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Jason J. Kilborn

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ARTICLES

The Innovative German Approach to Consumer Debt Relief: Revolutionary Changes in German Law, and Surprising Lessons for the United States

*Jason J. Kilborn**

Who would have thought that consumer bankruptcy¹ law could offer a solution to Germany's thirty-year slow decline in population?² Perhaps "solution" is overly optimistic, but the true story of "the first Frankfurt insolvency baby" is heartening if not prognostic. A young German couple visited a debt counselor in Frankfurt in early 2001. The pair were "very beaten down," the debt counselor reported, as a huge debt hung over their

* Assistant Professor of Law, Louisiana State University, Paul M. Hebert Law Center. I offer my sincerest thanks to Irene Di Maio, who taught me German for Reading Understanding last summer and without whose help this Article would not have been possible. I would also like to thank Paul Baier, Margaret Howard, Julie Kilborn, Pat Martin, Nancy Rapoport, and Jay Westbrook for their comments on this article, as well as Chancellor John Costonis for his generous research support. Unless otherwise indicated, all translations of German materials are the author's.

¹ Throughout this article, the words "bankruptcy," "insolvency," and "debt relief" are used interchangeably. Despite the technical distinctions among these words, the basic concept—using the law to assist consumers in debt over their heads—remains the same. U.S. law tends to use the word "consumer bankruptcy" more often, while German law uses the term "consumer insolvency." See *infra* notes 148-49 and accompanying text for a discussion of why Europeans eschew the U.S. terminology.

² "The population of indigenous Germans has been in decline since 1972 in the west and since 1969 in the east because the number of births has not kept pace with the number of deaths." U.S. LIBRARY OF CONGRESS, GERMANY—A COUNTRY STUDY, Population (1995), available at <http://memory.loc.gov/frd/cs/detoc.html>; see also U.S. Central Intelligence Agency, The World Fact Book 2003, Germany, People, available at <http://www.odci.gov/cia/publications/factbook/geos/gm.html#People> (last visited Jul. 16, 2003) (reporting a birth rate of 8.99 per 1000 and a death rate of 10.36 per 1000, producing negative population growth were it not for immigration of non-German peoples).

heads. This debt plagued the young couple especially, as they wanted nothing more in this world than a baby, but they had decided not to start a family for fear of burdening their child with a life hounded by collection agents. Luckily, the debt counselor was able to recommend a new law that would offer the would-be parents and their future child relief from their debts. In 1999, for the first time in German history, a new law had gone into effect in Germany that offered overburdened consumer debtors hope for a new life without debt. The debt counselor explained that the young family could erase their unpaid debts by agreeing to give up a small portion of their income over several years. Indeed, the law would require them to give up substantially less than they had already been paying to creditors up to that point. The couple could hardly believe it! After a bit more conversation about the new law, they began for the first time to smile, then to laugh, and finally they smiled at each other and raced out of the office. Nine months later, a new baby arrived in Frankfurt. "Without this counseling session, this child would never have been born," the debt counselor beamed. "She is thus really a true insolvency-baby!"³

Whether or not the new law has the potential to reverse German population contraction, the Insolvency Act (*Insolvenzordnung*)⁴ offers an excellent opportunity for comparative legal analysis. U.S. consumer bankruptcy reformers have wrangled for years over provisions very similar to those implemented in the new German law. Most notably, intense debate has surrounded proposals in the United States to require multi-year payment plans for all debtors.⁵ As the young Frankfurt couple learned, German law requires multi-year payment terms as a prerequisite for consumer debt relief. Nonetheless, a significant gulf separates the theory of this law from the reality of the demands it places on German debtors and the benefits it offers creditors. Careful analysis of the German consumer debt relief system reveals much more nuanced, enlightening, and perhaps surprising

³ See CLAUS TRIEBIGER, DAS 1. FRANKFURTER INSOLVENZBABY IST DA!, at <http://www.forum-schuldnerberatung.de/inso/> (last visited Feb. 8, 2004)(on file with author).

⁴ INSOLVENZORDNUNG [INSOLVENCY ACT] VOM 5. OKTOBER 1994 (BGBl. I 2866) [hereinafter INSO]. The *Insolvenzordnung*, made effective January 1, 1999, has been amended numerous times since its passage in 1994. The best place to find an up-to-date version of the law is online. For an English translation, I recommend the Ministry of Justice's version as of January 1, 2002, at <http://www.bmj.bund.de/images/11317.pdf> (last visited Jul. 9, 2003). For the German version, I recommend the up-to-date version at http://www.inso-rechtspfleger.de/inhalt/04_materialien/inso_text/indexa.html (last visited Jul. 9, 2003).

⁵ See, e.g., H.R. REP. NO. 107-617, at 5-20 (2002); Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States*, 18 BANKR. DEV. J. 1, 12-34 (2001); Kenneth N. Klee, *Restructuring Individual Debts*, 71 AM. BANKR. L.J. 431, 436-41 (1997); Michelle J. White, *Why It Pays to File for Bankruptcy: A Critical Look at the Incentives Under U.S. Personal Bankruptcy Law and a Proposal for Change*, 65 U. CHI. L. REV. 685, 710-16 (1998).

results than simple comparison of the U.S. and German consumer debt relief laws. Given the similarity in social and economic conditions in Germany and the United States, a look at how the new German law has developed in practice offers significant insight into the potential benefits and pitfalls of implementing a similar system in the United States.

This Article seeks to achieve two goals as it describes the consumer provisions of the new German Insolvency Act. First, it reveals critical distinctions between the theory of consumer insolvency, as described in German law and legal literature, and the reality of consumer insolvency in practice, as it has developed in the four-and-a-half years since the law went into effect. From both theoretical and practical perspectives, the German experience both supports and challenges many of the notions underlying consumer bankruptcy reform debates in the United States. As it turns out, the German and U.S. consumer debt relief systems produce largely the same economic results. At the same time, however, the German system includes important elements lacking in the United States, and it focuses on achieving important societal goals that U.S. law neglects.

Second, this Article provides access to a wide variety of legislative material and legal commentary on the new German consumer insolvency law that has been neither translated nor discussed in English. I hope the dissemination of easily accessible internet-based sources describing the theory, history, structure, and practice of German consumer debt relief law, as well as commentary on these sources in English, will add another productive dimension to U.S. academic and legislative debate on consumer bankruptcy reform. U.S. legislators ignored European approaches to insolvency law when they revamped the U.S. bankruptcy law in the 1970s, because so little was known about how European laws worked in practice.⁶ Today, improved transatlantic communication and the internet open up a wealth of information on current European insolvency processes. Europeans have studied and learned from U.S. bankruptcy law.⁷ Now we in the United States can and should learn from the innovative, thoughtful, and modern European approaches to relieving financially troubled consumers.

Part II of this Article explores the circumstances leading to consumer debt relief reform in Germany. It first reports statistics on the sources and volume of rising consumer indebtedness in Germany in the 1980s and 1990s. Then it surveys the deficiencies among the various legal protections

⁶ See COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, at 66 (1973).

⁷ See generally Nick Huls, *American Influences on European Consumer Bankruptcy Law*, 15 J. CONSUMER POL'Y 125 (1992) [hereinafter Huls, *American Influences*]; see also *infra* note 70 (describing a special meeting initiated by the Law Committee of the Bundestag, or lower house of the German Parliament, with U.S. bankruptcy experts to discuss the shape of the future German insolvency law).

available to overburdened consumer debtors before the Insolvency Act went into force in 1999. Part III describes the German solution to the problem of rising consumer overindebtedness. It lays out the history and structure of the consumer-oriented provisions of the Insolvency Act, with special emphasis on the practical operation and reform of the new law over the first few years of its existence. Part III pays particular attention to the development of the multi-year payment obligation as a prerequisite for a discharge of unpaid debt. Part IV extracts three lessons for U.S. law reform based on the German experience. This Part focuses on the critical and perhaps surprising disconnect between theory and reality in the German law, as well as the implications of that disconnect for U.S. law reformers. Finally, Part V distills the German system to its essence, pointing out that the current U.S. and German systems of consumer debt relief are not very different in practice. Nonetheless, the fundamental distinction between the goals and effects of the two systems contains a final crucial lesson for the United States.

II. THE BLEAK SITUATION FOR GERMAN CONSUMER DEBTORS BEFORE 1999: RISING DEBT LOADS, INEFFECTIVE BANKRUPTCY LAWS, AND INSUFFICIENT PROPERTY PROTECTIONS

The number of Germans facing serious debt problems rose drastically in the 1980s and 1990s.⁸ The volume of consumer credit—as well as the percentage of households taking on consumer debt—grew in Germany at an explosive rate following World War II, especially from 1968 onward.⁹ A study commissioned to investigate the growing problem of excessive debt in Germany estimated that, in 1989, 1.2 million households—over 3% of the total number of households¹⁰—suffered from excessive debt.¹¹ While

⁸ See, e.g., GESETZENTWURF DER BUNDESREGIERUNG: ENTWURF EINER INSOLVENZORDNUNG (INSO), BUNDESRATS-DRUCKSACHE [BR-Dr.] 1/92, at 82 (Jan. 3, 1992), available at http://www.parlamentsspiegel.de/cgi-bin/hyperdoc/show_dok.pl?k=BBD1/92 (last visited Jul. 18, 2003).

