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THE RELATIVE RELEVANCE OF BANKRUPTCY: A RESPONSE TO PROFESSOR MARTIN

Daniel Keating[*]

INTRODUCTION

Professor Nathalie Martin has spent a good part of her academic career "helping consumers avoid the many traps and pitfalls created by the current consumer credit world . . . ."[1] Between her voluminous cutting-edge scholarship on consumer law issues[2] and her many years teaching courses such as Bankruptcy, Consumer Law, and Financial Literacy, she brings a rare combination of deep expertise in both bankruptcy and consumer law. Professor Martin's passion for and knowledge of the intersection of consumer law and bankruptcy law are each ably demonstrated in her excellent and thoughtful article, *Bringing Relevance Back to Consumer Bankruptcy*.

Although lacking Professor Martin's sophistication on the consumer law side of things, I nevertheless share her obvious frustration with the economic and income stratification that we both can see on full display in our society today. This widening gap between the haves and the have-nots seemingly worsens with each passing year.[3] I also share Professor Martin's desire to find solutions to this crisis through some form of intervention, whether that be legislative, administrative, or market-based. Her article suggests that certain changes in the Bankruptcy Code (Code) might effectively address some of the ways that bankruptcy law has failed many economically marginalized debtors.

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[*] I would like to thank the following individuals for their helpful comments (some of them quoted in this response piece) on the issue of the relevance of consumer bankruptcy law today: Darrell Clark, Emily Cohen, Danielle D'Onfro, Robert Eggmann, David Farrell, Dave Going, Sandra Louis, T.J. Mullin, Judge Barry Schermer, Wendell Sherk, Judge Kathy Surratt-States, and Cynthia Kern Woolverton. I would also like to thank my fellow panelists Pamela Foohey, David Lander, and Nathalie Martin for their interesting insights on this issue.

[1] Professor Nathalie Martin, UNIV. OF N.M., http://lawschool.unm.edu/faculty/martin/index.html.

[2] *See, e.g.*, Nathalie Martin & Robert Mayer, *What Communities Can Do to Rein In Payday Lending: Strategies for Successful Local Ordinance Campaigns Through a Texas Lens*, 80 LAW & CONTEMP. PROBS. 147 (2017); Nathalie Martin, *Giving Credit Where Credit is Due: What We Can Learn from the Banking and Credit Habits of Undocumented Immigrants*, 2015 MICH. ST. L. REV. 989 (2015); Nathalie Martin & Max Weinstein, *Addressing the Foreclosure Crisis through Law School Clinics*, 20 GEO. J. ON POVERTY L. & POL'Y 531 (2013).

[3] *See, e.g.*, Chad Stone, et al., *A Guide to Statistics on Historical Trends in Income Inequality*, CTR. ON BUDGET & POL'Y PRIORITIES (Jan. 13, 2020), https://www.cbpp.org/research/poverty-and-inequality/a-guide-to-statistics-on-historical-trends-in-income-inequality (noting that beginning the 1970s, "[i]ncome growth for households in the middle and lower parts of the distribution slowed sharply, while incomes at the top continued to grow strongly.").

Because my assignment is to be a commentator on Professor Martin's article, I am assuming that my role is primarily to highlight where my views might differ from hers or where I might add insights that she may have omitted. Having said that, I want to reiterate at the beginning of my comments that I learned many valuable new insights from her article, that I thoroughly enjoyed reading it, and that I agreed with much, if not most, of what she had to say.

Whether or not Professor Martin's prescriptions for bankruptcy reform will make bankruptcy more relevant depends a lot on the accuracy of empirical assumptions and predictions that underlie her article—assumptions about the characteristics of the current consumer debtor population as well as predictions about how her reforms would affect the future behavior of both debtors and creditors. Because I have had so little connection to the real world of consumer bankruptcy practice, I thought that in preparing my response it would probably be helpful to me (and ultimately to Professor Martin) to share Professor Martin's article with people I know who work in the consumer bankruptcy practice area.

The group from which I sought some "real world" perspective included: two federal bankruptcy judges, one chapter 7 and chapter 13 standing trustee, one career law clerk to a federal bankruptcy judge, one former attorney advisor for the Bankruptcy Court for the Eastern District of Missouri, one bankruptcy lawyer who does mostly business but some consumer bankruptcy, and four lawyers who do primarily or exclusively consumer bankruptcy work. I was fortunate to receive written responses from each member of this group except for one lawyer who responded to me by phone call. Collectively, these responses served as a "reality check" to my own reactions to the various proposals put forth in Professor Martin's article. Where appropriate, I will note (and even quote) some of the more insightful comments that I received from this group.

To be clear, I do not pretend that this very informal survey is in any sense an "empirical study." Even if I had been afforded much more time than the one month that I was given to prepare this response, it is highly doubtful that I could have designed and executed a meaningful empirical study that could have reliably tested some of the empirical questions raised by Professor Martin's article. Be that as it may, even these anecdotal insights that I received from very experienced professionals in the field proved quite useful to me as I pondered my own reactions to the proposals contained in the article by Professor Martin.

With those preliminary thoughts out of the way, let me now proceed by first outlining the two "big picture" concerns that I had with the article and then by sharing my thoughts and comments on some of Professor Martin's more specific proposals for reform.

I. SOME THOUGHTS ON THE BIG PICTURE

Even the so-called "big picture" disagreements I have about the article may go more to the degree of Professor Martin's claims in the article than to the essence of what she is asserting. First, I have to quibble with Professor Martin's thesis, at least as it is stated in the opening sentence of her article, where she states, "Consumer bankruptcy has become . . . irrelevant."[4] That is a bold statement indeed, and I appreciate that we both work in an industry—the legal academy—where we are taught from a young, professional age to be bold, even perhaps at the risk of over-claiming. After all, how many untenured professors write law review articles whose stated goal is to make merely some modest contribution to the existing literature at the margin rather than to offer an entirely novel "paradigm-shifting" insight?

