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THE LEGAL INFRASTRUCTURE OF *EX POST* CONSUMER DEBTOR PROTECTIONS

Melissa B. Jacoby[*]

INTRODUCTION

On the first Tuesday of the month, a few dozen people stand staggered on the steps of the county courthouse. They appear to be reading aloud to themselves from a sheaf of papers. Passersby steal glances but often are unaware that these readings carry great legal significance: foreclosure auctions of homes. Those representing the mortgagees have neither podium nor microphone, let alone a gavel. Murmuring simultaneously, they don't take turns. As the law requires, these auctions likely have been advertised in small print in newspapers. But, for a variety of reasons, interested third-party bidders with the requisite cash, cashier's check, or wiring instructions are few and far between. Absent a higher third-party bidder, the mortgagee becomes the owner of the home in a matter of minutes. Absent a later challenge, the process is over.[1]

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1. This description is loosely based on my direct observation of "Foreclosure Tuesday" on the steps of the Fulton County Courthouse in Georgia, which is a non-judicial foreclosure state.

Just a few city blocks away, people with distressed mortgages file bankruptcy petitions in a federal courthouse. These filings will usually stop a scheduled foreclosure auction of their houses, at least temporarily. Many of these homeowners will propose repayment plans that will cure their mortgage arrears, although completion of those plans is far from certain.

These observations illustrate how bankruptcy and foreclosure systems address very similar legal and economic issues. But, as a formal matter, they are entirely distinct. Different judges, different lawyers, different rules. The division of debtor-creditor law among multiple legal systems has many perfectly reasonable explanations. Yet, the consequences for the delivery of consumer protection are too often overlooked and not yet well understood.

This Cooper-Walsh Colloquium contribution reviews the legal infrastructure of tools that protect debtors' assets or income, or that enable debtors to resolve secured credit problems during ordinary times (e.g., not specific crisis interventions). Part I divides consumer protection tools into functional categories: protection of assets and future income, and retention of property subject to a security interest in default. Part II identifies the location of similar tools in federal law, uniform state law, and non-uniform state law. Part III examines implications of this divided system, with a special focus on the bundling of debtor protections and the role of intermediaries. This discussion helps us imagine improvements to consumer protection whether or not new legal tools are added.

I. FUNCTIONAL CATEGORIES OF *EX POST* DEBTOR PROTECTION

In the traditional law school model, the concept of a remedy is equated with an action for money or injunctive relief in a lawsuit. Indeed, many federal and state statutes or common law doctrines offer these forms of relief to consumer debtors.[2] Damages might be compensatory, punitive, and/or include attorneys' fees for a prevailing debtor.[3] For example, section 9-625 of the Uniform Commercial Code (part of Article 9 governing secured transactions in personal property) explicitly authorizes damages to a defaulting debtor if a secured creditor fails to comply with Article 9's re-

2. Mark E. Budnitz, *The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement*, 24 GA. ST. U. L. REV. 663 (2008); Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305 (2010); William C. Whitford, *Structuring Consumer Protection to Maximize Effectiveness*, 1981 WIS. L. REV. 1018, 1026-41 [hereinafter Whitford, *Structuring Consumer Protection*].

3. Whitford, *Structuring Consumer Protection*, *supra* note 2, at 1029-32; *see also* 11 U.S.C. § 523(d) (2006) (shifting fees to creditors in non-dischargeability actions in bankruptcy under some circumstances).

quirements, such as conducting a commercially reasonable foreclosure sale, providing reasonable notice of the sale, and not breaching the peace during any self-help repossession of collateral.[4]

Scholars and advocates have long recognized a variety of impediments to consumers' effective use of traditional litigation-based remedies. Many consumers with viable claims do not seek advice on pursuing such claims either offensively or defensively.[5] Or, if they do, they wait too long for such actions to be any use. People with viable claims may have trouble obtaining legal representation when the dollar value of the remedy is modest.[6] This is a problem even if a law authorizes treble damages, fee-shifting, or other mechanisms to magnify the value of the litigation to lawyers.[7] Although Congress and state legislatures contemplated that litigants with small claims could join forces and bring their claims collectively,[8] obtaining certification of a consumer class action remains difficult.[9] And, in

4. *E.g.*, U.C.C. § 9-625(a) (2010) ("If it is established that a secured party is not proceeding in accordance with [Article 9], a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions."); *id.* § 9-625(b) ("Subject to [certain] subsections . . . a person is liable for damages in the amount of any loss caused by a failure to comply with this article. Loss caused by a failure to comply may include loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing."); *id.* § 9-625(c) (providing enhanced statutory damages in consumer goods transactions). A damages or injunctive remedy in the Article 9 regime substitutes for invalidation of a foreclosure sale that state real property law permits. However, such invalidation may rarely occur due to costs and barriers to foreclosure defendants of actively engaging in litigation.