⁹ See Knut Holzschek, *Konsumentenkreditaufnahme und Verbraucherverschuldung in der Bundesrepublik Deutschland*, in VERBRAUCHERKREDIT UND VERBRAUCHERINSOLVENZ: PERSPEKTIVEN FÜR DIE RECHTSPOLITIK AUS EUROPA UND USA 66 (1986). Total consumer credit volume grew from less than 10 billion DM in 1967 to nearly 160 billion DM in 1984. *Id.* at tbl. 1. To place this growth in context, the ratio of the total volume of consumer credit to the gross national product had risen from 0.2% in the late 1940s to 10% in 1984. *Id.*

¹⁰ See STATISTISCHE BUNDESAMT, BEVÖLKERUNG: HAUSHALTSTYPEN (2003), available at <http://www.destatis.de/basis/d/bevoe/bevoetab11.htm> (last visited Jul. 22, 2003) (reporting just over 38 million households in 2000, with a growth rate of about 300,000 households per year, suggesting about 35 million in 1989).

¹¹ See DIETER KORCZAK & GABRIELA PFEFFERKORN, ÜBERSCHULDUNGSSITUATION UND SCHULDNERBERATUNG IN DER BUNDESREPUBLIK DEUTSCHLAND XL (1992); see also *id.* at 23-112 for a general overview of the consumer credit situation in Germany in 1990. By May 1999, the number of over-indebted households had more than doubled to 2.8 million by

the median income grew only twelve-fold between 1950 and 1984, per-capita indebtedness increased more than 800-fold during the same period.¹²

Credit card usage remained quite low,¹³ but Germans nonetheless incurred substantial debts, primarily through installment loans from finance companies and banks, as well as credit purchases from mail order companies.¹⁴ Germans commonly took on debt to purchase furniture and other household items, as well as automobiles.¹⁵ Most troubling, a very large portion of consumer debt was incurred to pay off previous installment debt, leading many consumers into a vicious cycle of “chain indebtedness.”¹⁶ Credit deregulation in the 1980s further accelerated the growth of consumer debt. Total consumer debt in Germany more than doubled again between 1984 and 1994, from just under DM 160 billion in 1984 to almost DM 364 billion in 1994.¹⁷ Job loss and other unexpected stress on income¹⁸ would throw the already sensitive economics of heavily

some estimates. See GP-FORSCHUNGSGRUPPE, *VERSCHULDUNG UND ÜBERSCHULDUNG* (2003), http://gp-forschungsgruppe.com/de/tf_ver.asp (last visited Jul. 8, 2003). The total number of households has grown to just under 39 million, see STATISTISCHE BUNDESAMT, *supra* note 11 (which means that over 7% of households are overindebted in Germany today).

¹² DETLEF BONNEMANN & THOMAS RICKAL, *EINFÜHRUNG IN DEN PROBLEMKREIS VER-/ÜBERSCHULDUNG* § 1 (1997), available at <http://www.uni-essen.de/tts/lehrangebot/verschuldung/schulden.pdf> (last visited Jul. 2, 2003).

¹³ Estimates suggested that only 7.1% of the German population used credit cards by 1990. See KORCZAK & PFEFFERKORN, *supra* note 11, at 78-82, 272 tbl. 38.

¹⁴ See *id.*, at 52, 272 tbl. 38. Moderate-interest loans from banks are far more difficult for consumers to obtain than loans from finance companies and other credit suppliers, which leads a great many consumers to take on more expensive and riskier loans from finance companies and “shadier” lenders. See, e.g., Holzcheck, *supra* note 10, at 74-75.

¹⁵ See Holzcheck, *supra* note 9, at 70; KORCZAK & PFEFFERKORN, *supra* note 11, at 106, 272-73. The usage and structure of German consumer credit at the end of the 1980s was in many ways quite similar to consumer credit use in the United States in the early- to mid-1900s. See LENDOL CALDER, *FINANCING THE AMERICAN DREAM: A CULTURAL HISTORY OF CONSUMER CREDIT* 183-208 (1999).

¹⁶ See Holzcheck, *supra* note 9, at 71-73, 78-79; KORCZAK & PFEFFERKORN, *supra* note 11, at 273.

¹⁷ See LARS RATH, *ÜBERSCHULDUNG UND SCHULDNERBERATUNG IN DEUTSCHLAND UNTER BESONDERER BERÜCKSICHTIGUNG DER NEUEN INSOLVENZORDNUNG (INSO)* § 2.2 (1996), available at http://www.fh-fulda.de/fb/sw/diplarb/rath/dipl_inso.html (last visited Jul. 7, 2003).

¹⁸ Unemployment grew significantly in Germany in the late 1970s and early 1980s, and job loss is consistently cited among the most common reasons for consumer insolvency in Germany. See, e.g., RATH, *Id.* at §§ 2.5, 3.1; CURT WOLFGANG HERGENRÖDER, *SCHULDEN OHNE ENDE ODER ENDE OHNE SCHULDEN?* §VII (2001), available at www.s fz-mainz.de/dateien/abhandlungen/antrittsvorlesung_hergenroeder.htm (last visited Jul. 9, 2003); Holzcheck, *supra* note 9, at 76-77; EMPFEHLUNGEN DER AUSSCHÜSSE ZUM ENTWURF EINER INSOLVENZORDNUNG (INSO), BR-DR. 1/1/92, at 55 (Feb. 4, 1992), available at <http://www.parlamentsspiegel.de/cgi-bin/hyperdoc/showdok.pl?k=BBD1/92> (last visited Jul. 18, 2003).

indebted consumers into a tailspin.

German insolvency laws were unable to meet the challenges of this rising tide of consumer debt. Unlike the bankruptcy regimes of many European countries, German bankruptcy law has historically drawn no distinctions between consumers and “merchants.”¹⁹ Anyone could take advantage of the two German laws dealing with debt relief. Under the *Konkursordnung*,²⁰ the debtor’s assets were liquidated to produce a distribution to creditors, while the *Vergleichsordnung*²¹ sought to foster renegotiation of debtor-creditor relations by majority vote of creditors. Although both of these laws were technically available to consumers, neither generally offered consumers any benefit. These two laws were either practically unavailable or ineffectual for the overwhelming majority of consumer debtors for three reasons.

First, both laws allowed consumers to seek a court-imposed settlement agreement, possibly settling debts for less than full payment,²² but only with the assent of large majorities of creditors and, in most cases, a minimum payout from the debtor. To force a settlement on recalcitrant creditors, the *Konkursordnung* required the assent of a majority of the total number of creditors, and of creditors holding at least 75% of total claims.²³ The *Vergleichsordnung* imposed even more stringent requirements. In addition

¹⁹ See, e.g., EUROPEAN INSOLVENCY PRACTITIONERS’ HANDBOOK 111 (Sir Kenneth Cork & G.A. Weiss eds., 1984) [hereinafter INSOLVENCY HANDBOOK]; 1 J.H. DALHUISEN, DALHUISEN ON INTERNATIONAL INSOLVENCY AND BANKRUPTCY §§ 2.02[7], 2.04, 3.07[2] (1983); cf. EUROPEAN BANKRUPTCY LAWS 17, 61, 96, 108 (David A. Botwinik & Kenneth W. Weinrib eds., 2d ed. 1986) (noting that as of the mid-1980s, the bankruptcy laws of Belgium, France, Italy, and Poland, for example, applied only to merchants).

²⁰ Translated literally as “Forced Auction Act,” the *Konkursordnung* was enacted in 1877 and was promulgated in 1879, and it remained in force until the implementation of the new Insolvency Act in 1999. See, e.g., DALHUISEN, *supra* note 19, § 3.07[2]. The primary goal and effect of the law was liquidation of the debtor’s estate and distribution of value to creditors—not reorganization or relief from debt. See, e.g., EUROPEAN BANKRUPTCY LAWS, *supra* note 19, at 76.

²¹ The *Vergleichsordnung*, which translates literally as “Agreement Act,” was enacted in 1935 to offer a preventative measure to avoid the strict requirements and value-destructive effect of the forced liquidation under the *Konkursordnung*. See, e.g., EUROPEAN BANKRUPTCY LAWS, *supra* note 19, at 76; DALHUISEN, *supra* note 19, § 3.07[2].

²² See, e.g., EUROPEAN BANKRUPTCY LAWS, *supra* note 19, at 76-77; INSOLVENCY HANDBOOK, *supra* note 19, at 124, 127-37.