While I cannot sign on to Professor Martin's thesis as stated above, I could easily be persuaded by a more nuanced statement of the same thesis, perhaps something along the lines of, "Consumer bankruptcy has become less relevant," or "Consumer bankruptcy has become irrelevant for a certain subset of debtors."[5] What the statistics would show us is that consumer bankruptcy filings have clearly been on the decline following the passage of Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).[6] What the numbers would also show us, however, is that in the most recent calendar year, consumer filings in this country well exceeded 500,000, which seems to me a number large enough to suggest that bankruptcy is still very relevant for at least a nontrivial number of consumer debtors.[7]

The cause of the decline in consumer filings may well be due to the features of the current bankruptcy law that Professor Martin's article proposes to remedy.

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[4] Nathalie Martin, *Bringing Relevance Back to Consumer Bankruptcy*, 36 EMORY BANKR. DEV. J. 581 (2020).

[5] As one of my consumer bankruptcy lawyer respondents put it, "I think her article should be called 'Bringing Relevance Back to Consumer Bankruptcy for the Middle Class or Upper Middle Class.'" This lawyer continued, "In my experience, those who are truly in need of debt relief do not own houses or cars (remember I live in a city with a strong metro system). Also, nearly all do not have large student loans. I think what she is really arguing is that bankruptcy is less available for a certain segment of the population that purchased a new car or a home or purchased an expensive degree." Email from Anonymous Consumer Bankruptcy Lawyer to author (Jan. 8, 2020) (on file with author).

[6] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. 109-8, 119 Stat. 23 (2005). Consumer bankruptcy filings were at just over 1.5 million in 2010, but in 2018 had fallen to about half of that number. *See* Andrew Keshner, *Bankruptcy Filings are at a 10-year Low, but not for the Reasons You Might Think*, MARKETWATCH (Jan. 8, 2019), https://www.marketwatch.com/story/bankruptcy-filings-are-at-a-10-year-low-but-thats-not-necessarily-good-news-2019-01-07.

[7] *See* Keshner, *supra* note 6.

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I would suggest, however, that there are at least two other contributing factors to explain the significant drop in filings since BAPCPA. First, the added burdens to the debtor and the debtor's attorney of BAPCPA have so increased the cost of a basic consumer bankruptcy filing that many consumers who might have otherwise filed bankruptcy before BAPCPA have now been priced out of bankruptcy relief.[8] Second, thanks to the Affordable Care Act (ACA),[9] there are probably fewer debtors than before the ACA who must look to bankruptcy to discharge significant medical debt. I am not suggesting here that the ACA was a panacea in this regard, but only that it probably helped reduce the incidence of the so-called "medical bankruptcy" at the margins.[10]

In addition to my issue above with the scope of Professor Martin's thesis, my second "big picture" question that I have about the theme of Professor Martin's article is whether the bankruptcy system is best suited, or even well-suited, to address the systemic income and wealth inequality that clearly troubles many of us. My understanding of the role of bankruptcy law in the economy has always been that bankruptcy is designed to treat the case of a catastrophic economic disruption for the consumer debtor, with the traditional "big three" of these disruptions being medical debt, job loss, or divorce.[11] Bankruptcy and its discharge enable an individual who could otherwise be economically self-sustaining to wipe their slate clean with respect to whatever one-time financial catastrophe has left a sea of debt in its wake. The effect of such a large and sudden debt is that the individual's regular income is suddenly unable to keep up with both debt payments and living expenses each month. If bankruptcy, however, can discharge this large debt, then the individual is now able to create a personal budget that will finally leave them in the black financially.

Even though consumer bankruptcy and business bankruptcy are quite different in many respects, I believe that both types of bankruptcy share a common core with respect to their role in allowing either an individual or a business to overcome the effects of a non-recurring but major financial setback.

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[8] *See infra* section VI.

[9] Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 et seq. (2010).

[10] *See* Kari Paul, *Medicaid Expansion Saved 50,000 People from Bankruptcy in Two Years*, MARKETWATCH (Nov. 7, 2017), https://www.marketwatch.com/story/medicaid-expansion-saved-50000-people-from-bankruptcy-in-2-years-2017-11-07 (According to a study that was conducted in part by the Consumer Financial Protection Bureau, "Credit score gains due to Medicaid expansion [under the ACA] led to 50,000 fewer bankruptcies among subprime borrowers in the two years following the reform.").

[11] These were the three main precipitating causes of consumer bankruptcy that were cited in the landmark book, *As We Forgive Our Debtors*. *See* Elizabeth Warren, et al., AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA (1989).

In the chapter 11 casebook that I currently use for my seminar,[12] the co-authors at the very start of their book present the contrast of two different businesses as potential candidates for a chapter 11 reorganization. First, we have the Acme Shoe Company, which currently makes a pair of shoes at a cost of $10 and then sells each pair for $9.50. Then we have Ernestine and her Copy Shop, a start-up business that had been quite successful in its early months until a customer slipped and fell on the premises. The customer got a big tort judgment against Ernestine's business and Ernestine had failed to pay her liability insurance, which meant that the tort judgment was not covered by insurance. The authors of the casebook pose the question to the students, which of these two companies is an appropriate candidate for chapter 11 bankruptcy?[13]

The short answer to that question is of course supposed to be Ernestine and her Copy Shop. Ernestine's business has proven that, in the absence of this massive one-time debt, it can be self-sustaining and is worth more as a going-concern than it is if liquidated piecemeal. The deeper answer to this question is that perhaps Acme Shoe Company is also an appropriate candidate for chapter 11. However, in order for Acme Shoe Company to be a viable business even with the help of chapter 11, the company would need to change the way it does business so that it can become economically sustainable. Perhaps that would involve figuring out how to cut some needless costs or otherwise finding ways to become more efficient and profitable. Perhaps that would mean manufacturing some new products or expanding into some different geographic markets. But simply filing chapter 11 bankruptcy with nothing more is not going to save Acme Shoe Company from its fast-approaching demise.