5. *E.g.*, Jeff Sovern, *Toward a Theory of Warranties in Sales of New Homes: Housing the Implied Warranty Advocates, Law and Economics Mavens, and Consumer Psychologists Under One Roof*, 1993 WIS. L. REV. 13, 83.

6. *Id.* at 85.

7. *See* Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 78-79 (2007). *See generally* Harold L. Levine, *A Day in the Life of a Residential Mortgage Defendant*, 36 J. MARSHALL L. REV. 687 (2003); Whitford, *Structuring Consumer Protection*, *supra* note 2; William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397 (1994) [hereinafter Whitford, *The Ideal of Individualized Justice*].

8. Budnitz, *supra* note 2, at 664.

9. Weidemaier, *supra* note 7, at 79-80 ("[C]lass certification is far from common. Class actions run counter to a strong individualist streak in American law, which demands respect for the individual litigant's right to control his or her own claim, and which, by and large, requires individualized proof of facts unique to each claimant. Because of the need for such proof, class actions seeking damages may generally be certified only where, among other things, common questions of law or fact predominate over questions affecting only individual class members. This balancing act leads courts to deny certification to many proposed consumer classes."). *See generally* Gilles, *supra* note 2.

some contexts, doctrines such as the holder in due course limit the ability to pursue a damage remedy or to present a related defense to nonpayment.[10]

Debtor-creditor law includes other kinds of tools for defaulting debtors, however, based on a somewhat different model (although sometimes still premised on litigation). Categories of these tools are explored below.

Protection of unencumbered assets and future income: A variety of laws in this category prevent creditors from satisfying even undisputed claims out of particular assets or future income of individual debtors. Examples include limits or bans on deficiency judgments in foreclosure actions,[11] limits or bans on garnishment of wages, and exemptions of property interests from judgment lien enforcement. Bankruptcy law essentially represents a combination of these tools with other types relating to secured credit.[12]

Retention of property encumbered by a security interest: The prior category, protection of unencumbered assets and future income, has only limited direct effect on consensual secured creditors, at least as measured on an *ex post* basis. So, for example, property exemptions do not bar consensual secured creditors from reaching the full value of an asset. Tools to retain property that secures a debt by contract are of considerable interest to many consumer debtors, but also to policymakers concerned about the broader impact of the loss of homeownership. Consider this menu of possibilities:

(1) Property redemption from a secured loan—A baseline protection of all foreclosure law is to permit debtors in default to redeem collateral prior to a foreclosure sale. This principle applies both to real and

10. As McCoy and Renuart have explained, this doctrine "shields securitized trusts from most claims and defenses to nonpayment that the borrower has against the lender based on unconscionability, breach of contract, and most types of fraud." Patricia A. McCoy & Elizabeth Renuart, *The Legal Infrastructure of Subprime and Nontraditional Mortgages* 37 (Harvard Univ. Joint Ctr. for Hous. Studies, Working Paper UCC08-5, 2008), *available at* http://www.jchs.harvard.edu/publications/finance/understanding_consumer_credit/papers/ucc08-5_mccoy_renuart.pdf. McCoy and Renuart go on to explain how one qualifies for protection under this doctrine: "First, it must meet the definition of a 'holder' of a negotiable note. In addition, the trust must have taken the note: (2) for value; (3) in good faith; and (4) without notice that the note contained certain defects." *Id.* at 37-38.

11. *E.g.*, U.C.C. § 9-623 (2002) (providing pre-disposition redemption right for personal property); U.C.C. § 9-626 (2002) (describing circumstances under which personal property security deficiency judgments can be limited in non-consumer transactions, and leaving deficiency judgment limitation for consumer transactions to the courts); Melissa B. Jacoby, *Home Ownership Risk Beyond a Sub-Prime Crisis: The Role of Delinquency Management*, 76 FORDHAM L. REV. 2261, 2272 (2008) (discussing real property).

12. *E.g.*, 11 U.S.C. § 541(a)(6) (2006).

personal property.[13] Various laws set the price of redemption differently, with most state laws requiring payment of the full debt plus the creditor's costs, but with bankruptcy law permitting redemption of personal property based on the value of the collateral.[14] Less uniformly available is a post-sale redemption of real property (which is not recognized for personal property under Article 9 of the Uniform Commercial Code).

