind of debt arising from a divorce or separation decree should be nondischargeable, then section 523(a)(15) or some variation of its intent needs to be preserved.

VIII. Dischargeability of Student Loans

Another recommendation by the Commission that is controversial is the repeal of section 523(a)(8) which makes guaranteed student loan obligations nondischargeable.\textsuperscript{119} Currently, student loans are nondischargeable if the first installment payment was due within seven years of the filing of the petition unless there was undue hardship. This debt also is nondischargeable in Chapter 13 as well.\textsuperscript{120} The question of undue hardship is very narrowly construed against the debtor, and those who need it are usually unable to litigate this question of undue hardship.\textsuperscript{121}

The Commission Report indicated that, when the addition of section 523(a)(8) was initially considered by the 1970 Commission on the Bankruptcy Laws of the United States, there was a fear that the educational loan borrower would try to seek bankruptcy relief and escape liability through a bankruptcy discharge.\textsuperscript{122} The

\textsuperscript{118} Id. at 299-300 (citations omitted).
\textsuperscript{119} Section 523(a)(8) provides the nondischargeability of the following described student loan obligations:

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

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

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


\textsuperscript{120} See id. § 1328(a).

\textsuperscript{121} See COMMISSION REPORT, supra note 1, at 207. For journal articles analyzing and commenting on the “undue hardship” requirement under section 523(a)(8), see id. at 210 n.521.

\textsuperscript{122} See id. at 209 (citing the Commission on the Bankruptcy Laws of the United States, Report of the Commission on the Bankruptcy Laws of the United States, H.R. DOc. NO. 137, Part II, at 140).
images of abuse where largely described by the press and media.\textsuperscript{123} Congressional members were troubled by allegations of wild and excess abuse and did not endorse these views. Due to a persuasive lobby, the provision was added with the enactment of the Code in 1978. The nondischargeability of student loans was added as an exception to the superdischarge provisions of Chapter 13 in 1990 without real evidence of abuse.\textsuperscript{124}

In making its recommendation for repeal of section 523(a)(8), the Commission raised the question whether student loans should be treated any differently than other consumer debts.\textsuperscript{125} It made several findings regarding the status of student loans in the bankruptcy process. It noted that these loans are very "overwhelming," particularly for the Chapter 13 debtor; "interest continues to compound" during the petition; the debtor is faced with repaying existing debts and making the student loan payments; and the debtor emerges from bankruptcy with greater debt.\textsuperscript{126} Moreover, the debtor who seeks an educational loan is worse off than those who incurred debts for other reasons in that they are discharged.\textsuperscript{127}

According to the Commission Report, empirical evidence did not support the allegation that changes in "bankruptcy law entitlements," such as the discharge of educational loans, would affect the rate of bankruptcy filings.\textsuperscript{128} Whether debtors will continue to file in bankruptcy and discharge student loans in bankruptcy will not affect their decision or need to file. Empirical studies relied on by the Commission looked at debtors with student loans who were in default, and these debtors were described as having the following characteristics:

\textsuperscript{123} See id.
\textsuperscript{124} See id. at 210 (citing TERESA A. SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 275 (1973) (noting that in 1981 data indicated that less than one percent of total debt for wage earnings in all consumer cases under chapter 13 was for educational loans)).
\textsuperscript{125} According to the Commission Report:
The question at issue in this Proposal is not whether anyone wants individuals to discharge their debts, educational loans or otherwise. The question is whether a debtor overloaded with consumer debts incurred to buy a car, a vacation or a pizza can resort to bankruptcy but a debtor who borrows to pay for tuition and books cannot.
\textit{Id.} at 207.
\textsuperscript{126} COMMISSION REPORT, supra note 1, at 208.
\textsuperscript{127} See id. at 208-09.
\textsuperscript{128} See id. at 213.
[T]hey had attended vocational or trade schools; they had low income . . . ; the borrowers were unemployed at the time of default; they had borrowed small amounts; they had little or no financial support from others; many had minority backgrounds; some lacked high school diplomas; many did not complete the program for which they obtained the student loans, often attending for one year or less.\textsuperscript{129}

There was some concern of abuse by the educational providers who qualify for the loan programs; many of which were trade schools and technical programs. These providers often reneged on the service or education they promised to provide.\textsuperscript{130} There was also reference to the significant increases in tuition as schools are able to take advantage of the availability of the nondischargeable loans.\textsuperscript{131}