What concerns me the most about what I see in our country's current climate of income stratification is that a large segment of the economically marginalized population falls into a category that I would describe as "structurally unsustainable." In other words, it seems that a significant portion of our lower-wage workers simply do not make enough income at their current positions to afford what most of us would view as the basic necessities of life: safe housing, transportation, child care, food and medical care, not to mention certain other traditional features of middle-class life such as travel, entertainment, a pension, and money for a child's college tuition. Bankruptcy, it seems to me, is much better at dealing with the one-time economic catastrophe than it is at addressing these cases of structural unsustainability. To better address structural unsustainability, perhaps we need to look at broader approaches such as income

[12] *See* Mark S. Scarberry, et al., BUSINESS REORGANIZATION IN BANKRUPTCY (4th ed. 2012).
[13] *Id.* at 3–5.

tax reform, a more robust social safety net, a higher federal minimum wage, a guaranteed income, federally subsidized housing, and similar programs outside of the bankruptcy system.

Granted, just because an individual is currently in a state of structural unsustainability does not mean that they cannot change that, either by their own efforts, the government's assistance, or some combination of the two. Just like Acme Shoe Company can take a hard look at the way it does business to see if it can change in a way that makes it viable, individuals can potentially change their own situations through job training, higher education, or even consumer education that makes them use what little money they have more efficiently. The hard question for me, however, is whether bankruptcy is the vehicle best designed for effectively addressing this common category of struggling consumer in our current economy.

Let me now consider three different (and artificially constructed) categories of consumer bankruptcy debtors and ask in each case how Professor Martin's proposed reforms would make a bankruptcy filing more useful or relevant. For my Category 1 debtor, I will consider what I think of as the classic candidate for bankruptcy relief: An individual who could be financially self-sufficient but for some catastrophic one-time or random financial event, such as medical debt, temporary job loss, or divorce. This debtor has no student loans and they may or may not own their own home or their own car, but home or car debt is not their issue. Rather, it is their inability to pay the non-recurring but large debt that makes them currently unable to pay their bills and their expenses as they come due. Their financial situation could best be described as not structurally unsustainable, but merely temporarily unsustainable.

For this Category 1 debtor, the current consumer bankruptcy laws may already give them the relief that they need to become financially self-sufficient once again. It is possible that some of these Category 1 debtors will be forced to file a chapter 13 case instead of a chapter 7 case due to the means test of BAPCPA,[14] but even a chapter 13 case may ultimately get them out from under the catastrophic debt which they need to have discharged in order to make their income and expenses balance out again.

I would submit that for a Category 1 debtor as I have defined that group, Professor Martin's proposed reforms would not make bankruptcy more relevant for them personally. Because their problem is not rooted in large mortgage

[14] *See* 11 U.S.C. § 707(b) (2019).

payments and a home of declining value, or large car payments and a car of declining value, or large student loan payments, they will likely get the relief they need under current bankruptcy law with an eventual discharge of the unsecured debt represented by their one-time financial catastrophe.

My Category 2 consumer debtor is one that I have already described. They fall into my "structurally unsustainable" category. Their problem is that their current low income simply cannot keep up with the normal expenses of independent adult living. Perhaps they were able to run up a lot of credit-card debt in the short-term in order to mask temporarily the structurally unsustainable nature of their financial situation. And for that, a bankruptcy filing and the accompanying discharge of such unsecured debt could give them some short-term relief from their financial struggles. However, that relief by definition would only be short-term given that I am defining this group of consumer debtors as simply not making enough income to meet basic expenses even aside from any one-time or catastrophic debt. For this group of consumer debtors, neither current bankruptcy law nor Professor Martin's proposed reforms would provide much in the way of sustainable relief.

As I think about why bankruptcy is probably not a viable solution for the structurally unsustainable situations faced by many consumer debtors, I am reminded of a quote that I include in my Sales casebook[15] from Judge Richard Posner in an opinion he wrote about the unconscionability doctrine in UCC Article 2.[16] Judge Posner was reflecting on the limited utility of the unconscionability doctrine to help economically marginalized buyers: "Since the law of contracts cannot compel the making of contracts on terms favorable to one party, but can only refuse to enforce contracts with unfavorable terms, it is not an institution that is well designed to rectify inequalities in wealth."[17] I would say essentially the same thing about bankruptcy as applied to a consumer debtor who simply does not make enough income to meet basic living expenses: Since bankruptcy cannot compel employers to pay a higher wage for the consumer debtor, but can only discharge their past debts once every eight years, it is not an institution that is well designed to rectify inequalities in wealth (or income).

My Category 3 group of consumer debtors would be the ones who would most stand to benefit from Professor Martin's proposed reforms. I am defining these debtors as individuals who are unable to meet their basic living expenses

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15 DANIEL KEATING, SALES: A SYSTEMS APPROACH (7th ed. 2020).

16 *See* U.C.C. § 2-302 (2012).

17 Amoco Oil Co. v. Ashcraft, 791 F.2d 519, 522 (7th Cir. 1986).

mainly due to large mortgage payments, large car payments, and large student loan payments. In order for this group to benefit from Professor Martin's proposals, they would need to be in a situation where the secured loan on their car or home is currently undersecured by some significant amount. Otherwise, the strip down benefit that they would achieve in a chapter 13 filing would not serve to lower their payments. In other words, if their home value or car value currently equaled or exceeded the outstanding debt for that collateral, then they could not expect bankruptcy to bring them financial relief through lower monthly payments.

For my Category 3 debtors who are primarily burdened by large student-loan payments, Professor Martin's proposal would clearly seem to help them. The marginal benefit of that help would have to be measured against what the consumer debtor could already qualify for by way of nonbankruptcy income-driven student loan repayment plans.[18] A bankruptcy discharge of student loan debt has two benefits to the consumer as compared to an income-driven repayment plan outside of bankruptcy: first, in the short term, the debtor who gets a bankruptcy discharge would not have to make even the lower-than-standard payment required by a nonbankruptcy income-driven repayment plan; and second, in the long term, the debtor with a student-loan discharge would not need to worry about the huge tax burden that comes with forgiveness at the end of the income-driven repayment period. Under Professor Martin's proposal, consumer debtors would need to wait seven years from the point that they begin payments to qualify for the discharge that she recommends, but they could at least qualify for the all-important bankruptcy discharge at that time.