(2) De-accelerate, cure, and reinstate mortgages and security interests—Some laws permit borrowers with defaulted mortgages to retain their homes by curing arrears and paying associated costs in a lump sum even if the mortgage holder already had properly accelerated the loan in accordance with the terms of the agreement.[15] In bankruptcy law's version of this reinstatement right, a debtor can pay those arrearages over time.[16]

(3) Modification of a secured loan—Bankruptcy law permits debtors to restructure some (but not all) kinds of secured debts over the secured party's objections.[17] This potentially includes reducing secured debt to the collateral's value, paying that value with interest over time (essentially an installment redemption), and treating the remainder as an unsecured claim payable pro rata with other unsecured claims. As a foreclosure management effort, members of Congress have proposed to expand the circumstances under which at least high-risk mortgages could be modified in Chapter 13.[18]

(4) "Avoidance" of mortgages or security interests—Property retention is also occasionally accomplished through legal avoidance of a security interest. For example, a trustee in a bankruptcy case steps into the shoes of a hypothetical bona fide purchaser and may seek to strip a mortgage from real property if a bona fide purchaser would have had rights superior to the mortgagee.[19] This power is used to police compliance with state law formalities for "perfecting" security inter-

13. *See* U.C.C. § 9-623 (providing pre-disposition redemption right for personal property); Jacoby, *supra* note 11 (discussing real property).

14. 11 U.S.C. § 722.

15. *See* Jacoby, *supra* note 11. For a study of the use of this right in Cook County, Illinois, see Debra Pogrund Stark, *Facing the Facts: An Empirical Study of the Fairness and Efficiency of Foreclosures and a Proposal for Reform*, 30 U. MICH. J.L. REFORM 639 (1997).

16. 11 U.S.C. § 1322(b)(2), (5).

17. 11 U.S.C. § 1325(a)(5).

18. Emergency Homeownership and Equity Protection Act, H.R. 225, 111th Cong. (2009); Helping Families Save Their Homes in Bankruptcy Act, H.R. 200, 111th Cong. (2009).

19. 11 U.S.C. § 544(a)(3).

ests and mortgages that maximize creditor protection.[20] Alternatively, a trustee may seek to avoid a mortgage as a preferential transfer of an interest in the debtor's property.[21] Notably, the exercise of avoidance rights by a trustee depends on significant lender mistakes or omissions. Neither needs of the debtor nor motives of the creditor tend to be relevant to the formal legal analysis.

II. CHANNELS OF PRODUCTION OF *EX POST* DEBTOR PROTECTION

The debtor protections and tools discussed in Part I are generated through federal law, uniform state law, and non-uniform state law. Consumer bankruptcy law is a prominent example of federal law. Its discharge of debt, which effectively protects assets and future income, is used as a remedy for a wide variety of debtor-creditor problems.[22] It also contains many of the tools for working with secured debt discussed in Part I. Separately, federal law sets a floor on the proportion of wages that may be garnished.[23] Occasionally, federal regulation promulgated pursuant to a statute produces these kinds of debtor protections. For example, the Federal Trade Commission long ago promulgated a rule that deems non-purchase-money, non-possessory liens on household goods, to be an unfair credit practice.[24] The new Bureau of Consumer Financial Protection's rulemaking and enforcement authority could affect *ex post* debtor protections as well.[25]

The uniform law process produces a significant portion of commercial law, including some relevant to this discussion. A uniform act is a model statute intended to harmonize the law of multiple jurisdictions. It aims for enactment by all state legislatures. The Uniform Commercial Code (U.C.C.) is a joint product of the American Law Institute (ALI) (a private organization of several thousand lawyers, judges, and academics) and uni-

20. *See, e.g.*, *In re* Cocanougher, 378 B.R. 518 (B.A.P. 6th Cir. 2007) (upholding avoidance of mortgage now owned by CitiFinancial under Kentucky law); *In re* Biggs, 377 F.3d 515 (6th Cir. 2004) (upholding avoidance of deed of trust due to defective acknowledgment under Tennessee law).

21. 11 U.S.C. § 547; Wells Fargo Mortg. v. Lindquist, 592 F.3d 838 (8th Cir. 2010) (upholding avoidance of mortgage as preferential transfer when it was not recorded at the time of the bankruptcy filing). For more details, see Melissa B. Jacoby, *Home Mortgage Problems Through the Lens of Bankruptcy*, 10 LOY. J. PUB. INT. L. 171, 179 (2009).

22. Susan D. Kovac, *Judgment-Proof Debtors in Bankruptcy*, 65 AM. BANKR. L.J. 675, 679 (1991); Whitford, *The Ideal of Individualized Justice*, *supra* note 7, at 401.

23. 15 U.S.C. §§ 1671-77 (2006).

24. 16 C.F.R. § 444.2 (2011).

25. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1011-18 (2010).

form law commissioners from each state.[26] Article 9 of the U.C.C., originally drafted in the 1950s, governs security interests in personal property in both household and business contexts. After a decade-long reform effort, all states and the District of Columbia enacted a substantially revised version of Article 9 and made it effective in 2001.[27] Part 6 of Article 9 governs the remedies a creditor may exercise against a debtor and collateral upon the debtor's default as determined by contract interpretation.[28] But it also protects debtors in the process and makes most debtor protections non-waivable in advance of default.[29] Restatements of law, also a product of the ALI, are sometimes used to promote uniformity through state court adoption of particular legal principles relevant to debtor protection.[30]

The third category is non-uniform state law. Real estate foreclosure remains an important example. Some real property experts have sought greater uniformity in foreclosure law through the uniform state law movement, restatement projects, or federalization of foreclosure law.[31] Because these efforts have been unsuccessful, state law continues to supply most of the baseline rights for debtors who have defaulted on their real property mortgages.[32]

Non-uniform state law also establishes exemptions that shield individual debtors' property from court judgment enforcement by creditors. The interstate variation is notable: some state laws exempt unlimited value for

26. Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569, 583 (1998).

27. Some experts originally sought federalization of the law of security interests of personal property rather than uniform (or non-uniform) state law. Amelia H. Boss, *The Future of the Uniform Commercial Code Process in an Increasingly International World*, 68 OHIO ST. L.J. 349, 352-55 (2007). A technical revisions project for Article 9 is currently underway. *U.C.C. Article 9 Review Committee*, A.L.I., http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=21 (last visited Mar. 1, 2011).

28. *E.g.*, U.C.C. § 9-601 (2003) (setting forth menu of creditor options upon debtor default).

29. *E.g.*, U.C.C. § 9-602 (2003) (identifying non-waivable protections for debtors and third parties in Part 6); U.C.C. § 9-624 (2003) (governing post-default waivers of sale notice, mandatory disposition, and redemption rights).

30. Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1409 (2004) (discussing state court adoption of RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES). Other important examples for this context include the RESTATEMENT (SECOND) OF CONTRACTS and the RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT that the ALI is currently considering.

31. Nelson & Whitman, *supra* note 30, at 1408.

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

certain categories of property,[33] while others protect very little.[34] Some state legislatures periodically update their laws with respect to both types of property and value (perhaps with substantial input or encouragement from the relevant bar associations),[35] while others retain rather archaic categories of property and nominal dollar amounts. The variations tend not to rationally reflect differentials in economic conditions (let alone differentials within the state).[36] States also have made diverse decisions about whether to provide greater protection of wages from garnishment than the floor established by federal law.

Non-uniformity does offer opportunities for experimentation. For example, since 2004, the North Carolina Housing Finance Agency has offered a loan fund for homeowners who lose their jobs due to changing economic conditions. The program offers zero-interest loans to assist with mortgage payments as well as financial assistance while looking for a new job or participating in job retraining.[37]

III. IMPLICATIONS OF THE LEGAL INFRASTRUCTURE

Much can be said about the development of consumer debtor protections discussed in Parts I and II. Here, I focus on two sets of questions about that development.

A. Should Debtor Protections be Bundled or Unbundled?

The legal tools reviewed in Parts I and II implicitly illustrated two models of *ex post* consumer debtor protection: bundled and unbundled. In the idealized federal bankruptcy case, a debtor gets future income protection, asset protection, and secured debt tools all together. By contrast, most state law tools fill a discrete purpose. Thus, for example, mortgage reinstatement rights are associated with foreclosure laws, while wage garnishment limits exist as a standalone income protection.

33. Juliet Moringiello, *Has Congress Slimmed Down the Hogs? A Look at the BAPCPA Approach to Pre-Bankruptcy Planning*, 15 WIDENER L.J. 615 (2006) (discussing categories like annuities and firearms).

34. NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 121 (1997).

35. For example, North Carolina and Delaware have recently updated and expanded the value of property exemptions for debtors. DEL. CODE ANN. tit. 10, § 4902 (2010); N.C. GEN. STAT. § 1C-1601 (2009). In North Carolina, at least, a bar association was involved in the effort.

36. NAT'L BANKR. REV. COMM'N, *supra* note 34.

37. *Home Protection Program*, N.C. HOUS. FIN. AGENCY, http://www.nchfa.com/Homebuyers/HOhomeprotectionpilot.aspx (last visited Mar. 1, 2011). Repayment is generally deferred for fifteen years. Completion of an application to participate enjoins the foreclosure process for one hundred twenty days. Although it started as a pilot program for only certain counties, the program later became available state-wide.