It is worth noting that this provision was the beginning of the special interest groups finding a foothold into the Code's nondischargeable debt categories. As the legislative history revealed, at the time the Bankruptcy Commission of 1970 looked at the dischargeability law in 1970 and whether section 523(a)(8) was necessary, there were critics of this kind of provision being added and the question of special interests becoming an impetus for such provision was raised:

Groups such as the American Bankers Association and Consumer Bankers Association Task Forces on Bankruptcy opposed the 1970's student loan nondischargeability litigation that gave government agencies privileged treatment to collect debts post bankruptcy: "If the social utility of what is exchanged for the debt is to be determinative of dischargeability, then the question can be raised of whether it's proper to discharge medical bills, food bills, etc. This proposed [legislation] simply suggests that if sufficient political pressure can be generated, a special interest group can obtain special treatment under the bankruptcy law."\textsuperscript{132}

The lack of empirical data revealing an abuse of bankruptcy discharge with respect to student loans and Congress being

\textsuperscript{129} Id. at 215 (citing \textsc{General Accounting Office, Student Loans: Characteristics of Default Borrower in the Stafford Student Loan Program} (1991)).

\textsuperscript{130} See id. at 216.

\textsuperscript{131} See \textsc{Commission Report, supra} note 1, at 216.

\textsuperscript{132} Id. at 210 (quoting H.R. REP. NO. 595, at 150 (1977)).
skeptical about the existence of alleged abuse at the time of enactment is noteworthy. Perhaps the government needed to collect these loans more aggressively. The Commission report cited GAO information about debt collection on student loans aid:

Delinquent student loans are harder to collect than the other types of loans discussed in this report for several reasons. First, unlike the housing loans, student loans are unsecured, leaving the government and private lender with no collateral. Second, for the loans on which Education itself is trying to collect, delinquent cases are not received until both lenders and the guaranty agencies have attempted collection, a process which typically lasts at least 4 years after the debt became delinquent. Third, it is more difficult to locate and contact borrowers who frequently relocate after attending post secondary schools, experience name changes in the event of marriage, and, in general tend to have more frequent changes in residences.133

Bankruptcy should never be or become a collection device for lenders. The Commission identified how the lenders will likely respond to the repeal of section 523(a)(8) once it is no longer an available collection method:

If student loans could be discharged once again, the government and the lenders would not be powerless to protect themselves. If lenders request family cosigners, there is a significant disincentive to bankruptcy filing unless both the student and the co-signers are in financial trouble. If a child in a wealthy family seeks to borrow money and discharge it in bankruptcy, that child's family will remain liable on the obligation unless the family is willing to liquidate all property in excess of exemption and subject itself to the bankruptcy process as well. Families with meager means may discharge the debt in bankruptcy, but these are the families most likely to have defaulted on the student loan even if the debt were not dischargeable. Making more student loans nondischargeable does not alter the defaulters' inability to repay the loans.134

The Dissenting Commissioners did not support this recommendation, stating that it was largely based on conclusions that the "undue hardship exception is subject to disparate multi-factor

134. Id. at 216.
approaches” and that the defaults were largely from “fly-by-night trade and educational schools.” They also expressed views why the provision should be retained: that is, section 523(a)(8) “is necessary for the continued viability of the guaranteed student loan program”; while the repeal of section 523(a)(8) also would eliminate “confusion or nonuniformity” in the decisions interpreting and applying section 523(a)(8), the Commission missed the point in discounting all the evidence, testimony, and arguments that were presented by various sources on how this recommendation would adversely impact the loan program.

In support of the continuation of section 523(a)(8), the Dissenting Commissioners characterized student loans as risky loans and important loans: risky because the borrowers do not have the “traditional credit criteria” needed to qualify for typical consumer loans; special because they represent an investment by the lender in the borrower’s future earnings potential due to the education the loan would support. Accordingly, these lenders need protection. It was their view that the Commission’s recommendation was more or less “an indictment of schools which do not adequately educate or train the students than it is a justification for making these loans nondischargeable.” Finally, it was noted that there is no reason for the elimination of the provision due to the fact that there is “no public outcry” for its elimination.