In order for us to meaningfully address the questions of whether, and to what extent, Professor Martin's proposals would make bankruptcy relevant, or more relevant, we would need to have a sense of the relative number of consumer debtors that fall within these three categories. Even if we had the time and resources to do a detailed empirical study, I suspect that the artificial boundaries of my categories would become quickly apparent, and most real-life debtors would probably fit some combination of the three categories as I have outlined them above. Nevertheless, the important unknown here for me is to what extent the population of debtors today leans toward the characteristics of my Category 3 debtor. It would be to that extent—to the extent that today's debtor population resembles my Category 3 debtor—that Professor Martin's proposals would

[18] *See generally The Road to Zero: A Strategic Approach to Student Loan Repayment*, ACCESSLEX INST. (2020), https://www.accesslex.org/RoadToZero.

make consumer bankruptcy more relevant than current bankruptcy law for the overall group of more than half a million annual consumer bankruptcy filers.

II. Lien-Stripping for Home Mortgages and Car Loans

I am generally in agreement with Professor Martin's proposal to allow lien strip downs for a debtor's primary home mortgage or for a debtor's car loans. As a bankruptcy judge friend of mine put it so succinctly, if the lender were forced to do a foreclosure sale outside of bankruptcy on the home or car, all they would get in cash is the value of the collateral anyway.[19] If the debtor wanted to file bankruptcy immediately after such a foreclosure sale they could thereby discharge the unsecured deficiency claim, if any, and achieve the functional equivalent of a mortgage strip down. The big difference, of course, between what a lender gets outside of bankruptcy with a state-law foreclosure in this context vs. what the lender gets in a chapter 13 case is the timing of payment: immediately in a state-law foreclosure vs. over a five-year period in a chapter 13 plan.

Having stated my general agreement with this lien-strip down proposal of Professor Martin's, let me just add a few thoughts on the subject. First, the marginal benefit of this proposal will be a function not only of the particular debtor's circumstances (see my three debtor categories above), but also of the residential real estate market. Three of my small sample of consumer debtor attorneys opined without my asking that in the current residential real estate market, a mortgage loan strip down would not be meaningful for most debtors who come to see them and are currently paying home mortgages. As one consumer bankruptcy lawyer put it,

> The subprime market that existed prior to the crash does not exist in this environment. Lending has in fact tightened with underwriting, all but eliminating the 'no doc' and inflated valuations the country experienced in the early 2000s. The national delinquency rate is less than 4% while Missouri's default rate is at approximately 1%.[20]

Presumably when the next recession hits and real estate prices drop, this proposal of Professor Martin's would have greater relevance to at least those

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[19] Email from Anonymous Bankruptcy Judge to author (Jan. 10, 2020) (on file with author).

[20] This lawyer noted that "Delinquency rates have fallen to their lowest rate in 25 years, and on a year-over-year basis, total mortgage delinquencies decreased for all loans outstanding. The delinquency rate decreased by 56 basis points for conventional loans, decreased 74 basis points for FHA loans, and decreased 23 basis points for VA loans." Seth Welborn, *Where Mortgage Delinquency Rates Are Improving Most*, DS News (Nov. 15, 2019), https://dsnews.com/daily-dose/11-15-2019/delinquency-rate-by-loan-type.

debtors who file bankruptcy and want to keep their homes with potentially reduced monthly payments.

My second observation about this lien-strip down proposal is that it would add a nontrivial valuation issue to any consumer case where the debtor sought the benefits of strip down. This was a point specifically raised by one of my bankruptcy lawyer respondents.[21] Granted, residential real estate valuation is not nearly as complicated as is commercial real estate valuation. Nevertheless, the valuation range of any home at any given time can be quite broad. A recent personal example is that when my own county recently reassessed my home's value for property-tax purposes, it claimed that in the two-year interval since the last assessment the value of my house had risen by forty-seven percent based on local "comparable" houses that the assessor's office had compiled. When I challenged that assessment on appeal with my own list of comparable houses, the county reduced its reassessment to a much more modest six percent increase over its previously assessed value at the last two-year interval. The point is, even when it comes to residential real estate values, there is a wide range within which the two sides can litigate about valuation with potentially many thousands of dollars at stake. That, in turn, could add cost and complication to a consumer bankruptcy case as compared to the current no-valuation setting.[22]

A third point that was raised by two of my consumer bankruptcy attorney friends is that even in the absence of this lien-strip down reform proposal, a clever debtor's lawyer can often achieve the benefits of a lien strip down during a time of falling real estate prices. One lawyer focused on the language of the current anti-strip down provisions in chapter 13 cases, in which only mortgages that are "secured only by the principal residence" are denied strip down treatment.[23] This lawyer explained, "Since most Deeds of Trust get an assignment of insurance proceeds in the event of a fire, a creative judge could easily view that as extra collateral and allow a cramdown. I did this once . . . when [the mortgage lender] refinanced a home and took chicken coops also—[it] saved my guy $60,000 plus interest over time! Got to read those Deeds of Trust and think outside the box!"[24]

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[21] Email from Anonymous Consumer Bankruptcy Lawyer to author (Jan. 23, 2020) (on file with author).

[22] A debtor's home valuation can still become an issue in a chapter 13 case even without the strip down possibility. The bankruptcy court must determine the debtor's equity in their home as part of a determination of how much non-exempt property the debtor owns in a chapter 13 case. However, the valuation stakes in those cases tend not to be high given that the typical debtor's equity in their home does not exceed the relevant homestead exemption amount and thus would not be available for creditors anyway.

[23] *See* 11 U.S.C. § 1322(b)(2) (2019).

[24] Email from Anonymous Consumer Bankruptcy Lawyer to author (Jan. 8, 2020) (on file with author).