Prior work has explored some practical problems with bundling in the bankruptcy context.[38] Put bluntly, the costs may reflect a wider range of benefits than is strictly necessary under the circumstances. A debtor who uses bankruptcy to discharge a large foreclosure deficiency judgment is paying substantially more to use bundled bankruptcy rights than her counterparts in states that offer protections against deficiency judgments on a standalone basis or broader protection against wage garnishment.[39] Some might reply that debtors in less protective states reap benefits in terms of access to credit, but the extent of this benefit, and the countervailing social welfare implications, remain empirically in dispute.[40]

Chapter 13 has, perhaps unintentionally, functionally served as a separate mortgagor protection law by combining the right to cure and reinstate with unrelated burdens and benefits.[41] To cure a mortgage in installments under bankruptcy law, a debtor must opt for a repayment plan in Chapter 13.[42] Chapter 13 permits a debtor to spread these costs over time, which may make them look more manageable than they often turn out to be. Some might argue that these higher costs help police against moral hazard, but it is far from clear that costs make good screening devices in this context.

Should some of the bundled features of bankruptcy be offered on a standalone basis? In some respects, the financial crisis put these issues on the table. A 2007 task force report from Connecticut explicitly mentioned a state law installment reinstatement right as a possibility, albeit without much analysis.[43] Various foreclosure task forces and consumer advocates

38. Jacoby, *supra* note 11, at 2287-88.

39. Kovac has argued that some use of bankruptcy comes from insufficient income and asset protection through other laws, such as state laws on garnishment. Although her analysis is not universally embraced, her assessment suggests that bankruptcy usage could be decreased by more targeted protection of income from consumer creditors. Kovac, *supra* note 22, at 677-78; *see also* Gary Neustadter, *When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Law Office*, 35 BUFF. L. REV. 177, 250 (1986).

40. For a review of literature on this point, see Melissa B. Jacoby, *Bankruptcy Reform and Homeownership Risk*, 2007 U. ILL. L. REV. 323, 332 n.45.

41. *See generally id.*

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

43. CONN. SUB-PRIME MORTG. TASK FORCE, SUB-PRIME MORTGAGE TASK FORCE FINAL REPORT (2007). A search of the relevant legal scholarship, foreclosure task force reports, and policy recommendations of advocacy groups in early 2010 revealed no significant subsequent discussions about implementing this proposal or proposals of a similar nature. An update on the work of the Connecticut Sub-Prime Mortgage Task Force as of 2008 did not

have more generally recommended the addition of post-acceleration cure and reinstatement rights to state law, which some states have adopted in the wake of the foreclosure crisis.[44] These kinds of proposals could shift some debtors away from the aggregated bankruptcy model and deserve closer consideration, especially to the extent they could reduce the need for intermediaries,[45] who are discussed in greater detail below.

B. How Does Legal Infrastructure Hinder Effective Use of Intermediaries?

Looking at the legal profession as a whole, very little lawyers' work is directed toward representing families in debt-related disputes.[46] The legal profession also has incentives to limit competition from non-lawyers,[47] and the law deters some non-lawyers from assisting consumers on debt problems.[48] Relatedly, it is difficult for lawyers to serve the individualized pur-

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mention the previous proposal. *See* CONN. SUB-PRIME MORTG. TASK FORCE, SUB-PRIME MORTGAGE TASK FORCE ACTIVITIES UPDATE (2008).

44. *See, e.g.*, MD. CODE ANN., REAL PROP. § 7-105.1(n)(1) (West 2008) (creating a right to cure and reinstate up to one business day before the foreclosure sale); MD. HOMEOWNERSHIP PRESERVATION TASK FORCE, FINAL REPORT 39 (2007); *see also* MASS. GEN. LAWS ch. 244, § 35(a) (2007) (establishing a ninety day right to cure and bring current upon receipt of Notice of Default); MASS. MORTG. SUMMIT WORKING GRPS., REPORT: RECOMMENDED SOLUTIONS TO PREVENT FORECLOSURE AND TO ENSURE MASSACHUSETTS CONSUMERS MAINTAIN THE DREAM OF HOMEOWNERSHIP 17 (2007). Recent proposals also encourage states to require mortgage holders to provide homeowners with clear notice of such state law rights to cure and reinstate. *See* JOHN RAO & GEOFF WALSH, NAT'L CONSUMER LAW CTR., FORECLOSING A DREAM: STATE LAWS DEPRIVE HOMEOWNERS OF BASIC PROTECTIONS 25-29 (2009) (asserting the need for meaningful notice to borrowers of state rights to cure and reinstate, and describing some related statutes); Dan Immergluck et al., *Legislative Responses to the Foreclosure Crisis in Nonjudicial States* (Working Paper Series, Jan. 28, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1749609.

45. Iain Ramsay, *Market Imperatives, Professional Discretion and the Role of Intermediaries in Consumer Bankruptcy: A Comparative Study of the Canadian Trustee in Bankruptcy*, 74 AM. BANKR. L.J. 399, 459 (2000) ("If it is difficult to find neutral intermediaries for the delivery of bankruptcy services then one possible solution is greater simplification and routinization and the use of bright line rules which reduces the need for intermediaries.").

46. Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 373, 397 (2004) (discussing unmet legal needs of the poor and middle class).

47. *Id.* at 405. For small-claims courts that do not permit consumers to be legally represented, see Weidemaier, *supra* note 7, at 79. Non-lawyers do play a somewhat greater role regarding consumer counseling and preparation for bankruptcy than in other fields of law that affect consumers. *See generally* David A. Lander, *A Snapshot of Two Systems That Are Trying to Help People in Financial Trouble*, 7 AM. BANKR. INST. L. REV. 161 (1999).

48. *See, e.g.*, 11 U.S.C. § 110 (2006) (imposing heightened requirements on the use of non-lawyer petition preparers in consumer bankruptcy cases).

suit of consumer debtor remedies at affordable prices.[49] Legal representation of average-sized consumer debt matters is profitable primarily if handled on a volume basis, hence the earlier discussion of class actions.[50] With respect to legal tools that cannot be aggregated formally, such as personal bankruptcy filings, lawyers find other ways to routinize the process.[51] In this context, some lawyers rely heavily on paralegals for intake work and preparation for filing a case.[52] This may translate into relatively little in-depth counseling from the lawyer.[53] The volume approach to debtor protection also may discourage lawyers from affirmatively taking on legal disputes that would help the client, if successful, but would require additional preparation and time in court.[54]

Specialization aids a volume business. At least in the consumer law world, specialization tends to center on a particular part of the legal system even if functionally similar tools lie elsewhere. In the 1970s, Professor Stewart Macaulay set out to study Wisconsin lawyers' use of the Magnuson-Moss Warranty Act, which had been widely touted in the national news media as a boon for consumers. Macaulay quickly discovered, though, that "most lawyers in Wisconsin knew next to nothing about the Magnuson-Moss Warranty Act—many had never heard of it."[55] The lawyers who were familiar with consumer protection laws largely knew one single state law that addressed debt collection and financing consumer

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49. Sovern, *supra* note 5, at 85 (discussing economic impediments to lawyers developing expertise in consumer cases).

50. *See supra* Part I.

51. Whitford, *The Ideal of Individualized Justice*, *supra* note 7, at 400. In the context of tort "settlement mills," which also are not formally aggregated, Engstrom writes that

> it is assumed that claims will be straightforward. Standardized and routinized procedures are then designed and employed in keeping with that assumption. Efficiency trumps process and quality. Important tasks (such as client screening and, sometimes, actual settlement negotiations) are delegated to non-lawyers. Factual investigations are short-circuited or skipped altogether.

Nora Freeman Engstrom, *Run-of-the-Mill-Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1493 (2009).

52. Geraldine Mund, *Paralegals: The Good, The Bad, and the Ugly*, 2 AM. BANKR. INST. L. REV. 337 (1994). Observers have reported that consumer bankruptcy lawyers sometimes have filed cases before actually meeting their clients. *Id.* at 338.

53. *Id.* at 338. In such a situation, they may first meet at a mandatory post-filing meeting with the case trustee (known as a "341 meeting" after the Bankruptcy Code section that requires it). *See* 11 U.S.C. § 341 (2006).

54. Whitford, *The Ideal of Individualized Justice*, *supra* note 7, at 406. Most Chapter 7 consumer bankruptcy cases involve no court appearances at all.

55. Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC'Y REV. 115, 118 (1979).

transactions.[56] Macaulay noted: "[I]f awareness of a more empirically accurate view of legal practice is not developed, reformers are likely to go on creating individual rights which have little chance of being vindicated, and, as a result, they may fail to achieve their ends repeatedly."[57] Although much has changed since the 1970s, Macaulay's observations have served as an important warning.[58]

Those who practice debtor-side consumer bankruptcy comprise one of the biggest and most developed consumer bars in the country.[59] Even before the 2005 amendments to the Bankruptcy Code, scholars questioned the extent to which lawyers who specialized in bankruptcy were helping their clients compare options out of bankruptcy.[60] Indeed, scholars have scrutinized how lawyers advise debtors about key decisions even *within* the bankruptcy system, such as whether to file Chapter 7 or Chapter 13.[61]

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

57. *Id.* at 161.

58. *See generally* Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 6 AM. BANKR. L.J. 501 (1993) [hereinafter Braucher, *Lawyers and Consumer Bankruptcy*].

59. Whitford, *The Ideal of Individualized Justice*, supra note 7, at 400. Consumer bankruptcy lawyers tend to be a distinct group from business bankruptcy lawyers. *See generally* Lynn M. LoPucki, *The Demographics of Bankruptcy Practice*, 63 AM. BANKR. L.J. 289 (1989); Ramsay, *supra* note 45, at 399 (discussing studies of U.S. lawyers more generally). An older study found that bankruptcy lawyers are likely to cluster around the limited locations of federal bankruptcy courts. LoPucki, *supra*, at 299 ("Nearly every American lives within about 20 miles of a state court of general jurisdiction. But there is a bankruptcy clerk's office in only 165 American cities. Bankruptcy judges ride circuit to an additional 204 cities and towns. This still leaves many parts of the United States 50 to 100 miles from the nearest place where bankruptcy court meets. Not surprisingly, the offices of bankruptcy lawyers are heavily concentrated in the 369 cities where the bankruptcy court meets.").