Two recommendations regarding section 523(a)(8), offered as alternatives, were provided by The Bufford Group. This report recommended that the nondischargeability of student loans be limited to the Health Educational Assistance Loans (“HEAL”) which is already covered by the Health Education Assistance Loan Act. Thus, the repeal of section 523(a)(8) was recommended. The grounds for this recommendation were that the distinction between student loans and other unsecured loans is not merited; these debts do not carry incidence of culpability by the debtor nor do they

135. Dissenting Commissioners, supra note 5, at 52.
136. See id. at 52-53.
137. See id. at 54-55.
138. Id. at 56.
139. Id. at 58.
140. See Bufford Group Memorandum, supra note 6, at 14-17.
have compelling public concerns associated with them like the payment of family support obligations or taxes.\textsuperscript{141}

The Bufford Group took a different view from the Dissenting Commissioners regarding the purpose of these loans. The purpose of student loans being to support education and not made as an some investment in the earnings potential of the debtor.\textsuperscript{142} It also was argued that any reduction in the default rate on student loans is not due to nondischargeability of student loans but the "tightening of the programs' lending practices and the operation of shorter term proprietary schools."\textsuperscript{143} They indicated there was no real evidence that educational loan borrowers seek to discharge their debts more than other debtors; much of the evidence revealed these individuals have "received training of questionable value" and are trying to overcome difficult circumstances.\textsuperscript{144} That is, defaults are usually the result of the failure of debtors to bring about an improvement in their earnings potential or the result of guarantors who suspend repayment periods beyond the time stipulated under section 523(a)(8).\textsuperscript{145}

In addition, The Bufford Group suggested that, if the repeal of section 523(a)(8) was too much of a change and could adversely affect the impact of such loan programs, the period for nondischargeability be reduced to five years as section 523(a)(8) was originally enacted.\textsuperscript{146} This is suggested in light of the fact that the default rates have dropped which, they suggest, is due to "lower unemployment rates and more careful monitoring of institutions with extraordinary high default rates."\textsuperscript{147}

The Commission's recommended repeal of section 523(a)(8) is correct, and its justifications for the repeal represent sound bankruptcy policy. If one remains true to the principles for exception to discharge, the student loan does not merit the benefit of an exception. As noted both by the Commission and The Bufford Group, there is no wrongful conduct that is characteristic of the debtor who incurs such an obligation. Moreover, there does

\textsuperscript{141} See 42 U.S.C. § 292f(g) (1994); see also Bufford Group Memorandum, supra note 6, at 14.
\textsuperscript{142} See Bufford Group Memorandum, supra note 6, at 15.
\textsuperscript{143} Id.
\textsuperscript{144} Id. at 15-16.
\textsuperscript{145} See id. at 16.
\textsuperscript{146} See id.
\textsuperscript{147} Bufford Group Memorandum, supra note 6, at 17.
not appear to be a compelling societal need to prevent a discharge of the debt if the available empirical evidence on the absence of abuse is true. This exception, as indicated by the legislative history, was a special preference granted to consumer lenders providing student loans. The reasons for distinguishing a particular consumer debt from other consumer debts should be measured carefully and require extraordinary circumstances. The compelling societal interest must be clear to all; it should be without question why the exception is merited; and the excepted debt should, at the least, equal the importance of other preferred obligations (such as familial support) or support the welfare of the greater community (such as tax debts).

IX. Retention of the Superdischarge in Chapter 13

One final recommendation by the Commission that is at the center of controversy is the retention of the superdischarge in Chapter 13.\(^{148}\) Retaining the superdischarge as it exists would permit the chapter 13 debtor, upon completion of the plan, to receive a discharge of all prepetition debts except debts for family support, drunk driving, student loans, criminal restitution, and priority unsecured debts.\(^{149}\)

This has been a very controversial issue with several arguments in opposition to the superdischarge. For example, some advocate "elimination of the superdischarge so that debtors are entitled to the same discharge in any chapter."\(^{150}\) The Commission Report described this view as being based on public policy; that being, the bankruptcy debtor should be subject to the same rules governing discharge and nondischargeability of debts regardless of the chapter of bankruptcy relief being sought.\(^{151}\) Another argument against superdischarge relates to taxes which are discharged under chapter 13; some advocate that taxes should not be dischargeable under chapter 13.\(^{152}\) The counter argument to this view is that the superdischarge serves debtors with a "manage-

\(^{148}\) "Congress should retain 11 U.S.C. section 1328(a), which permits a debtor who completes all payments under the plan to discharge all debts provided for by the plan or disallowed under section 502 of title 11 except for those listed in section 1328(a)(1)-(3)." \textit{Id.} at 287.


