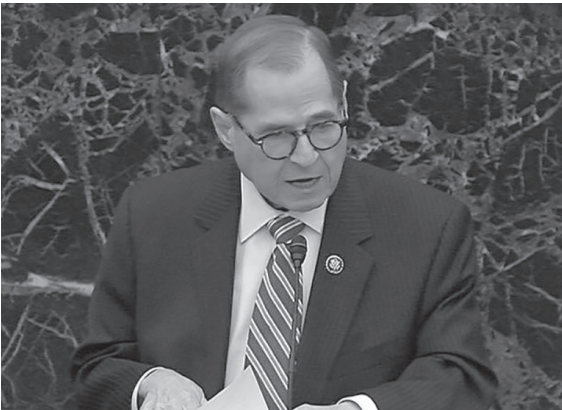


Consumer Bankruptcy Reform Act of 2020



Senator Elizabeth Warren and House Judiciary Chair Jerrold Nadler have introduced the [Consumer Bankruptcy Reform Act of 2020](#). The proposed legislation is designed to simplify and modernize the consumer bankruptcy system to make it easier for individuals and families forced into bankruptcy to get back on their feet. “Our bankruptcy system too often fails to provide financially struggling individuals and families the relief they desperately need,” said Senator Warren. Adding, “The Consumer Bankruptcy Reform Act of 2020 will take long overdue steps to make it easier and less expensive for financially-strapped families and individuals to obtain meaningful bankruptcy relief and give Americans a better chance to get back on their feet.”

The following letter explaining and supporting the legislation, was drafted by Professor [Pamela Foohey](#), signed by more than 74 consumer law professors, and sent to Senator Warren. For a copy of the letter with all signatories, visit, <https://bit.ly/3mjUHJM>

December 14, 2020

The Honorable Elizabeth Warren
United States Senate
317 Hart Senate Office Building
Washington DC 20510

Dear Senator Warren:

We are 74 law professors who specialize in bankruptcy and consumer law. We write to express our support for the Consumer Bankruptcy Reform Act of 2020, S.4991. The consumer bankruptcy system is expensive and complex, and it too often fails to provide effective relief. People who need to file bankruptcy can be shut out altogether when they cannot afford to hire an

attorney to help them navigate the bankruptcy process. We support the Consumer Bankruptcy Reform Act because it will address these systemic issues as well as many other problems that plague the current consumer bankruptcy system.

Congress enacted our current Bankruptcy Code in 1978. Much has changed since then. Even after adjusting for population growth and inflation, Federal Reserve data show that credit-card debt has tripled. In 1978, student-loan debt was such a small part of household finances that the Federal Reserve did not even separately track it. Today, student-loan debt is the largest component of household debt except for home mortgages. In 1978, asset securitization was in its infancy. Mortgages and auto loans are now routinely bundled and sold to investors, separating the servicing of the loan from the financial institutions that own

the loan. Advances in technology have made it easier for debt collectors to hound consumers even for debts that are decades old. In 1978, what we now think of as the Internet was a little-known research tool for academics instead of a global information revolution that has affected how Americans interact, including with consumer lenders, attorneys, and the court system. Given all these changes, it is little surprise that a forty-year-old bankruptcy law no longer serves our needs today.

The central piece of the Consumer Bankruptcy Reform Act is to create a new chapter 10 for individual bankruptcy filers. The Act also eliminates chapter 7 as an option for individual filers and repeals chapter 13. Individuals will remain able to file under chapter 11 (those with debts over \$7.5 million will be required to use that chapter), but for most people, the new chapter 10 will be a single point of entry into the bankruptcy system.

The single point will substantially improve the consumer bankruptcy system by replacing the current structure where consumer debtors must choose between a chapter 7 liquidation bankruptcy or a chapter 13 repayment plan bankruptcy. There are substantial differences around the country in the rates at

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which people use chapter 7 and chapter 13. In 2019, only 9.6% of the bankruptcy cases in the District of Idaho were chapter 13 cases as compared to 81.0% of the cases in the Southern District of Georgia. The gaping

disparity itself is an indictment of a federal system that the Constitution directs to be “uniform.”

Academic studies and media articles have documented that Black households are more likely to end up in chapter 13. Although chapter 13 can be a good choice for people who wish to retain assets they would otherwise lose in a chapter 7, chapter 13 is far more expensive, and it takes years rather than months for a debtor to complete a chapter 13 plan and receive a bankruptcy discharge. Also, more than 50% of chapter 13 debtors do not receive a discharge because they are unable to complete their repayment plan. The racial disparity in chapter choice is deeply troubling, especially given that bankruptcy lawyers must necessarily play a role in the chapter-choice decisions.

For most chapter 10 debtors, relief will be swift. Immediately upon filing a chapter 10 petition, a consumer bankruptcy debtor will face a screen for income and assets reasonably available to pay creditors. Debtors who pass this screen will receive an immediate discharge and be sent on their way. Debtors who have income or assets to pay creditors will have a minimum payment obligation they meet over three years. Debtors will not have to wait to receive a discharge but, if they fail to pay, they will be pursued by the bankruptcy trustee for nonpayment.

A debtor's minimum payment obligation is based on a combination of the value of all nonexempt assets plus the amount by which the debtor's income exceeds 135% of their state's median income for a household of like size. Debtors can satisfy this minimum payment obligation by surrendering nonexempt, unencumbered assets to the bankruptcy trustee or by paying out of future income. These asset and income screens are a reasonable approach to catching the few “can pay” debtors

while getting the many more “can't pay” debtors out of the system quickly, efficiently, and cheaply.