60. *See* Kovac, *supra* note 22; Neustadter, *supra* note 39, at 233 (finding that even lawyers who offered more of a client-centered model did not give substantial attention to bankruptcy alternatives).

61. Jean Braucher, *Counseling Consumer Debtors to Make Their Own Informed Choices—A Question of Professional Responsibility*, 5 AM. BANKR. INST. L. REV. 165, 172-73 (1997) [hereinafter Braucher, *Counseling*]; Braucher, *Lawyers and Consumer Bankruptcy*, *supra* note 58, at 581-82; Neustadter, *supra* note 39, at 230, 232 (discussing a "product model" of lawyering in which lawyers primarily "sold" a particular kind of bankruptcy). *See generally* Teresa A. Sullivan et al., *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL'Y 801, 848, 850 (1994) (finding subspecialization of consumer bankruptcy lawyers, including some that did predominantly Chapter 13 repayment plans). Iain Ramsay observed a similar phenomenon with private "trustees" in Canada. Ramsay, *supra* note 45, at 422 (quoting a Canadian trustee saying that the trustees are a "destination vendor rather than a mall" and that "[p]eople don't [come] here because they are wandering around"). For a new empirical analysis finding higher proportions of Chapter 13 cases in districts that permit higher fees, see Frank

The internal complexity of each part of the debtor-creditor system certainly does not help matters. A prominent example comes from the 2005 revision to the Bankruptcy Code.[62] The amendments changed (and largely weakened) bankruptcy law in dozens of convoluted ways and increased the cost to debtors of accessing the system.[63] Those amendments also established financial penalties on lawyers that aimed to make the lawyers think twice before recommending Chapter 7 bankruptcy to their clients, and led them (along with the extra work required under the new laws) to raise their fees.[64] The United States Supreme Court's interpretation of the 2005 amendments has enhanced the complexity of the amendments' application to individual cases.[65] Furthermore, the bankruptcy system has its own judiciary; Congress has authorized over 350 bankruptcy judgeships.[66] As one would expect (and particularly given an unclear statute), sometimes judges within the same district have starkly different views on matters relevant to a consumer bankruptcy case. Only a handful of such disparities are resolved through the appellate process.

Legal education also bears some responsibility. With some exceptions that rely on a "systems approach" to debtor-creditor law,[67] a typical law school curriculum tends to follow the channels of law production rather than functional categories. Thus, for example, consumer bankruptcy tends to be severed off from "consumer law" courses.[68] Even if professors recognize that this is less than ideal, and even as the content of standard con-

McIntyre et al., *Lawyers Steer Clients Toward Lucrative Filings: Evidence from Consumer Bankruptcy* (Working Paper Series, Feb. 10, 2010), *available at* http://ssrn.com/abstract=1708111.

62. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

63. Melissa B. Jacoby, *Ripple or Revolution? The Indeterminacy of Statutory Bankruptcy Reform*, 75 AM. BANKR. L.J. 169 (2005).

64. Melissa B. Jacoby, *Bankruptcy Reform and the Costs of Sickness: Exploring the Intersections*, 71 MO. L. REV. 903, 914 (2006).

65. *See, e.g.*, Hamilton v. Lanning, 130 S. Ct. 2464 (2010) (finding that the projected disposable income requirement of Chapter 13 could incorporate forward-looking estimates, at least if they are substantial and fairly certain).

66. *Biographical Directory of Federal Judges*, FED. JUD. CTR., http://www.uscourts.gov/JudgesAndJudgeships/BiographicalDirectoryOfJudges.aspx (follow "bankruptcy judgeships" hyperlink) (last visited Jan. 24, 2011). This includes thirty-six temporary judgeships. Otherwise, bankruptcy judges serve fourteen year terms as units of the U.S. District Court and receive a salary that is ninety-two percent of a district judge salary. *Id.*

67. LYNN M. LOPUCKI & ELIZABETH WARREN, SECURED CREDIT: A SYSTEMS APPROACH (6th ed. 2009) (including some bankruptcy law and real estate foreclosure law in a case book on Article 9 of the U.C.C.).