Another bankruptcy attorney friend of mine suggested an alternative way to qualify for strip down even under the current bankruptcy laws: "Regarding the strip off/strip down of real estate used as a residence: I never understood why a debtor did not simply move in with the in-laws for a few months and establish a different residence prior to the bankruptcy. Then, do the strip off of the second mortgage or the strip down of the first mortgage in bankruptcy. Then move back after discharge."[25]

On the subject of BAPCPA's rule that eliminated car-lien strip downs for any car bought within 910 days of the debtor's bankruptcy filing,[26] one consumer bankruptcy lawyer that I contacted suggested that Professor Martin's proposed reform (which I also support) might not actually put more money in the debtor's pocket in many cases that he has recently seen: "I don't think this [proposed repeal by Professor Martin of BAPCPA's anti-strip down rule for car loans] is going to make or break the system as such. With the 'typical' middle class Ch. 13 case, it simply caused a reduction in the unsecured dividend in order to pay for the 910-day car. It was a wealth transfer within the estate but it has typically meant a minimal increase in the actual payment required of the debtor into the estate."[27]

That same attorney, however, believes that Professor Martin's proposal on stripping down car loans could be significant over time:

> I suspect that [the lack of impact noted above] will change in the coming years. We're seeing auto loans that extend well beyond the standard 5-year term to deal with high MSRPs [manufacturer's suggested retail price], far more than typical consumers can reasonably afford. The vanishing middle class is causing this creative financing, so we get 8-year car loans, which include a chunk of negative equity to boot.
>
> The means test doesn't account for that well (we only get a deduction driven by 60-months of the auto debt service) and cramdown on those very costly cars could be critical to making any plan work while retaining the car. We can currently set up the plan to pay those long-term loans on a conduit basis—just keep up the contract payments for 5-years—but at the contract subprime interest rates instead of 'Till' rates[28] [generally much lower than subprime interest rates]. That may

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[25] Email from Anonymous Consumer Bankruptcy Lawyer to author (Jan. 8, 2020) (on file with author).

[26] *See* 11 U.S.C. § 1325(a) (2019).

[27] Email from Anonymous Consumer Bankruptcy Lawyer to author (Jan. 9, 2020) (on file with author).

[28] *See* Till v. SCS Credit Corp., 541 U.S. 465, 479–80 (2004) (holding that the interest rate to which a secured creditor is entitled in a chapter 13 plan is not the creditor's contract rate but instead a market rate of interest equal to the prime rate plus some small additional 'risk factor' to reflect the particular debtor's level of

> leave nothing to cope with mortgage arrearage or other things we have to pay under the plan. At the very least, it would be nice to be able to 'term-out' such car loans with a reduced interest rate and not be limited to five years [the usual length of the Chapter 13 plan]. That might be more valuable than a repeal of 910-day protections on the valuation, in the long term, given the spiraling cost of new cars.[29]

III. STUDENT LOANS

Whether or not bankruptcy is the best vehicle with which to address the student loan problem, I think that most people would agree that the student-loan debt problem is a growing economic crisis that is currently in search of solutions.[30] The student-loan crisis reminds me a lot of the underfunded pension crisis that was fueled by the passage of ERISA and the federal government's guarantee of employer-sponsored defined-benefit pension plans.[31] Both situations present classic examples of economic bubbles that are bound to burst. In my article on the federal pension guarantee, I called this pattern "deferred maintenance"—where someone gets a benefit now by making a promise to pay someone later—and moral hazard, since the federal government's role as guarantor in both situations means that defined-benefit pensions were promised by employers and student loans were made by lenders that otherwise might not have been promised or made but for the existence of the solvent third-party guarantor.[32]

In both cases, the federal government finally realized at some point in the process that it had overpromised and that it needed to do something to help manage its likely losses. In the pension arena, the scope of the defined-benefit pension guarantees by the federal Pension Benefit Guaranty Corporation eventually had to be scaled back.[33] With student loan guarantees, the federal government continues to struggle with how to eliminate participation by certain colleges and universities (often for-profit) whose graduates have historically low

risk to the lender).

[29] Email from Anonymous Consumer Bankruptcy Lawyer to author (Jan. 9, 2020) (on file with author).

[30] *See* Daniel M. Johnson, *What Will It Take to Solve the Student Loan Crisis*, HARV. BUS. REV. (Sept. 23, 2019), https://hbr.org/2019/09/what-will-it-take-to-solve-the-student-loan-crisis (estimating current student loan debt at just under $1.6 trillion).

[31] *See generally* Daniel Keating, *Pension Insurance, Bankruptcy and Moral Hazard*, 1991 WIS. L. REV. 65 (1991).

[32] *Id.*

[33] *See id.* at 88–89.

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repayment rates, while still keeping the program generally available to the next generation of college students.[34]

The main limit of bankruptcy as a solution to either of these two federal financial crises, at least from the perspective of the federal treasury, is that bankruptcy fails to put any new money on the table. In theory, bankruptcy can be helpful to the debtor in each of these two situations—the employer with the underfunded defined-benefit pensions and the consumer with unpaid student loans—if it allows the debtor to transfer their liability onto the federal government's guarantee. Thus, in bankruptcy a broader student-loan discharge would amount to a wealth transfer from each debtor who gets the student-loan discharge to federal taxpayers as a group. In the corporate pension arena, this has worked to some degree for corporations that were able to use chapter 11 bankruptcy to discharge some or all of their defined-benefit pension liability and then emerge with a much cleaner balance sheet for the future.[35] For individual debtors looking for similar relief in the student loan arena, the outcomes have been much less favorable, thanks to the current "undue hardship" standard for discharge that is found in § 523(a)(8).[36]

I am inclined to favor Professor Martin's proposal on student loan discharge, and I definitely favor it over a more universal nonbankruptcy loan forgiveness program such as that being proposed by certain presidential candidates.[37] The biggest problem that I have with a nonbankruptcy loan forgiveness across the board is that it would sweep within its scope many debtors who could easily afford to repay their loans. I am thinking here of highly paid professionals who borrowed to attend medical school, law school, or business school. These wealthy debtors would potentially receive the same debt forgiveness as debtors who worked hard to earn degrees that were not marketable and who now struggle with limited incomes to repay their large student loan debts. One major advantage to Professor Martin's proposal (unlike universal forgiveness programs outside of bankruptcy) is that it would require seven years of repayment by the debtor plus surrender of all the debtor's non-exempt assets (or

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[34] *See, e.g.*, Annie Nova, *Bill Would Make For-Profit Colleges Ineligible for Federal Student Loans*, CNBC (Oct. 23, 2019), https://www.cnbc.com/2019/10/23/bill-would-make-for-profit-schools-inelgible-for-financial-aid.html.