The current system often turns on what the debtor spends. In contrast, the new chapter 10 focuses on what the debtor has. By doing so, chapter 10 would get the bankruptcy courts out of the business of making decisions best left to the family. Debtors who want to sacrifice in some areas to meet a payment obligation so their children can attend a private religious school will not have to explain why their decision is reasonable. Debtors with what might be considered nontraditional families will not have to justify the choices they have made about whose expenses belong to the household. Chapter 10 will not be a free ride, but it will recognize the diversity of American households.

Importantly, chapter 10 eliminates unnecessary complexity and useless paperwork and ineffective credit counseling for the vast majority of bankruptcy filers. Although chapter 10 will catch “can pay” debtors, study after study has shown that most every bankruptcy filer arrives in bankruptcy court in dire financial shape, suffering not from bad choices but from bad luck. Under current bankruptcy law, attorneys must document the debtor's income from the past six months even when it is apparent the debtor's income is far below any threshold where it would be legally relevant. These requirements drive up costs to no one's benefit, and understandably lead lawyers to charge more to help with bankruptcy cases because of the increased burdens on their time. The Consumer Bankruptcy Reform Act will allow debtors to establish income with basic documentation and will allow attorneys to rely on that documentation unless it shows that the debtor was within 80% of the relevant threshold. The Consumer Bankruptcy Reform Act also eliminates other unnecessary filing requirements for debtors. In combination with its simpler procedures, chapter 10's streamlined disclosures should lower attorney's fees and provide better access to the bankruptcy system for those who need it.

The Consumer Bankruptcy Reform Act also creates a pathway for people to pay for their attorneys. Because bankruptcy wipes out a filer's obligations, bankruptcy attorneys usually will ask for payment upfront before filing a chapter 7. At present, consumers without the money to afford an attorney might use chapter 13 to pay for that attorney. If so, the cost of their bankruptcy case will now be closer to the \$3,800 it costs for a typical chapter 13 rather than the \$1,300 it costs for a typical chapter 7. Nevertheless, many people are forced into chapter 13 just to pay for attorney representation, only to have their chapter 13 case fail when they cannot complete the plan payments. The Consumer Bankruptcy Reform Act creates a procedure for debtors to pay their attorneys over time through the bankruptcy plan. Unlike in chapter 13, however, if the debtor is ultimately unable to pay the attorney's fees, the debtor's discharge will not be jeopardized. The Consumer Bankruptcy Reform Act ensures that bankruptcy attorneys are fairly compensated for their services—and thus will continue to provide those services—without letting the fees become an obstacle to access to justice.

The Consumer Bankruptcy Reform Act streamlines the bankruptcy process in other ways. Like current law, it gives a debtor tools to try to save a family home or motor vehicle, but it unpackages those tools into their own separate components. A consumer who is having problems with a home mortgage or an auto loan can use chapter 10 to deal only with that mortgage or auto loan, leaving the rest of the consumer's financial affairs out of the bankruptcy case. By doing so, the Consumer Bankruptcy Reform Act should incentivize a home or auto lender to reach an out-of-court solution for a loan that has fallen behind. If the home or auto lender does not want to cooperate, chapter 10 gives the debtor a tool to deal with that loan only. This streamlined

process should further lower costs to consumers by eliminating the need for a full-blown bankruptcy case just to deal with one troubled loan.

The Bankruptcy Code has never given effective tools for renters to try to stay in their residences. Renters have always been required to immediately catch up on all back rent if they want to keep their residence—usually an impossible task. The Consumer Bankruptcy Reform Act remedies that gap by giving renters the ability to stay in a lease and treat several months of rent arrearage like any other debt.

Bankruptcy is also a type of debt collection procedure, and legal scholarship has documented many abusive debt collection practices spilling over into bankruptcy. Many consumer debts themselves were incurred in violation of various federal and state consumer protection laws. The Consumer Bankruptcy Reform Act tackles these abuses head on. It provides for the disallowance of claims if the underlying debt violates consumer financial protection laws, and it enables debtors to obtain compensation from creditors that harass them in violation of the bankruptcy discharge injunction. The Consumer Bankruptcy Reform Act also gives the Consumer Financial Protection Bureau a role in bankruptcy, enabling the Bureau to appear in bankruptcy cases and to create a process for informal resolution of complaints of individual debtors. Additionally, the Consumer Bankruptcy Reform Act provides much needed updating and inflation indexing of the remedial provisions of federal consumer financial protection laws, which date back to the 1970s without inflation adjustment.

As bankruptcy and consumer law scholars, we have focused this letter on the important structural changes the Consumer Bankruptcy Reform Act would make, but we would be remiss not to mention one specific change that will have great benefits for many consumers. The Act would make student loans like any other debt by making them subject to the bankruptcy discharge. Student loan debt is crushing households across America. Money that would be going into purchasing new homes and building new families is instead going to pay overwhelming student loan debt, often from a predatory educational institution that failed to deliver the education it had promised. Again, chapter 10 will not be a free ride. Debtors who can pay will not be able to walk away from their obligations. For debtors who cannot pay, allowing student-debt relief is not only the right thing to do but also helps the economy by freeing up income for productive investment to help people build their financial lives.

Although we have listed our titles and affiliations below, we speak for ourselves and not our institutions. Similarly, the signatures on this letter should be not be understood as any individual's endorsement of every word of the bill now or after it is amended. The Consumer Bankruptcy Reform Act provides a thoughtful, workable, and comprehensive response to the problems that plague the current consumer bankruptcy system, which is why we support it.

Sincerely,

All 74 signatories may be found at, <https://bit.ly/3mjUHJM>