²³ See, e.g., INSOLVENCY HANDBOOK, *supra* note 19, at 124; MANFRED BALZ, DER VERBRAUCHER IM INSOLVENZRECHT: RECHTSPOLITISCHE ÜBERLEGUNGEN, in VERBRAUCHERKREDIT UND VERBRAUCHERINSOLVENZ: PERSPEKTIVEN FÜR DIE RECHTSPOLITIK AUS EUROPA UND USA 250, 253 (1986). The pre-1999 German bankruptcy law was thus quite similar to the several pre-1898 U.S. bankruptcy laws, which also required majority and sometimes supermajority creditor assent. See Bankruptcy Act of April 4, 1800, ch. 19, § 36, 2 Stat. 31 (repealed 1803); Bankruptcy Act of August 19, 1841, ch. 9, § 4, 5 Stat. 443-44 (repealed 1843); Bankruptcy Act of March 2, 1867, ch. 176, § 33, 14 Stat. 533 (repealed 1878).

to convincing a majority of creditors and those holding between 75% and 80% of total claims,²⁴ the proposed settlement had to offer payment of at least 35% of all claims.²⁵ Consumers in particular were unlikely to be able to clear either the majority creditor assent hurdle or the minimum payment hurdle.²⁶ As a result, forced settlements under the *Konkursordnung*, and cases initiated under the *Vergleichsordnung*, represented only a miniscule percentage of all debt relief proceedings in Germany.²⁷

Second, a case could be opened under the *Konkursordnung* only if the debtor's available assets could be expected to cover the significant costs of the proceedings (including administrator's fees and court costs).²⁸ Most debtors—both consumers and businesses—were thus doomed to failure immediately out of the gate. This minimum assets requirement led to the dismissal of over 75% of all cases under the *Konkursordnung*.²⁹ One suspects that the vast majority of consumer cases fell within the doomed “insufficient assets” category.³⁰

²⁴ See, e.g., EUROPEAN INSOLVENCY LAWS, *supra* note 19, at 76-77; INSOLVENCY HANDBOOK, *supra* note 19, at 133-34; Balz, *supra* note 23, at 252.

²⁵ See, e.g., EUROPEAN INSOLVENCY LAWS, *supra* note 19, at 76; INSOLVENCY HANDBOOK, *supra* note 19, at 127. In addition, the minimum dividend rose to 40% if the plan proposed a payout over longer than one year. See EUROPEAN INSOLVENCY LAWS, *supra* note 19, at 76.

²⁶ See, e.g., Balz, *supra* note 23, at 253 (explaining that consumers might hope for a forced settlement only if third parties were willing to put up money to support the plan).

²⁷ See, e.g., Balz, *supra* note 23, at 252-53 (pointing out that forced settlements under the *Konkursordnung* occurred in only 8% of all cases, and noting that the *Vergleichsordnung* had “lost more and more meaning since its entry into force,” and that in the mid-1980s, fewer than 1% of insolvency cases were initiated under the *Vergleichsordnung*, the majority of which led to no agreement); Klaus Kamlah, *The New German Insolvency Act: Insolvenzordnung*, 70 AM BANKR. L.J. 417, 419 (1996); BR-DR. 1/92, *supra* note 8, at 72; KOMMISSION FÜR INSOLVENZRECHT, ERSTER BERICHT DER KOMMISSION FÜR INSOLVENZRECHT 461, App. II (1985) (showing percentage of cases under *Vergleichsordnung* as less than 2% of all insolvency cases after 1975, and less than 1% after 1980); DEUTSCHER BUNDESTAG, STENOGRAPHISCHER BERICHT, 222. SITZUNG 19118 (Apr. 21, 1994), available at http://www.parlamentsspiegel.de/cgi-bin/hyperdoc/show_dok.pl?k=BAP12/222 (last visited Jul. 7, 2003) (noting that fewer than 40 *Vergleichsordnung* proceedings were initiated per year by 1994).

²⁸ See, e.g., INSOLVENCY HANDBOOK, *supra* note 19, at 113; EUROPEAN BANKRUPTCY LAWS, *supra* note 19, at 78; Balz, *supra* note 23, at 251.

²⁹ See, e.g., Kamlah, *supra* note 27, at 419; KOMMISSION FÜR INSOLVENZRECHT, *supra* note 27, at 459, App. I (showing percentages of cases dismissed for lack of assets between 1900 and 1983); INSOLVENCY HANDBOOK, *supra* note 19, at 113; EUROPEAN BANKRUPTCY LAWS, *supra* note 19, at 75, 78; BR-DR. 1/92, *supra* note 8, at 72.

³⁰ One member of the commission that was established to reform the German insolvency laws estimated that the number of true “consumer” proceedings under the old *Konkursordnung* amounted to only about 5% of all cases. See Balz, *supra* note 23, at 250-51. See also, *infra* note 129 and accompanying text (explaining that, before cost-deferral reform in 2001, 90% of consumer insolvency cases under the Insolvency Act were dismissed for lack of assets).

Finally, the most important deficiency of pre-1999 German bankruptcy law was that German law had never offered a forced discharge of unpaid debt at the conclusion of bankruptcy proceedings.³¹ The *Konkursordnung* focused on facilitating the enforcement of creditors' claims, not on relieving the honest debtor of a heavy debt burden.³² Following insolvency proceedings, all creditors included on the debtor's schedule of debts could receive a writ of execution, allowing them to seize the debtor's future property and future income, at any time for up to thirty years.³³ Thus, the German *Konkursordnung* relegated most consumer debtors to life-long indebtedness in the "modern debtor's prison."³⁴ Consequently, many such

³¹ See, e.g., INSOLVENCY HANDBOOK, *supra* note 19, at 128; EUROPEAN BANKRUPTCY LAWS, *supra* note 19, at 79. In the former *Länder* of the German Democratic Republic (East Germany), a different law offered a sort of discharge. Under section 18, paragraph 2, clause 3 of the *Gesamtvollstreckungsordnung* (literally, the "Collective Enforcement Act"), or *GesO*, after a debtor had undergone an insolvency proceeding, creditors could enforce their claims against the debtor only to the extent that the debtor accumulated enough savings to acquire new property beyond a "normal lifestyle corresponding to his or her personal and professional situation." This lifestyle had to be "neither poor nor overly costly." See FRANK WENZEL, DIE "RETSCHULDBEFREIUNG" IN DEN NEUEN BUNDESLÄNDERN §§ III(3)-(4), VII(1) (1994); BR-DR. 1/92, *supra* note 8, at 104-05, 188. This approach destroyed any incentive for productive life beyond a minimal existence following insolvency proceedings, and so can hardly be compared to the "fresh start" discharge offered by U.S. law and the new German Insolvency Act. See *id.* at §§ VII(1), (2) and (4) (explaining that, because the *GesO* didn't offer a real "discharge," it failed to provide a way out of the "modern debtor's prison" or to provide incentive to pay creditors, and therefore should not be adopted in Germany as a whole following reunification). Moreover, the *GesO* suffered from the same problem as the *Konkursordnung*, in that courts dismissed "the great majority" of cases under the Bankruptcy Act because consumer debtors possessed insufficient assets to cover the costs of the proceeding. See *id.* at §§ VI(5)(c), VII(1).

³² See, e.g., Walther Gerhardt, VON DER INSOLVENZRECHTSREFORM ZUR INSOLVENZORDNUNG—ENTWICKLUNG UND ENDPRODUKT AUS DER PERSÖNLICHEN SICHT EINES KOMMISSIONSMITGLIEDS, IN FESTGABE ZIVILRECHTSLEHRER 1934/1935, at 121, 143 (Walther Hadding ed., 1999); KOMMISSION FÜR INSOLVENZRECHT, ZWEITER BERICHT DER KOMMISSION FÜR INSOLVENZRECHT 163 (1986).

³³ See, e.g., KOMMISSION FÜR INSOLVENZRECHT, *supra* note 32, at 162; BR-DR. 1/92, *supra* note 8, at 81, 187-88; INSOLVENCY HANDBOOK, *supra* note 19, at 123; EUROPEAN BANKRUPTCY LAWS, *supra* note 19, at 79. Indeed, enforcement proceedings undertaken at any point within the 30-year period reset the clock. See, e.g., RATH, *supra* note 17, at § 3.2; KORCZAK & PFEFFERKORN, *supra* note 11, at 133; BR-DR. 1/92, *supra* note 8, at 81.