[35] *See, e.g.*, Keating, *Moral Hazard*, *supra* note 35, at 65 (describing the 1986 chapter 11 filing of the LTV Corporation).

[36] 11 U.S.C. § 523(a)(8) (2019).

[37] *See* Adam S. Minsky, *How Do the Warren and Sanders Student Loan Forgiveness Plans Compare?*, FORBES (June 27, 2019), https://www.forbes.com/sites/adamminsky/2019/06/27/how-do-warrens-and-sanders-student-loan-forgiveness-plans-compare/#5a8a4c318c4f (noting that Sanders' plan is a total forgiveness plan whereas Warren's plan has various limitations).

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its equivalent value in chapter 13 plan payments) as the cost of receiving the student loan discharge.[38]

The other benefit to Professor Martin's proposal as compared to nonbankruptcy forgiveness programs is that it would probably be less costly to taxpayers. But even with Professor Martin's proposal, my one hesitation in endorsing it without qualification is the uncertainty of its cost. Given the hundreds of billions of dollars in outstanding student loan debt, how much of that would get discharged under Professor Martin's bankruptcy reform and thus get written off the federal treasury's bottom line? That is one of those critical empirical questions for which we just don't know the answer.

On the subject of student loans, I want to close by sharing ideas that were sent to me by two of the people that I contacted in the bankruptcy field. One bankruptcy lawyer that I know suggested to me that the way to rein in the student loan crisis, at least going forward, is to require that colleges and universities where students attend must sign on as guarantors of any student loans taken out by their students.[39] This would, he said, address the "Bennett Principle" mentioned in Professor Martin's article. That is where former Secretary of Education William J. Bennett complained that colleges were able to raise their tuition at artificially high rates only because of the assurance that students could pay those higher tuition costs thanks to the federally guaranteed student loans.[40] While I appreciate how that might address the arguable moral hazard that universities have under the current system, I think that I had better not wholeheartedly support this idea, at least given the nature and identity of my current employer!

Another of my respondents from the bankruptcy field thought that many debtors might be able to improve their current situation regarding their student loans if only they had appreciated prior to filing bankruptcy what rights they already had under income-driven repayment programs:

> I also think that a mechanism for communication between lenders and student loan debtors before bankruptcy would eliminate lawsuits in bankruptcy and in some instances the filing of bankruptcy cases in the first instance. All too often a debtor does not learn of (or understand)

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[38] Under chapter 13, the "best interests of creditors test" under § 1325(a)(4) says that no chapter 13 plan can be confirmed over a creditor's objection if that creditor does not receive at least as much as the creditor would in a chapter 7 liquidation of the same debtor. And a chapter 7 liquidation of any debtor would require that the debtor give up all of their non-exempt property to pay pre-petition creditors.

[39] Telephone Interview with Anonymous Consumer Bankruptcy Lawyer (Jan. 15, 2020).

[40] Martin, *Relevance*, *supra* note 5, at 608.

> nonbankruptcy student loan repayment options until after filing an adversary proceeding in his bankruptcy case and being connected with lender's counsel.[41]

IV. Discharge Hearings

I agree with Professor Martin that there is an unfortunate but significant psychological or shame-based aspect to the bankruptcy process, and that in a perfect world a debtor would have an opportunity to tell someone their side of the story. I truly believe that people get better and feel better when they have an opportunity to tell their story. Based on what I heard from my professional friends in the consumer bankruptcy field, however, it seems that the better forum in which a debtor can tell their story is not the former discharge hearing, but rather the offices of their own bankruptcy attorney. I received more than one impassioned response that roundly applauded the demise of the discharge hearing.

One attorney who has been doing exclusively consumer bankruptcy filings for almost fifty years recalls:

> I well remember those [discharge] hearings. I used to send letters to other lawyers and offer to attend for them, meet their clients, and tell what was happening along with my clients, of course, at $10 a head. I always made an extra $40 that way. You had to attend the hearing with your clients, of course, as otherwise your clients would not understand what was going on and if there was a debt to be reaffirmed, you already had to be there lest things get confused.
>
> As a consequence, your clients lost two to four hours of work earning money, had to pay for parking and the lawyer had to charge for going, also. Total waste of time. I agree that folks need to feel good about what they are doing. But this is the job of the debtor's attorney. You need to explain to folks that filing is designed to give them an opportunity for a fresh start. That the guys who drafted the Constitution, Thomas Jefferson, Ben Franklin, Jim Madison, and all the [founders] wanted the U.S. to be a place of fresh starts. That people like Harry Truman, Walt Disney, and others have filed. That you cannot walk forward in life while kicking yourself in the butt!
>
> If you do this, your clients will not be happy they are seeing you, obviously, any more than a person with cancer is happy to see the doctor, but they will be happy that they live someplace where folks can get a fresh start (unlike some places in the world) and will

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[41] Email from Anonymous Consumer Bankruptcy Lawyer to author (Jan. 14, 2020) (on file with author).