\(^{150}\) \textit{COMMISSION REPORT, supra} note 1, at 288.

\(^{151}\) \textit{See id.}

\(^{152}\) \textit{See id.} at 289.
able reentry to the tax system" without overwhelming liabilities facing them at the end of the plan.153

The Commission Report indicated that proponents of the superdischarge noted that the superdischarge is "consistent with the Congressional intent to build incentives" for debtors to go into Chapter 13 and repay debts from future earnings instead of opting for relief through Chapter 7 liquidation.154 It was asserted that, without the superdischarge, the debtor emerges from the Chapter 13 with the nondischargeable debts and an accrued interest on the debts which, in some cases, means a greater debt facing them than when they entered bankruptcy.155 Another argument in support of the superdischarge is in the fact that it eliminates the need for litigation over whether a "particular debt was nondischargeable" and is a direct incentive to complete the plan in order to enjoy the benefit of the superdischarge.156 The fact that the debts are nondischargeable in chapter 13 protects the debtor from meritless charges of nondischargeability and means that the monies the debtor would have to expend on such actions could go to payment of creditors under the plan.157 Some proponents argue that the superdischarge should be expanded to its original form, where the only nondischargeable debts would be long-term debts and family support obligations, for Chapter 13 debtors who propose repayment plans scheduled to last at least two years longer than required under the Code.158

The Dissenting Commissioners did not agree that the superdischarge should be retained. They criticized the Commission Report on this issue as being too brief and simplistic.159 They found the Commission's assertion that the superdischarge is an incentive for Chapter 13 filings to be disingenuous. It was specifically noted that the Commission Report acknowledged that there was no real evidence to support the suggestion that Chapter 13 debtors as a whole really need the superdischarge, and, thus, this suggestion that the superdischarge is an incentive for chapter 13 filings is not

153. Id.
154. Id.
155. See COMMISSION REPORT, supra note 1, at 290.
156. See id.
157. See id.
158. See id.
159. See Dissenting Commissioners, supra note 5, at 69.
valid. In fact, the Dissenting Commissioners pointed out other features of Chapter 13 relief that are greater incentives for debtors to seek such relief including: a debtor being able to "cure defaults on secured property to prevent foreclosures"; "the ability to strip down liens"; and the co-debtor stay protection. Moreover, it was the view of the Dissenting Commissioners that Chapter 13 was a "misplaced piece of social legislation" and a "national disgrace" in that it allows many obligations based on a debtor's wrongdoing to be discharged while not dischargeable in Chapter 7.

The Bufford Group recommended amending the superdischarge by excepting those debts from the superdischarge that address "societal" needs only (i.e., alimony, support, and taxes). The recommended change would make any liability of the debtor based on the debtor's wrongful conduct dischargeable in Chapter 13. They emphasized that the intent behind Chapter 13 relief is to encourage "economic rehabilitation of the debtor who honestly devotes all disposable income to the plan for 3 to 5 years"; in addition, while there may be debts incurred by the debtor due to culpable conduct, the objective to bring about the economic rehabilitation of the honest debtor should remain the primary focus of Chapter 13 relief. The alternative recommendation is to permit debtors with the nondischargeable debts to classify them differently from other unsecured debts in order to allow a greater reduction of such debts under the plan and lessen the burden of the debtor coming out of bankruptcy.

Both the Bankruptcy Reform Act of 1998 and the Responsible Borrower Protection Bankruptcy Act include a proposed amendment to increase the number of debts excepted from the Chapter 13 superdischarge under section 1328(a) by adding sections 523(a)(2) and (4) to the list of debts excepted from discharge; section 523(a)(6) would be added to this list under the Bankruptcy Reform Act proposed amendment as well. Accordingly, the effect of these amendments, if adopted by Congress, would be to