³⁴ See, e.g., RATH, *supra* note 17, at § 1; KORCZAK & PFEFFERKORN, *supra* note 11, at 134; Balz, *supra* note 23, at 251; DEUTSCHER BUNDESRAT, STENOGRAPHISCHER BERICHT, 639. SITZUNG 81 (Feb. 14, 1992), available at http://www.parlamentsspiegel.de/cgi-bin/hyperdoc/show_dok.pl?k=BBP639 (last visited Jul. 7, 2003) (lamenting the special problem of the "modern debtor's prison," from which many debtors cannot escape despite all efforts); DEUTSCHER BUNDESTAG, STENOGRAPHISCHER BERICHT, 94. SITZUNG 7770-71, 7775 (Jun. 3, 1992), available at http://www.parlamentsspiegel.de/cgi-bin/hyperdoc/show_dok.pl?k=BAP12/94 (last visited Jul. 7, 2003) (explaining that simple debtors needed a new insolvency law "to come out of the debtor's prison" and noting that 1.4 million households were trapped in the "modern debtor's prison"); DEUTSCHER BUNDESTAG,

debtors resigned to life in the shadow economy and work on the black market.³⁵

Consumer debtors were thus consigned to “living in poverty”³⁶ under the meager protections of German law shielding certain property and income from seizure.³⁷ Even today, only a narrow range of consumer property remains outside the grasp of creditors seeking to execute judgments. German law exempts from seizure general personal and household items only “to the extent that they are required for the debtor’s *modest* lifestyle and domestic activity, appropriate to his or her occupational activity and indebtedness,” as well as items necessary for the debtor’s profession.³⁸ Indeed, if necessary items are overly “luxurious,” such as a color television as opposed to a black-and-white television, they can be seized and replaced by the creditor with less luxurious alternatives.³⁹ The German property exemptions take seriously the word “modest,” placing virtually anything of significant value within reach of creditors.⁴⁰

STENOGRAPHISCHER BERICHT, 222. SITZUNG, *supra* note 27, at 19120, 19124, 19126-27 (noting the great significance of a discharge of debt to release “approximately 1.7 million overindebted households . . . imprisoned in a modern debtor’s prison” and referring to the “lifelong debtor’s prison” of pre-1999 law).

³⁵ See, e.g., BR-DR. 1/92, *supra* note 8, at 81; WENZEL, *supra* note 31, at § VII(2).

³⁶ A study conducted in the late 1980s used this phrase to describe life under the German wage and property exemptions. KORCZAK & PFEFFERKORN, *supra* note 11, at 299.

³⁷ See BR-DR. 1/92, *supra* note 8, at 188; RATH, *supra* note 17, at § 3 (noting the paucity of debt regulation options for consumers prior to 1999).

³⁸ See ZIVILPROZESSORDNUNG [CODE OF CIVIL PROCEDURE] Arts. 811(1), (5) (2003). Only “clothing, underwear, bedding, [and] household and kitchen utensils” are specifically identified in this list, *see id.*, but such items as refrigerators, washing machines, radios, black-and-white television sets, and furniture likely fall within the exemption, as well. See, e.g., Theo Rauh, *Germany, METHODS OF ENFORCEMENT OF JUDGMENTS IN EUROPE* 111, 116 (Peter Kaye ed., 1996); BUNDESARBEITSGEMEINSCHAFT SCHULDNERBERATUNG E.V., WAS TUN, WENN DER RICHTSVOLLZIEHER KOMMT: RECHTE UND PFLICHTEN? 4 (2003), *available at* <http://www.bmfsfj.de/Kategorien/Publikationen/Publikationen,did=3032.html> (last visited Feb. 11, 2004) [hereinafter WAS TUN]; BUNDESMINISTERIUM FÜR FAMILIE, SENIOREN, FRAUEN UND JUGEND, WAS MACHE ICH MIT MEINEN SCHULDEN? 16 (9th ed. 2002), *available at* <http://www.bmfsfj.de/Kategorien/Publikationen/Publikationen.dud=3032.htm> (last visited Jul. 3, 2003) (on file with author) [hereinafter WAS MACHE ICH].

³⁹ See ZIVILPROZESSORDNUNG [CODE OF CIVIL PROCEDURE] Arts. 811a-811b (2003); WAS TUN, *supra* note 38, at 4 (citing the example of a color television being replaced with a black-and-white television).

⁴⁰ To guard against overreaching by creditors, less valuable items are specially protected. German law prohibits “in *terrorem*” seizures of items of personal value to the debtor but with low market value. “Normal household items” in use in the debtor’s home may not be seized if it is “patently obvious” that their sale would produce proceeds “completely disproportionate to their value.” See ZIVILPROZESSORDNUNG [CODE OF CIVIL PROCEDURE] Art. 812 (2003); WAS MACHE ICH, *supra* note 38, at 16 (noting that such items as washing machines and video equipment will not likely fall to execution, as transportation and realization costs exceed their value).

Similarly, until recently, legal restrictions on seizure protected relatively little of German consumer debtors' wages and salary. While most consumers in financial straits possess little if any valuable hard property for creditors to attach,⁴¹ seizure of future wages—better known as “garnishment”—often represents a significant source of potential value for creditors and a serious potential hardship for debtors. Indeed, unlike the law of the United States and many European countries, German law allows for the free contractual assignment of future wages as security for repayment of debt, even before financial trouble arises.⁴² Such future wage assignments have been extremely common in Germany as a means of securing consumer credit.⁴³

⁴¹ See, e.g., HERGENRÖDER, *supra* note 18, at § III(3)(c); Holzschek, *supra* note 9, at 79-80 (noting that execution proceedings against consumer debtors result in even partial payment of the debt in only 10% of cases). One other fact suggests that many German debtors have no attachable assets. If the court official in charge of attaching property (the *Gerichtsvollzieher*) is unable to find attachable property, German creditors can demand (under penalty of up to 6 months imprisonment) that the debtor execute an affidavit, called an *Eidesstattliche Versicherung*, detailing his or her assets. If the debtor executes such a document, his or her name is listed in an official debtor list, which is circulated country-wide, for three years, during which time the debtor loses his or her ability to obtain credit. See WAS MACHE ICH, *supra* note 38, at 17; see also <http://www.forum-schuldnerberatung.de/> (last visited Feb. 11, 2004) (on file with author) (explaining the operation of the *Eidesstattliche Versicherung*, also called an *Offenbarungseid*). Hundreds of thousands of German debtors had executed such affidavits by the late 1980s attesting to their lack of attachable assets. See KORCZAK & PFEFFERKORN, *supra* note 11, at XXIII, XL (citing 630,000 such affidavits filed by 1989); BONNEMANN & RICKAL, *supra* note 12, at § 1 (citing 630,000 such affidavits filed by 1989). The number of *Eidesstattliche Versicherung* continues to rise. See, e.g., STATISTISCHE ZAHLEN ZU VERBRAUCHERINSOLVENZVERFAHREN IM JAHR 2000, available at <http://www.infodienst-schuldnerberatung.de/infos/insoent2000/insoent2000.html> (last visited Jul. 21, 2003) (reporting that the number of affidavits filed annually suddenly doubled to 818,000 in the years preceding 1999).

⁴² See, e.g., KORCZAK & PFEFFERKORN, *supra* note 11, at 129 (explaining that clauses in credit contracts assigning future wages and salary are legal so long as the purpose and extent of the assignment and the circumstances leading to enforcement of the assignment are adequately and clearly described, and the assignment leads to a reasonable balance of the interests of the parties); Balz, *supra* note 23, at 268-69 (noting that future wage and salary assignments are extremely common in Germany, while they are heavily restricted in countries like the United States, the Netherlands, Austria, and Switzerland); cf. 49 Fed. Reg. 7740, 7755-61 (1984) (outlawing most forms of future wage assignments in the United States as unfair trade practices).

⁴³ See, e.g., KORCZAK & PFEFFERKORN, *supra* note 11, at 129 (describing future wage and salary assignment as “a widespread credit security measure” commonly inserted into credit contracts); Holzschek, *supra* note 9, at 80 (noting that wage assignments are the most common out-of-court enforcement mechanism in Germany); Balz, *supra* note 23, at 268-69 (noting that “by far the largest portion of consumer credit” is secured by future wage and salary assignments); BR-DR. 1/92, *supra* note 8, at 101 (expressing concern that future wages as a credit protection device should not be unduly limited); BESCHLUSSEMPFEHLUNGEN UND BERICHT DES RECHTSAUSSCHUSSES (6. AUSSCHUSS) ZU DEM GESETZENTWURF DER BUNDESREGIERUNG—DRUCKSACHE 12/2443—ENTWURF EINER

German law exempts a certain amount of future wages from both garnishment⁴⁴ and assignment,⁴⁵ but the restrictions in place during the 1980s and 1990s left affected debtors with rather little exempt income. Applying a rough average historical conversion rate,⁴⁶ the German wage exemptions applicable between April 1, 1984, and July 1, 1992,⁴⁷ allowed childless couples, for example, to keep an absolute maximum of about \$13,250 per year.⁴⁸ After July 1, 1992, childless couples could keep an

INSOLVENZORDNUNG (INSO), BUNDESTAGS-DRUCKSACHE [BT-DR.] 12/7302, at 170 (Apr. 19, 1994), available at http://www.parlamentsspiegel.de/cgi-bin/hyperdoc/show_dok.pl?k=BAD12/7302 (last visited Jul. 18, 2003) (rejecting proposals to limit wage assignments, as such assignments “represent important security devices for formal consumer credit”).