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> appreciate that brave men have gone to the death to keep it that way on a variety of levels, not just bankruptcy. Better this extra fifteen minutes in the office than wasting two to four hours of their time later plus pay extra fees for the lawyer to sit there trying to think of something else while the judge drones on.[42]

Another lawyer with three decades in consumer bankruptcy practice echoed those sentiments about the discharge hearing:

> I agree a lot of my clients are relieved to finally be able to tell their story. A discharge hearing might, in the right circumstances, be a nice forum for them to celebrate their fresh start. But I think it's likely to be a bad idea as implemented. First, if it's mandatory, it will cost them time away from work. They can't afford that. They just can't. These are folks who are often working two jobs. They work a couple hours of their time to pay for parking downtown. And then give up a couple more hours to just be there.
>
> Second, there are just enough judges who think consumers ought to be punished for being bankrupt that I dread having my clients ever having to appear before them. (Not in [the Eastern District of Missouri] thankfully.)
>
> Third, I currently can tell most clients they only have to go to court once, they never even have to see the (fearsome) judge in most cases, and at the end they don't have to go back down there to bend their knee and apologize to anyone to get their fresh start. They genuinely fear any public appearance as part of their bankruptcy case. Telling them they can keep their head down, collect this entitlement and move on with their life is what they crave.
>
> What we're talking about here is folks need to have a sympathetic counselor. That's my job, not [the bankruptcy judge's]. I can usually look at an intake questionnaire of three pages and know what happened. Not the nitty-gritty details but the big picture. But I have to give them five to ten minutes to just tell their story and get it off their chests and then they're ready to begin working with me. I agree with [Professor Martin] that they need it but I don't think it belongs in the courthouse. Plus, if it's a court hearing, lawyers ought to go. That's an additional cost to the client that they cannot afford.[43]

Finally, a former bankruptcy attorney who spent many years as a federal bankruptcy law clerk, as an attorney in private practice and then as an attorney

[42] Email from Anonymous Consumer Bankruptcy Lawyer to author (Jan. 8, 2020) (on file with author).

[43] Email from Anonymous Consumer Bankruptcy Lawyer to author (Jan. 8, 2020) (on file with author).

advisor for the bankruptcy court remembers her judge talking about these hearings and how perfunctory they were when they used to be required:

> Steps to force debtors to attend discharge hearings are not, in my opinion, practical nor would they be effective in giving debtors the desired feeling of being heard and encouraged on their discharge. First, courts do not have the capacity to conduct individual hearings on discharge so the process would become an exercise in convening a group and conveying a common message. Debtors would actually be burdened to take time from work to attend such a hearing. Rather, I think care for debtor concerns is best met by their counsel as a matter of legal ethics and duty to be responsive to clients. I do not know any instance when a debtor who wants to speak to the court has not been allowed to speak and when speaking has not been made to feel heard. Counsel simply needs to ask for such an opportunity at a scheduled hearing. Legislating care and compassion does not work.[44]

V. EFFICIENCY

Professor Martin did not focus much of her reform proposals on the increased time and cost that BAPCPA created as potential barriers to bankruptcy's current relevance to the average consumer. Nevertheless, those were both common (if unprompted) themes of the comments that I received from the people I contacted who work in the consumer bankruptcy field. A number of respondents noted how the added costs of BAPCPA may have priced some potential consumer bankruptcy filers out of the market altogether. One of my bankruptcy judge respondents observed:

> [F]ilings are and have been down since 2005 for some of the reasons stated by Prof. Martin in this article, but there are also other reasons, such as limited lending by banks and other financial institutions and the increased cost of filing consumer bankruptcy (i.e. increase in attorney's fees due to additional attorney work required under BAPCPA, cost for credit counseling and financial management courses).[45]

An attorney with three decades of experience representing consumer debtors echoed those sentiments:

> I believe a growing impediment to relief—and thus making bankruptcy irrelevant to consumers—is the growing cost of it.

[44] Email from Anonymous Former Consumer Bankruptcy Lawyer to author (Jan. 23, 2020) (on file with author).

[45] Email from Anonymous Bankruptcy Judge to author (Jan. 8, 2020) (on file with author).

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> Structurally, BAPCPA created a tax payable to me for collecting a lot more data, providing more docs, and dealing with more risks. The AO's last couple of revisions to the official forms have not exactly reduced that tax either. They're horrendous and burdensome without any offsetting benefit at all. So one of the effects of that tax coupled with the decline of the middle class and the absence of disposable income is the problem of actually getting anything filed. Just calculate how many hours the median Missourian must work—effectively for me and the court—in order to get a case filed. Ignoring any other costs of their life. If we're charging them $1,000 plus a $335 filing fee, it's insurmountable for many lower-income folks without family or savings. Pro se or pro bono services are not able to cover the gap in affordability. And pro se systems are downright dangerous in places with weak exemptions like Missouri.[46]

Another attorney respondent with almost five decades of practicing consumer bankruptcy law was even more blunt in his assessment of the inefficiencies brought about by BAPCPA:

> The first thing we should consider when making any changes in the law is how do we make it faster, cheaper, and easier. The current law has slowed things down and raised the cost of doing business greatly, all to no benefit to anyone. Fees have gone up from $175 to $750 a case and we, as lawyers, made more money when it was $175 than now and the clients are not getting any better results either![47]

A chapter 7 and chapter 13 standing trustee who handles hundreds of cases each year cited BAPCPA's means test as creating new cost-heavy barriers for consumer debtors with no corresponding benefit to anyone in the bankruptcy system:

> I for one think that the Means Test is worthless. The idea behind the Means Test of course is to force the abusive debtor from chapter 7 into chapter 13. However, these days where you have 0% chapter 13 plans or chapter 13 plans where a small amount is paid to the unsecured creditors, forcing someone into chapter 13 really does not help the creditors but simply punishes the debtor. The old section 707(b) [dismissal for abuse of the bankruptcy process] was an effective tool to police the system. In fact, it seemed to me to give more leeway to the U.S. Trustee to pursue a 707(b) rather than the formulaic Means Test. In some jurisdictions the U.S. Trustee takes the position that if one passes the Means Test they will not look at a traditional 707(b). In addition, the Means Test is unfair in that there are different median

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[46] Email from Anonymous Consumer Bankruptcy Lawyer to author (Jan. 9, 2020) (on file with author).

[47] Email from Anonymous Consumer Bankruptcy Lawyer to author (Jan. 8, 2020) (on file with author).