160. See id. at 70.
161. Id. at 72.
162. Id. at 71.
163. See Bufford Group Memorandum, supra note 6, at 31.
164. See id.
165. See id.
166. See id. at 31-32.
make debtors remain liable for debts incurred through fraud, embezzlement, defalcation, and willful and malicious conduct under Chapter 13 like Chapter 7 liquidation. This increase in exceptions to the superdischarge in Chapter 13 can be, and has been, rationalized as appropriate by those who hold fast to the view that discharge should be available only to the debtor who comes into bankruptcy with clean hands. However, one of the benefits and incentives behind the Chapter 13 rehabilitation is that it allows the debtor, who makes a good faith effort to pay prepetition indebtedness with all of his or her disposable postpetition earnings, to receive a discharge that is more generous than that allowed in Chapter 7. The effect of the proposed reduction to the superdischarge would lessen the attractiveness of Chapter 13 for debtors with these types of debts. This proposal also is contrary to the Commission's goal of making Chapter 13 rehabilitation a more attractive alternative to the Chapter 7 liquidation.
X. Conclusion

168. In addition to the recommendations discussed above, the Commission proposed recommendations to clarify the law under sections 523(c) and 727. See 11 U.S.C. §§ 523(c), 727 (1994). Because these recommendations do not invoke the concerns about bankruptcy policy that the recommendations affecting nondischargeable debts under sections 523(a) and 1328(a) present, the following material will briefly summarize the recommended changes and the justification for these changes as expressed by the Commission. The recommendations concerning section 523(c) address: (1) the application of the issue preclusion doctrine and default judgments and (2) the application of the vicarious liability doctrines in nondischargeability determinations. The recommendations to amend section 727 concern: (1) settlements and dismissal of objections to discharge and (2) creditor remedy in instances where there has been a lack of notice in a debtor’s bankruptcy filing.

Issue Preclusion Effect on True Defaults

With respect to the doctrine of issue preclusion, the Commission recommended that section 523(c) be amended to make it clear that issues relevant to determinations of nondischargeability “that are not actually litigated and necessary to a prior judgement shall not be given preclusive effect.” This recommendation would require the application of an issue preclusion doctrine, like that used in federal courts, to give the debtor the opportunity to contest, for example, a charge of fraud as it related to a nondischargeability determination under section 523(a)(2) where the question of fraud by the debtor had not been litigated in a prior action. If the issue bearing on nondischargeability has been litigated before, the issue preclusion doctrine would apply and then avoid “needless” litigation in bankruptcy court.

The Commission explained that this amendment is necessary because “not all courts use the same test for issue preclusion,” many use the issue preclusion doctrine of the state court that decided the prior action. This is critical in bankruptcy because some state preclusion doctrines do not require actual litigation of the issue in question. The Commission stated that this result is inconsistent with congressional intent because nondischargeability should be narrowly applied, and all creditors should be treated equally. While it is appropriate to defer to prior state court judgements when the issues relevant to dischargeability have been litigated fully, if the issue was not actually litigated, then the state court judgment is “an insufficient basis on which to make the debt nondischargeable.” The concern with this recommendation is to prevent “forced entry of a default” judgment, versus a litigated judgment, from resulting in a nondischargeability determination without any prior litigation of the issue relevant to nondischargeability. See COMMITTEE REPORT, supra note 1, at 217-22.

Vicarious Liability

On the matter of the appropriateness of using the doctrine of vicarious liability in nondischargeability determinations under section 523(c), the Commission recommended that the Code be “amended such that intentional action by a wrongdoer who is not the debtor cannot be imputed to the debtor.” The Commission noted that it was not appropriate and contrary to Congressional intent to use the vicarious liability doctrine in determinations under section 523(c) where wrongful conduct by the debtor is a requirement. The Commission’s belief that clarification is necessary is due to the disparity between courts in cases where the debtor happened to be a partner or in an agency relationship with another person who was the one engaged in misconduct. See id. at 223-25.

Effect of Lack of Notice on Time to Bring Objection to Discharge

The Commission recommended an amendment to section 727 permitting “the creditor that did not receive notice of a bankruptcy [to receive] an extension of time to file an objection to or seek revocation of a discharge.” This recommendation would parallel the protection of section 523(a)(3) which provides creditors whose debtors have been omitted
The purpose of this commentary on the National Bankruptcy Review Commission's recommendations concerning discharge has been to consider the success of the Commission's goals. As stated previously, the Commission attempted to present a set of proposed changes to bankruptcy law and procedure that would improve the integrity, accountability, and efficiency of the bankruptcy system and to achieve fairness and balance throughout the system.