⁴⁴ See ZIVILPROZESSORDNUNG [CODE OF CIVIL PROCEDURE] Arts. 850-850k (2003).

⁴⁵ One of the requirements for a valid wage assignment is that the assigned wages must not be subject to an exemption. See BÜRGERLICHES GESETZBUCH [CIVIL CODE] Art. 400. Thus, wages that are exempt from attachment pursuant to Articles 850-850k of the Code of Civil Procedure are also not subject to assignment. This and other requirements for assignments of wages and other third-party claims are discussed in several very enlightening web pages by Professor Helmut Rüssmann, see <http://ruessmann.jura.uni-sb.de/bvr99/Vorlesung/abtretung.htm> (last visited Jul. 2, 2003); see also FAQ file on wage assignments, at <http://www.forum-schuldnerberatung.de/> (last visited Feb. 11, 2004) (on file with author).

⁴⁶ These converted amounts use a very rough average exchange rate of two Deutschmarks per dollar in the 1980s and 1990s. I arrived at this rough average using the historical exchange rate tables for Deutschmarks to U.S. Dollars between 1980 and 2000 at <http://www.oanda.com/convert/fxhistory> (last visited Jul. 3, 2003).

⁴⁷ These are the effective dates of the fifth and sixth laws increasing the wage exemptions. See GESETZESBESCHLUSS DES DEUTSCHEN BUNDESTAGES: FÜNFTE GESETZ ZUR ÄNDERUNG DER PFÄNDUNGSFREIGRENZEN, BR-DR. 32/84, at 2 (Feb. 3, 1984), available at http://www.parlamentsspiegel.de/cgi-bin/hyperdoc/show_dok.pl?k=BBD32/84 (last visited Jul. 18, 2003); GESETZESBESCHLUSS DES DEUTSCHEN BUNDESTAGES: SECHSTES GESETZ ZUR ÄNDERUNG DER PFÄNDUNGSFREIGRENZEN, BR-DR. 127/92, at 1 (Feb. 21, 1992), available at http://www.parlamentsspiegel.de/cgi-bin/hyperdoc/show_dok.pl?k=BBD127/92 (last visited Jul. 18, 2003).

⁴⁸ The maximum exemption is calculated by taking a 100% exemption in the first \$6500 per year, then adding 50% of wages between \$6500 and \$20,000. See BR-DR. 32/84, *supra* note 47, at 1, Art. 1(4) (exempting 1092 DM base per month plus 50% up to 3302 DM per month maximum). I have multiplied the monthly exemptions by 12 for easier comprehension by U.S. readers more familiar with annual income comparisons. The somewhat complicated German wage exemption scheme proceeds in three steps: First, it allots a base exemption in 100% of a certain amount of monthly wages, depending upon the number of people in the debtor's household (or a former household to whom the debtor owed a support obligation). Second, the debtor is then granted an exemption in a sliding percentage of monthly wages beyond the base exemption amount, again depending upon the number of his or her dependent obligations (30% for single people, 50% for those with one support obligation, and 10% more for each additional obligation up to a maximum of 5). Finally, all debtors are subject to the same maximum monthly wage beyond which all wages are fully seizable. Thus, single debtors with no dependent obligations receive 100% of a minimum amount plus 30% of excess wages up to the maximum, those with one dependent obligation (married debtors, for example) receive a slightly higher minimum 100% exempt

absolute maximum of about \$16,500 per year.⁴⁹ All income above the maximum was available to creditors.⁵⁰ A comparative analysis of the buying power of these sums in the United States and Germany in the 1980s and 1990s is beyond the scope of this paper, but suffice it to observe that a young couple would be hard-pressed to lead even a “modest” lifestyle on \$16,500 per year in northern Europe.⁵¹

III. DEVELOPMENT OF A NONCONSENSUAL DISCHARGE FOR CONSUMER DEBT

Consumers occupied a sort of no-man’s land in German debt relief law before 1999. Lawmakers were loath to interfere with the consequences of bargains struck between debtors and creditors. They resisted the notion of allowing consumers to escape their debts other than by re-negotiating their agreements with creditors. Powerful economic change ultimately produced enough political pressure to bring consumer protection to the fore, and reformers introduced a revolution in debtor-creditor relations—the discharge of unpaid debt. Such a potent legal remedy, though, had to be balanced by careful measures to avoid misuse. This Part describes the path from no discharge to a discharge in stages, subject to ostensibly heavy requirements. Part III.A describes the early stages of debt relief law reform in Germany, from resistance to acceptance of the notion of freeing debtors from unpaid debt. Part III.B describes in detail the series of stages through which a consumer debt relief case passes under the new Insolvency Act. This part examines the past, present, and likely future provisions of the new law. Finally, Part III.C looks to the future of German consumer debt relief

amount plus 50% of excess wages up to the maximum, and those with two through five exemptions (married debtors with one through four children, for example) receive a steadily increasing minimum exemption plus 60% through 90% of excess wages (10% for each dependent obligation up to the fifth) up to the maximum. See ZIVILPROZESSORDNUNG [CODE OF CIVIL PROCEDURE] Art. 850c (2003); WAS MACHE ICH, *supra* note 38, at 20-22, 69-74 (setting forth exemption tables and an illustrative example of how to calculate the exemption amount). Actually, income exemptions are even more complicated than this, as varying percentages of vacation pay and benefits payments, for example, are exempt. For a more detailed discussion, see VORSCHRIFTEN ÜBER DIE BERECHNUNG DES PFÄNDBAREN EINKOMMENS, available at <http://www.forum-schuldnerberatung.de/> (last visited Jul. 14, 2003) (on file with author).

⁴⁹ This constitutes an increased base exemption of about \$10,000 per year plus 50% of wages between \$10,000 and \$23,000. See GESETZENTWURF DER BUNDESREGIERUNG: ENTWURF EINES SECHSTEN GESETZES ZUR ÄNDERUNG DER PFÄNDUNGSFREIGRENZEN, BT-DR. 12/1754, at 4, Art. 1(3) (Dec. 5, 1991) (exempting DM 1677 base per month plus 50% up to DM 3796 per month maximum).

⁵⁰ See *supra*, note 48 (explaining the three-step wage exemption scheme).

⁵¹ The threshold for poverty assistance for a single person with no dependents in Germany in December 1990, for example, was about \$7000 per year (DM 1153 per month). See BT-DR. 12/1754, *supra* note 49, at 16 (noting the change in the poverty level during the 1980s).

law with observations about growth and stability in the foreseeable future.

A. Early History and Resistance to the Concept of Discharge

The plight of overburdened consumers drew no attention in the earliest bankruptcy reform efforts in Germany.⁵² The oil crisis of 1973 and its widespread negative consequences for business originally sparked the movement for reform, when in 1978 the German Minister of Justice appointed a commission to study the bankruptcy laws and recommend much needed change.⁵³ The Commission on Insolvency Law issued two reports, one in 1985 and the other in 1986.⁵⁴ The first report contained no mention of any issue relating to consumer indebtedness, focusing instead on the desperate need for reform in big business insolvency proceedings and secured transactions law.⁵⁵

The second report dealt with an issue of central concern to consumers—the post-bankruptcy discharge of debt—but it concluded that “a discharge after the Anglo-American model is out of the question.”⁵⁶ The Commission adhered firmly and unanimously to the notion that debtors could escape their unpaid debts only by agreement with creditors.⁵⁷ Bankruptcy law served in the first instance to facilitate creditor enforcement of the debtor’s obligations, the Commission insisted, “it is in no way to function as a ‘debt-divestiture proceeding’ to help the debtor to rid himself of his obligations.”⁵⁸ The Commission recognized that some form of expanded protection against judgment enforcement might be appropriate for consumers, but it demurred as to such questions, as they fell within “a problem of consumer protection, especially in connection with consumer credit, which has no immediate relationship to insolvency law reform.”⁵⁹

⁵² See RATH, *supra* note 17, at § 5.1.

⁵³ See BR-DR. 1/92, *supra* note 8, at 103; RATH, *supra* note 17, at § 5.1.

⁵⁴ *Id.*

⁵⁵ See KOMMISSION FÜR INSOLVENZRECHT, ERSTER BERICHT DER KOMMISSION FÜR INSOLVENZRECHT (1985); Balz, *supra* note 23, at 261.

⁵⁶ KOMMISSION FÜR INSOLVENZRECHT, ZWEITER BERICHT DER KOMMISSION FÜR INSOLVENZRECHT § 6.3 (1986) [hereinafter, ZWEITER BERICHT]; see also Gerhardt, *supra* note 32, at 142.

⁵⁷ See ZWEITER BERICHT, *supra* note 56, at § 6.3; Gerhardt, *supra* note 32, at 142.

⁵⁸ ZWEITER BERICHT, *supra* note 56, at § 6.3.