> incomes and different standard exemptions from state to state. If we went back to the old system, I think there is more flexibility.[48]

Besides the means test, the pre-bankruptcy credit counseling and post-bankruptcy financial management classes required by BAPCPA were cited by many of my respondents from practice as needlessly adding to the time and cost of a typical consumer bankruptcy filing.

One veteran consumer bankruptcy lawyer faulted the general "one size fits all" nature of such required courses as being not very helpful to most consumer debtors:

> I used to think [that more expansive consumer education would be useful], but the studies more recently seem to say that most such programs are simply not preparing consumers for the lending environment we're in now. Some of the specialized programs show results—like the programs directed at new home buyers. I suspect that there's good reason for this. Targeted education related to a specific loan product that someone is seriously thinking about using will get focused attention from the student. A discussion about how daily interest loans work and that it is a dangerous product, taken a couple years before the borrower walks into a friendly neighborhood finance store, was probably a complete waste of that person's time. They won't even recall what questions they should be asking. I don't. And I've been doing this for 30 years.
>
> The same is true of most budgeting courses. The only people who can gain much from education about budgeting are high-income folks who somehow keep piling up credit card debt anyway because they have no conception of how to say 'no' to new fixed costs in their life. The low-income folks learn from hard, painful experience to budget or they go hungry. The middle class usually grasps the principles of budgeting but rarely have income that consistently keeps up with their status . . . they spend to try to maintain a standard of living that most of us consider reasonable.
>
> I just don't think any education program I've heard about will really work unless it is focused on a desired transaction or specific goal. Then it seems to 'take.' But we just have not found the tools for broad consumer finance education yet. And I feel like such proposals will inherently be a taxpayer cost. In which case, you will have most cash-strapped communities looking for 'free' programs which, in turn, will come gift-wrapped from the industry. And while I suspect Jamie

[48] Email from Anonymous Consumer Bankruptcy Lawyer to author (Jan. 21, 2020) (on file with author).

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> Dimon[49] could probably be counted on to put together a largely unbiased program (although not recommending my services), I have very little expectation that Freedom Debt Relief (the biggest debt settlement operator) would miss the opportunity to market itself.[50]

Another multi-decade practitioner also had little good to say about how these debtor education requirements have worked out in practice:

> The current requirement of two classes is an expensive total waste of time. Clients are much better buying shoes for the kids than paying for time-wasting classes. Also, they will get more benefit out of watching re-runs of Roseanne than spending two to four hours on the computer effectively being told they do not have enough money to live on. Also, the classes smack of cultural imperialism, I think, with 'know-it-alls' telling working people how to live their lives.[51]

A bankruptcy judge echoed the sentiments of these two lawyers:

> [I believe that] other barriers to bankruptcy access, particularly for the average and marginalized consumer, [include] the pre-petition credit counseling requirement and barrier to discharge of the post-petition financial management requirement. Elimination of these two requirements should be included in any proposal to provide better access to the average consumer, in that these requirements can be detrimental to bankruptcy filers, often resulting in dismissal of cases shortly after filing or closing of cases without a discharge, and are an additional cost, requiring additional time by the debtor and they really serve no purpose.[52]

A chapter 7 and chapter 13 standing trustee distinguished between the relative value of the pre-bankruptcy credit counseling requirement and the post-bankruptcy financial management classes that debtors must take to qualify for discharge under BAPCPA:

> What I find from my clients and from debtors for whom I am their chapter 13 or chapter 7 trustee is that very little is attained by the debtors in pre-bankruptcy credit counseling. However, I have had a number of debtors comment that the post-bankruptcy financial management is of service. Accordingly, it seems to me that the pre-bankruptcy credit counseling is doing nothing more than providing a logistic impediment for consumers to file bankruptcy and really doing

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49 Jamie Dimon is currently chairman and CEO of JPMorgan Chase & Co.

50 Email from Anonymous Consumer Bankruptcy Lawyer to author (Jan. 9, 2020) (on file with author).

51 Email from Anonymous Consumer Bankruptcy Lawyer to author (Jan. 8, 2020) (on file with author).

52 Email from Anonymous Bankruptcy Judge to author (Jan. 23, 2020) (on file with author).

https://scholarlycommons.law.emory.edu/ebdj/vol36/iss2/10

> no good whereas the post-bankruptcy financial management actually has benefit.[53]

One long-time bankruptcy lawyer disagreed with the others in my group of respondents on the costs and benefits of the education requirements, having concluded from his experience that probably the benefits justify the costs:

> In my opinion the BAPCPA-required classes for bankruptcy filing and for a discharge are not a barrier. They cost about $50 for both classes and you pay once—before you file. Debtors can take them online or over the telephone. I bet it takes 20 minutes for each class. I have had some debtor clients say that the class helps. It is not a total waste of time.[54]

CONCLUSION

Professor Martin's article is a provocative and thoughtful exploration into the ways that the bankruptcy system could be improved to address some of the most vexing problems that our society faces today in an era of increasing wealth disparity. Although I did not agree entirely with all of her proposals for reform, even those with which I disagreed gave me new insights and new food for thought on issues that are clearly important to the overall bankruptcy system as it operates in practice today. Probably my biggest question about the overall theme of the article is whether bankruptcy, as opposed to broader nonbankruptcy solutions, is the most appropriate vehicle for addressing these systemic income and wealth imbalances that we face as a nation. As I suggested earlier in my response, the answer to that question is to a large extent an empirical one that depends on the circumstances and attributes of the typical consumer bankruptcy debtor. Whatever the empirical data might end up telling us about the likely efficacy of Professor Martin's various proposals, I am confident that her article is an important contribution to the growing literature on how bankruptcy might be used to ameliorate certain of our country's current economic inequities.

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[53] Email from Anonymous Consumer Bankruptcy Lawyer to author (Jan. 21, 2020) (on file with author).
[54] Email from Anonymous Consumer Bankruptcy Lawyer to author (Jan. 8, 2020) (on file with author).