When one considers the fundamentals of bankruptcy relief and the principal role that the discharge plays in this relief, the stated goals of the Commission to bring about such a holistic reform is undaunting. This is particularly true when one considers how the basic rules of discharge, and specifically the exceptions to discharge, have become blurred and grossly distorted by the special interest group legislation that has permeated the nondischargeability provisions of section 523(a) during the last twenty years since the enactment of the Bankruptcy Code. The original principles for debt exception from discharge have been set aside time and time again. All too often, neither the requirement of debtor wrongdoing nor compelling societal nor moral justification for nondischargeability were required for nondischargeability status for many of the

from bankruptcy schedules the possibility of having the debt deemed nondischargeable. As the Commission Report noted, generally, the remedy for creditors to have discharge denied under section 727 has been to seek an extension within the time permitted under Bankruptcy Rule 4004(b) or seek a revocation of discharge under 727(e). Unfortunately the language of these provisions do not precisely address this situation. While the Commission recognized these alternatives for relief under the Code, it suggested this amendment to "encourage debtors and their attorneys to be as forthright as possible in listing creditors and in providing accurate information." See id. at 227-28.

Settlement and Dismissal of Objections to Discharge

The Commission recommended an amendment to section 727 to require in any motion by a creditor to dismiss a complaint against discharge that all other creditors should be notified advising them that they have an opportunity to substitute themselves in the complaint; an affidavit disclosing all consideration that the debtor is giving the creditor in connection with the dismissal; and, if consideration is given by the debtor, it must be a benefit to the estate.

The purpose of this recommendation is to address the problem with creditors objecting to discharge with the purpose of extracting a reaffirmation from the debtor, or other benefits for a creditor, which may indicate a "meritless" complaint or any "undeserving debtor" who is trying to prevent other creditors from discovering dishonesty. This recommendation also reflects a local practice in some bankruptcy courts where they treat the creditor filing the complaint as a "trustee" for all creditors and prohibit the creditor from "abdicating" that responsibility or using that position" to his own benefit. The Commission noted that not all dismissals are deceptive, but this requirement is designed to give bankruptcy courts information to determine if dismissal or settlement should be approved or to permit other creditors to be substitutes. See id. at 228-31.
post-1978 amendments to section 523(a), as was the case with the enactment of section 523(a)(2)(C), (a)(8), (a)(14), and (a)(16). Or, in other instances, a new exception to discharge, specially tailored to accommodate special interest group obligation, was added to section 523(a) when original provisions under section 523(a) covering basic common law notions of intentional wrongful conduct by the debtor were sufficient and appropriate in requiring creditor proof of fraud, embezzlement, or willful and malicious injury where appropriate—such as in the case of section 523(a)(9), (11)-(13). All of which has resulted in unnecessary duplication in the law and a bloated body of nondischargeable debt categories.

Given the fact that the number of nondischargeable debt categories increased from eight to eighteen since 1978, the Commission’s selective and limited set of recommendations is to be commended. While this commentator would have preferred an overhaul of the discharge provisions, similar to the “take-the-bull-by-the-horn” approach of The Bufford Group, the Commission did make movement toward a restoration of integrity, fairness, and balance in several of its recommendations. In particular, it was willing to take on the issue of credit card debt and student loan exceptions to discharge which alone is quite controversial given the powerful lobby of the consumer credit industry.

It is obvious that the Commission’s recommendations go against the tide by virtue of the fact that the pending consumer bankruptcy legislation from both the House and Senate offer very little in terms of reform of nondischargeable debt categories and, instead, provide greater protections to credit card issuers and ignore the need to restore the fairness and balance that the basic principles for discharge and exception to discharge embody; that is, to provide discharge to the honest debtor and to assure that creditors are treated equitably. The continuation of preferential treatment of selected groups of creditors in the discharge can only be justified in cases where the debtor is undeserving due to wrongful or culpable conduct in dealing with a particular claimant, or where our most valued moral and societal obligations make a discharge of such debts detrimental to the welfare and basic fabric of society.

As a law premised in equity, bankruptcy law must be about fairness and balance for the good of all parties affected by the debtor’s bankruptcy. To the extent that the exceptions to discharge are contrary to basic notions of fairness and balance, there should
be reform. The Commission's recommendations are a big step in this direction.