⁵⁹ *Id.*; Gerhardt, *supra* note 32, at 143 (explaining that a provision dealing with the social and socio-political problems of post-bankruptcy indebtedness seemed inappropriate to connect with bankruptcy law). The Kohl Administration disagreed, explaining in its proposed bill that “insolvency law must also make a contribution” to overcoming the increasing problem of consumer overindebtedness. See BR-DR. 1/92, *supra* note 8, at 104. The push to move provisions for discharge out of the insolvency law and into an independent procedure found new life in the Bundesrat. See EMPFEHLUNGEN DER AUSSCHÜSSE ZUM ENTWURF EINE R INSOLVENZORDNUNG (INSO), BR-DR. 1/1/92, *supra* note 18, at 50-51 (Feb. 4, 1992); STELLUNGNAHME DES BUNDESRATES ZUM ENTWURF EINE R INSOLVENZORDNUNG

Political change undermined the Commission's views, and the discharge of debt following insolvency proceedings—especially for consumers—became an essential plank in the platform of insolvency law reform. In 1986, a national election brought to power a new Minister of Justice who prioritized the implementation of a discharge of personal liability following bankruptcy.⁶⁰ In December 1988, the Ministry of Justice and the Ministry for Youth, Family, Women and Health commissioned a research group to investigate the growing problem of consumer overindebtedness in Germany.⁶¹ The commission's 1989 report on the explosion of consumer debt and its dire consequences⁶² supported the introduction of new discharge provisions into the bill for a new insolvency law,⁶³ which was finally introduced into the Bundesrat on January 3, 1992.⁶⁴

The first section of the proposed new law announced that the goals of insolvency proceedings would henceforth encompass not only equitable distribution of the debtor's assets among creditors, but also the opportunity for "[t]he honest debtor . . . to free himself of his remaining debts."⁶⁵ The report accompanying the new bill explained that the meager economic gains

(INSO), BR-DR. 1/92, *supra* note 8, at 26-27 (Feb. 14, 1992); EMPFEHLUNGEN DER AUSSCHÜSSE ZU PUNKT DER 669. SITZUNG DES BUNDESRAATES AM 20. MAI 1994: INSOLVENZORDNUNG (INSO), BR-DR. 336/1/94, at 1-3 (May 10, 1994), *available at* http://www.parlamentsspiegel.de/cgi-bin/hyperdoc/show_dok.pl?k=BBD336/1/94. The Bundestag has consistently rejected this approach, however, and the discharge is now firmly lodged in German insolvency law. *Id.*

⁶⁰ See RATH, *supra* note 17, at § 5.1.

⁶¹ KORCZAK & PFEFFERKORN, *supra* note 11, at XXXVI.

⁶² *Id.*

⁶³ Reunification of East and West Germany on October 3, 1990, also spurred the movement toward consumer debt relief, as "East German society [confronted] the consumer habits of the West." See Christoph G. Paulus, *The New German Insolvency Code*, 33 TEX. INT'L L.J. 141, 143 (1998).

⁶⁴ See BR-DR. 1/92, *supra* note 8, at 3, 46-49 (§§ 235-252), 81-82, 84, 100-02, 187-94. The legislative process in Germany begins for most bills, like it did for the Insolvency Act, with introduction of the bill by the Administration into the Bundesrat, or upper house of Parliament. See, e.g., NIGEL FOSTER, GERMAN LEGAL SYSTEM & LAWS § 2.1.1 (1993). The bill continues in the lower house of Parliament, the Bundestag, through three "readings," or analyses and debates, beginning with referral to committee, which constitutes the most extensive and exacting stage of the legislative process. See *id.* The bill as passed by the Bundestag must be approved by the Bundesrat, sometimes after a conference committee hammers out remaining differences between the two chambers of Parliament. See *id.* This occurred for the Insolvency Act as well, but the conference committee essentially ignored the Bundesrat's objections and re-proposed the bill to both houses in summer 1994 with only a minor modification; i.e., that the bill's entry into force be delayed almost five years to January 1, 1999. See CHARLES E. STEWART, INSOLVENZORDNUNG, EINFÜHRUNGSGESETZ ZUR INSOLVENZORDNUNG 10 (1997); EINIGUNGSVORSCHLAG DES VERMITTLUNGSAUSSCHUSSES: INSOLVENZORDNUNG (INSO), BR-DR. 643-94 (June 24, 1994), *available at* http://www.parlamentsspiegel.de/cgi-bin/hyperdoc/show_dok.pl?k=BBD643/94.

⁶⁵ BR-DR. 1/92, *supra* note 8, at 10.

to be expected from creditor enforcement action were far offset by the economic costs to debtors forced into life-long indebtedness and eking out a lean existence with exempt wages.⁶⁶ The discharge was viewed as a social necessity. Because the former bankruptcy law lacked a discharge,⁶⁷ and agreements with creditors were the rare exception,⁶⁸ society in general suffered a detriment. Many debtors were forced into the shadow economy of the black market, if they were not pushed out of productive economic life entirely.⁶⁹ The concept of a discharge of debt found support in a growing trend among other European nations.⁷⁰ The German version would chart a middle path between the “debtor-friendly” Anglo-American law and the life-long liability of former German law.⁷¹ Reformers hoped that the possibility of a discharge would raise debtor morale and offer new hope for an economic new beginning,⁷² which would redound to the benefit of society by returning debtors to productive activity and tax-paying status.⁷³

B. Acceptance of Discharge Subject to “Strict Prerequisites”

Exuberance for the revolutionary new fresh start was accompanied by deep concern for avoiding abuse of the liberal new provision. Even the staunchest supporters of the discharge emphasized the need for “strict prerequisites” for debtors to demonstrate worthiness for such relief and to avoid abuse.⁷⁴ Proponents were quick to point out that the new law would

⁶⁶ *Id.*, at 81, 188.

⁶⁷ See *supra* notes 31-35 and accompanying text.

⁶⁸ See *supra* notes 22-27 and accompanying text.

⁶⁹ See BR-DR. 1/92, *supra* note 8, at 81.

⁷⁰ The German law drew from experience under the laws of Austria, France, Belgium, the Netherlands, Switzerland, Italy, and the Scandinavian countries, for example. See BR-DR. 1/92, *supra* note 8, at 105-06. Reformers paid particular attention to the United States, which they viewed as having similar economic conditions. *Id.* at 104-05; BT-DR. 12/7302, *supra* note 43, at 150 (noting that the Law Committee of the Bundestag had met specially with a delegation of U.S. lawyers in November and December 1992 to discuss U.S. bankruptcy law).

⁷¹ BR-DR. 1/92, *supra* note 8, at 100.

⁷² See, e.g., DEUTSCHER BUNDESRAT, STENOGRAPHISCHER BERICHT, 639. SITZUNG, *supra* note 34, at 50, 81-82 (remarks of Secretary of State Rainer Funke, the principal drafter of the new insolvency law); BT-DR. 12/7302, *supra* note 43, at 151; DEUTSCHER BUNDESTAG, STENOGRAPHISCHER BERICHT, 222. SITZUNG, *supra* note 27, at 19116, 19120-21, 19124.

⁷³ DEUTSCHER BUNDESRAT, STENOGRAPHISCHER BERICHT, 639. SITZUNG, *supra* note 34, at 84 (remarks of Secretary of State Rainer Funke, the principal drafter of the new insolvency law); DEUTSCHER BUNDESTAG, STENOGRAPHISCHER BERICHT, 222. SITZUNG, *supra* note 27, at 19120 (same, also mentioning the benefits of the debtor's not needing social assistance); GESETZENTWURF DER BUNDESREGIERUNG: ENTWURF EINES GESETZES ZUR ÄNDERUNG DER INSOLVENZORDNUNG UND ANDERER GESETZE, BR-DR. 14/01, at 37-38 (Jan. 5, 2001), available at http://www.parlamentsspiegel.de/cgi-bin/hyperdoc/show_dok.pl?k=BBD14/01.

⁷⁴ See, e.g., BR-DR. 1/92, *supra* note 8, at 3; DEUTSCHER BUNDESRAT,

“demand much more” than the “very debtor-friendly” U.S. model.⁷⁵ Following significant reworking in committee,⁷⁶ the new Insolvency Act places a complicated four-step obstacle course between overburdened consumer debtors and a new life after discharge. First, the debtor must attempt to conclude an out-of-court payment agreement with all creditors.⁷⁷ Failing that, the debtor can file a petition to open an insolvency case, but then must make another attempt at a payment plan with creditors.⁷⁸ This time, the court can impose the plan on a non-consenting minority of creditors if a majority in both number and total amount of claims is deemed to agree to the plan.⁷⁹ Third, if a majority of creditors cannot be enticed or forced into a plan, simplified liquidation proceedings ensue, seeking to realize value from the debtor’s nonexempt assets.⁸⁰ Finally, the debtor confronts the most significant hurdle, a six-year payment period, during which the debtor must exert her best efforts to obtain gainful employment and turn over all nonexempt income to a trustee for distribution to creditors.⁸¹

This Part explores the development and application of these steps in greater detail. Part B.1 describes the long and seldom fruitful process of haggling over a debt arrangement plan, both in and out of court. Part B.2 very briefly describes the “simplified liquidation proceeding” used to extract value from the debtor’s current assets. Finally, Part B.3 examines the volatile history and implementation of the six-year payment period preceding the final discharge of remaining unpaid debt.