68. *See generally* Jeff Sovern, *The Content of Consumer Law Classes*, 12 J. CONSUMER & COM. L. 48 (2008); Jeff Sovern, *The Content of Consumer Law Classes II*, 14 J. CONSUMER & COM. L. 16 (2010) [hereinafter Sovern, *Consumer Law Classes II*].

sumer law courses continues to shift,[69] the increasing complexity of bankruptcy law deters integration of the subjects.

When lawmakers add statutory complexity and financial disincentives, they decrease the ability of consumer debtors to navigate the system without representation. They discourage integration in the law school curriculum. They deter lawyers who do similar types of activities under a different set of laws from branching out. They increase the barriers to civil legal aid lawyers representing clients with debtor-creditor problems.[70] With fewer lawyers practicing in the area, specialization and fees rise further. A foreclosure defense lawyer in Chicago reports that:

> A competent foreclosure defense lawyer must know the entire Federal statutory framework [Truth in Lending Act, Real Estate Settlement Procedures Act, Home Ownership and Equity Protection Act, Equal Credit Opportunity Act, Community Reinvestment Act], common law claims and defenses, and that lawyer must have the ability to raise and respond to motions to dismiss, motions for summary judgment and other pleadings including counterclaims, affirmative defense, as well as know the Rules of Evidence and trial procedure.[71]

The lawyer's list illustrates the importance of looking beyond the four corners of foreclosure law. But the foreclosure defense lawyer's list omits bankruptcy, which contains some of the most potent mortgagor protection tools. Bankruptcy would require foreclosure defense lawyers to move into a different legal system that, at least before the foreclosure crisis, may have been somewhat alien to them.[72]

In the past, lawmakers have occasionally responded to general concerns about lack of comparative counseling by requiring that consumers receive

69. Sovern, *Consumer Law Classes II*, *supra* note 68, at 18.

70. Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474, 608 (1985) (reporting that family law "represents as much as ninety percent of the work of private practitioners under judicare schemes, and even in staffed offices it frequently is the single largest topic" and opining that "[t]his is neither surprising nor likely to change"); *see also* Kovac, *supra* note 22, at 749-50, 756 (noting the absence of legal aid lawyers from debtor representation in her study of judgment proof filers in Tennessee).

71. Levine, *supra* note 7, at 698. Levine is speaking of judicial foreclosures. The speed of the process in nonjudicial foreclosure states can increase the difficulty for homeowners of getting any legal assistance. Immergluck et al., *supra* note 44, at 11-12.

72. Some bankruptcy lawyers are now concentrating on using bankruptcy as a forum to challenge mortgage holders' rights against debtors' homes. *See, e.g.*, Robbie Whelan, *Niche Lawyers Spawned Housing Fracas*, N.Y. TIMES, Oct. 21, 2010; Prashant Gopal, *Foreclosure Lawyers Go to Max's Farm for Edge*, BLOOMBERG BUS. WK. (Oct. 27, 2010). And a former business bankruptcy lawyer has started a law practice that includes both consumer bankruptcy and foreclosure defense. *See* LAKE LAW, http://www.lakelaw.com (last visited Mar. 11, 2011).

basic written notice of their alternatives.[73] But some scholars have doubted the utility of these requirements and instead have suggested that policymakers focus on educating and perhaps incentivizing the *intermediaries*, including but not limited to lawyers.[74] Of course, this would require that lawmakers take a less antagonistic attitude toward those who represent and assist consumer debtors.

CONCLUSION

Studying the infrastructure of consumer debtor protections reminds us of an important fact: enhancing protection for individuals in lending and other commercial transactions is not merely a matter of increasing the number of substantive rights in statute books.[75] Rather, the placement of rights, the bundling of rights, the complexity of the law, and the incentives shaping intermediaries' activities all contribute to a determination of whether a legal tool is a meaningful way to improve debtor-creditor law or just merely a hollow gesture.

73. 11 U.S.C. § 322 (2006) (providing that a lawyer will file a declaration or affidavit stating that she has informed the consumer of the relief available under both Chapters 7 and 13). Recent amendments conditioning bankruptcy eligibility on a credit counseling briefing can be understood as having a similar thrust.

74. Kovac, *supra* note 22, at 754 ("We believe that amending the Bankruptcy Code to add non-bankruptcy solutions to the options that must be explained to consumer debtors would probably not produce a significant reduction in the personal bankruptcy rate."); Lander, *supra* note 47, at 189 (recognizing the likelihood of proper sorting between bankruptcy and credit counseling depends on the availability of legal counsel that is both "competent and affordable"); Ramsay, *supra* note 59, at 419 ("Most trustees would indicate to consumers their rights in relation to collection practices but only a minority seemed interested in actively providing a consumer with material on how to address harassment."); Sullivan et al., *supra* note 61, at 858.

75. *E.g.*, Macaulay, *supra* note 55; Sullivan et al., *supra* note 61; Whitford, *Structuring Consumer Protection*, *supra* note 2.