1. Out-of-Court and Court-Directed Debt Arrangement Plan Negotiations

The main goal in German consumer insolvency law is to encourage and facilitate the execution of fair out-of-court debt arrangement

STENOGRAPHISCHER BERICHT, 639. SITZUNG, *supra* note 34, at 83 (remarks of Secretary of State Rainer Funke, the principal drafter of the new insolvency law); DEUTSCHER BUNDESTAG, STENOGRAPHISCHER BERICHT, 94. SITZUNG, *supra* note 34, at 7770 (remarks of Secretary of State Rainer Funke,); BT-DR. 12/7302, *supra* note 43, at 153.

⁷⁵ BR-DR. 1/92, *supra* note 8, at 188.

⁷⁶ The special “consumer” insolvency provisions appeared for the first time after two years of review of the bill by Bundestag committees. See BT-DR. 12/7302, *supra* note 43, at 2, 132-37, 153-54, 189; Gerhard Wagner, DIE ANFECHTUNG IM VERBRAUCHERINSOLVENZVERFAHREN, 20 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 689, 690 (1999), available at http://www.parlamentsspiegel.de/ruffprint/DAB12_7329_ON_o.pdf.

⁷⁷ See InsO § 305(1)(1).

⁷⁸ See *id.* at §§ 305-09.

⁷⁹ See *id.* at § 309.

⁸⁰ See *id.* at §§ 311-14.

⁸¹ See *id.* at §§ 286-303. The debtor must also turn over 50% of the value of any property acquired by inheritance. See *id.* at § 295.

agreements among debtors and creditors.⁸² To this end, the Insolvency Act requires debtors to make two attempts to forge a reasonable payment arrangement with creditors. A consumer insolvency case begins in Germany with the debtor's attempt to reach a consensus with all creditors on an out-of-court renegotiation of claims.⁸³ In negotiating this plan, the debtor must be supported by a "suitable person or office."⁸⁴

The "suitable person or office" thus plays a crucial role in this first step, and the extraordinary demands on and insufficient numbers of such people have created serious bottlenecks in the system from the beginning. The *Länder* (individual German States) determine which "persons or agencies" are suitable,⁸⁵ and the two most common such persons are lawyers and state-sponsored debt counselors.⁸⁶ Because lawyers have resisted taking on high-work, low-pay consumer insolvency cases,⁸⁷ the bulk of the burden in this first stage has fallen on the network of state-sponsored debt counseling centers (*Schuldnerberatungsstelle*) spread throughout Germany.⁸⁸

⁸² See DEUTSCHER BUNDESTAG, STENOGRAPHISCHER BERICHT, 222. SITZUNG, *supra* note 27, at 19116 (comments of Joachim Gres, one of the drafters of the Committee Report on the insolvency law as finally enacted). A pamphlet distributed by the Ministry of Family, Seniors, Women and Youth describes out-of-court debt arrangement as the "kings way" in debt regulation. See WAS MACHE ICH, *supra* note 38, at 37.

⁸³ The law imposes this requirement in a pessimistic way, in that it requires a certificate attesting to failure of an out-of-court settlement attempt within the last six months to be filed along with the petition opening insolvency proceedings. See InsO § 305(1)(1).

⁸⁴ See *id.* at § 305(1)(1).

⁸⁵ *Id.*

⁸⁶ See, e.g., BT-DR. 12/7302, *supra* note 43, at 190.

⁸⁷ See Gerhard Pape, EIN JAHR VERBRAUCHERINSOLVENZ—EINE ZWISCHENBILANZ, 20 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 2037, 2040 (1999); BUND-LÄNDER-ARBEITSGRUPPE "INSOLVENZRECHT," PROBLEME DER PRAKTISCHEN ANWENDUNGEN UND SCHWACHSTELLEN DES VERBRAUCHERINSOLVENZVERFAHRENS § (B)(1)(2)(b) (2000), available at <http://www.jm.nrw.de/JM/justizpolitik/schwerpunkte/insolvenzrecht/pdf/zwischenbericht.pdf>; HERGENRÖDER, *supra* note 18, at § IV(2)(d) (reporting one lawyer's description of representing insolvency clients as "dark bread with hard crust"). But see also DANIELA LITSCHKE, DIE NUTZUNG DES VERBRAUCHERINSOLVENZVERFAHRENS: ANALYSE ANHAND EINER DATENERHEBUNG IN SCHLESWIG-HOLSTEIN 28 (2000), available at http://www.s fz-mainz.de/dateien/abhandlungen/diplom_litschke.pdf (reporting that only 30% of the out-of-court payment plan negotiations were directed by debt counseling centers in Schleswig-Holstein from January 1999 to June 2000, suggesting that lawyers and tax counselors played a much greater role here than originally expected).

⁸⁸ Today, over 1100 of these public debt counseling centers are located throughout Germany. See, e.g., WAS MACHE ICH, *supra* note 38, at 27. The public debt counseling centers grew slowly between 1958 and 1984, and their numbers increased dramatically beginning in 1984, when public authorities reacted to the skyrocketing incidence and severity of over-indebtedness. See KORCZAK & PFEFFERKORN, *supra* note 11, at 187-88. For a description of the operation of modern German debt counseling centers, see WAS MACHE ICH, *supra* note 38, at 27-36; KORCZAK & PFEFFERKORN, *supra* note 11, at 171-263; see also

Due to poor financial support from the *Länder*,⁸⁹ the debt counseling centers are unable to provide sufficient personnel to support the masses of debtors seeking entry into the insolvency relief process.⁹⁰ In the early years after passage of the Insolvency Act, debtors at about half of these centers had to wait two to eight weeks for a first appointment, while waiting periods at the other centers stretched from three months to a year.⁹¹ Indeed, some debt counseling centers had to turn away those seeking help by mid-2000, as their waiting lists had simply grown too long.⁹² Far fewer cases were opened in the first two years under the Insolvency Act than had been expected,⁹³ and these long waiting periods for support in the out-of-court first stage of the process represented a major cause of the dearth of cases.⁹⁴

Long waiting periods notwithstanding, statistics suggest that debt

Nick Huls, *Towards a European Approach to Overindebtedness of Consumers*, 16 J. CONSUMER POL'Y 215, 216 (1993) [hereinafter, Huls, *Towards a European Approach*].

⁸⁹ See BR-DR. 14/01, *supra* note 73, at 17; Heinz Vallender, *Erste gerichtliche Erfahrungen mit dem Verbraucherinsolvenzverfahren*, 20 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 125, 125-26 (1999); THOMAS SEETHALER, ÜBERSICHT DER FÖRDERUNGEN DER VERBRAUCHERINSOLVENZBERATUNG IN DEN BUNDESLÄNDERN (2003), available at <http://www.infodienst-schuldnerberatung.de/themen/foerderungsblaender/foerderungsblaender.html>.

⁹⁰ By some estimates, the debt counseling centers could manage only 5-10% of the need for advice even before the Insolvency Act increased the demand for their services. See KORCZAK & PFEFFERKORN, *supra* note 11, at 268.

⁹¹ See, e.g., WOLFGANG SCHRANKENMÜLLER, SCHULDNER WARTE, WARTE NOCH EIN WEILCHEN... ZUM UMGANG DER SCHULDNERBERATUNG MIT DEM ANSTURM ÜBERSCHULDETER MENSCHEN AUF DIE BERATUNGSSTELLEN §§ 1-2 (2000), available at <http://www.infodienst-schuldnerberatung.de/praxisthema/andrag/andrag.html> (reporting that waiting periods up to a year were reported to be "the norm rather than the exception" after the entry into force of the Insolvency Act); RATH, *supra* note 17, at § 4.3; see also SENATSVERWALTUNG FÜR ARBEIT, SOZIALES UND FRAUEN, ENTWICKLUNG DER SCHULDNER-UND INSOLVENZBERATUNG IN LAND BERLIN NACH INKRAFTTRETEN DER VERBRAUCHERINSOLVENZORDNUNG 20, 24 (2000), available at <http://www.berlin.de/sengessozv/lageso/pdf/pkg9e.pdf> (reporting that waiting times in Berlin had been reduced to 3-6 months for first appointments by December 2000).

⁹² See SCHRANKENMÜLLER, *supra* note 91, at § 2.

⁹³ See, e.g., PRESSEERKLÄRUNG ZUR SONDERVERANSTALTUNG: 100 TAGE INSOLVENZRECHT—EXPERTEN ZIEHEN BILANZ (April 24, 1999), available at <http://www.insolvenzverein.de/archiv/presseschau/PeHundert.htm> (reporting that only 39 petitions were filed in the first 100 days of the new Insolvency Act); Vallender, *supra* note 89, at 125. Lack of funds to cover the substantial costs of proceedings accounted for perhaps the largest reason for the low numbers of cases. See *infra* note 128.

⁹⁴ See BUND-LÄNDER-ARBEITSGRUPPE "INSOLVENZRECHT," *supra* note 87, §§ (A)(4), (B)(I)(2)(b); Vallender, *supra* note 89, at 125-26; Pape, *supra* note 87, at 2040; W. UHLENBRUCK, EIN JAHR INSO—ZIEL ERREICHT ODER REFORMBEDARF? § II(1) (1999), available at <http://www.insolvenzverein.de/archiv/vortragstexte/Uhlenbruckv.htm>; MICHAEL SCHÜTZ, ERÖFFNETE VERBRAUCHERINSOLVENZVERFAHREN IN BAYERN 1999 (2000), available at <http://www.forum-schuldnerberatung.de> (suggesting that lack of support for debt counseling centers contributed to the low numbers of cases opened in Bavaria in 1999).

counseling centers in many *Länder* have been quite successful in brokering out-of-court debt arrangements. Between the entry into force of the Insolvency Act in 1999 and October 2001, for example, out-of-court plans had been established with creditors in between 11% and 54% of cases in the various *Länder*.⁹⁵ The average rate of creditor agreements to out-of-court plans negotiated by debt counseling centers reached just over 30% federation-wide in 2001.⁹⁶ In densely populated Berlin,⁹⁷ the quota of agreed out-of-court arrangements hovered around 15% in 2000 and 2001.⁹⁸ In the most populous and industrialized *Land* of North Rhine-Westphalia,⁹⁹ where the capital Bonn is located, of 4,682 total attempted arrangements in which negotiations continued to completion,¹⁰⁰ 2,084 agreements resulted—a success yield of over 44%.¹⁰¹ Such impressive success rates are due in some cases, however, to the support of regional organizations that offer loans and subsidies to help debtors to make one-time payments to creditors to entice them into accepting a plan.¹⁰² Moreover, successful development of payment plans does not necessarily lead to successful completion of such plans by debtors. I could find no statistics reporting on final completion of out-of-court plans, but experience in the United States suggests that the rate of successful completion is likely no more than one in three.¹⁰³

One dissenting creditor can destroy an out-of-court plan,¹⁰⁴ so the

⁹⁵ See SEETHALER, *supra* note 89.

⁹⁶ *Id.*

⁹⁷ Berlin is considered its own *Land*, and it is the most densely populated *Land*, with 3800 inhabitants per square kilometer. See STATISTISCHE BUNDESAMT, BEVÖLKERUNG: FLÄCHE UND BEVÖLKERUNG (Apr. 23, 2003), available at <http://www.destatis.de/jahrbuch/jahrtabl.htm>.

⁹⁸ See SENATSVERWALTUNG FÜR ARBEIT, SOZIALES UND FRAUEN, *supra* note 91, at 16.

⁹⁹ With over 18 million people, North Rhine-Westphalia has nearly twice as many inhabitants as the next most highly populous *Land*, Baden-Württemberg. See STATISTISCHE BUNDESAMT, *supra* note 97.

¹⁰⁰ A substantial portion of negotiations are broken off before any conclusion is reached. In North Rhine-Westphalia in 2001, for example, 1,891 negotiations broke off early with no result, while 4,682 continued to final success or failure. See FÖRDERUNG VON SCHULDNER-/INSOLVENZBERATUNG IN DEN BUNDESLÄNDERN 7 (2003), available at <http://www.infodienst-schuldnerberatung.de/themen/foerderungsblaender/foerderungsblaender.pdf>.

¹⁰¹ See *id.*

¹⁰² See SEETHALER, *supra* note 89 (reporting that such subsidies are offered in Baden-Württemberg); LITSCHKE, *supra* note 87, at 53 (referring to such subsidy programs in the northernmost *Land* of Schleswig-Holstein).

¹⁰³ See *infra* note 236, reporting on completion rates for Chapter 13 payment plans in the United States.

¹⁰⁴ See Pape, *supra* note 87, at 2040; HERGENRÖDER, *supra* note 18, at § (IV)(2)(b). The debt counseling center in the *Land* of Mecklenburg-Western Pomerania reported in 2001, for example, that many creditors caused the failure of debt arrangements despite their own interests. The debtors had offered, with the financial assistance of third parties, payments of

court-driven part of the insolvency process begins with another, in-court attempt to negotiate an agreed payment plan. This time, the court can force a dissenting minority of creditors into a plan if a majority of both total number of creditors and amount of claims either votes in favor of the plan or fails to vote within one month after service of the plan documents.¹⁰⁵ In addition, two other conditions must be met. In order for the court to “cram down”¹⁰⁶ a plan on dissenting minority creditors, the proposed plan must offer each creditor an appropriate share in relation to other creditors, and dissenting creditors may not be placed in a worse economic position than they would occupy were the case to continue through the liquidation and six-year payment period.¹⁰⁷ The early yield of court-imposed payment plans was much lower—only about 1.5% of all consumer cases filed in 1999, for example, ended with a court-brokered plan.¹⁰⁸ Once again, I was unable to locate any statistics reporting on successful completion of payments under such plans.

This second stage of in-court plan negotiation is destined for elimination and integration into the out-of-court process in the near future. Dedication to the court-driven plan process has been rapidly eroding from the outset. The federal-state (*Bund-Länder*) working group commissioned by the Ministry of Justice to study consumer insolvency in its early stages concluded that the in-court plan process often represented a “pure formality,” and it pointed out a long string of commentaries criticizing the process.¹⁰⁹ “In many proceedings,” the group’s report revealed, “it is clear from the beginning that the necessary majority of creditors supporting the plan cannot be achieved,” particularly when, as is often the case, the debtor has no nonexempt income to offer creditors in the plan, or one large creditor

over 20% of creditor claims, while the creditors stood to collect nothing in insolvency proceedings from the debtors with no non-exempt income. See PETER SCHNEIDER, ZUR SITUATION ÜBERSCHULDETER PRIVATER HAUSHALTE IN MECKLENBURG-VORPOMMERN 78 (2002), available at <http://www.bagschuldnerberatung.de/download/Schneider%20%20Zur%20Situation%20%20FCberschuldeter%20privater%20Haushalte%20in%20Mecklenbur%20Vorpommern%20Jahresbericht%202001.doc>.

¹⁰⁵ See InsO §§ 307(1), 308, 309.

¹⁰⁶ This buzzword from U.S. bankruptcy law corresponds quite closely to what happens in the German system. See, e.g., MICHAEL J. HERBERT, UNDERSTANDING BANKRUPTCY § 17.15[D] (1995).

¹⁰⁷ See InsO § 309(1). These two requirements appear to be equivalent to two of the central requirements for cram-down of a plan under U.S. consumer bankruptcy law, the “equal treatment” and “best interests” tests in 11 U.S.C. §§ 1322(a)(3) and 1325(a)(4). See HERBERT, *supra* note 106, §§ 18.07[B], 18.08[A][1].

¹⁰⁸ See BUND-LÄNDER-ARBEITSGRUPPE, *supra* note 87, at § (A)(4) (reporting approximately 20,000 consumer cases filed, but only 339 court-imposed agreements).

¹⁰⁹ See BUND-LÄNDER-ARBEITSGRUPPE, *supra* note 87, at §§ (B)(1)(3)(a), (C)(3). For a brief description of the history of this working group, see *id.* § A(1)-(2); see also http://www.jm.nrw.de/indexseite/presse/reden/2002_06_11.html (last visited Jul. 10, 2003).

refuses to support the plan.¹¹⁰ The representative from Saxony considered the in-court process senseless and would have eliminated it immediately,¹¹¹ but the working group,¹¹² the Administration,¹¹³ and ultimately the German Parliament¹¹⁴ agreed to make the process optional—with the option to be exercised by the court.¹¹⁵ As it turned out, most courts opted out of the in-court plan process and hardly undertook any further in-court plan proceedings.¹¹⁶

The latest reform proposal from the Administration, therefore, essentially throws in the towel on the “largely meaningless”¹¹⁷ in-court plan process.¹¹⁸ It reinforces the earlier out-of-court process, which now fails if even one creditor dissents, by integrating the court-imposed “cram-down” provisions into the out-of-court stage. The reform would allow¹¹⁹ the debtor to petition the court—before an insolvency case has been initiated—to deem an out-of-court plan accepted if the requisite majority of creditors approves the plan or fails to respond in a timely manner to the plan proposal.¹²⁰ If a majority of creditors rejects the out-of-court plan, or if the debtor chooses not to seek “cram-down,” the debtor will be able to initiate an insolvency case and proceed immediately to simplified insolvency proceedings—the current second round of (in-court) plan review and voting will be disposed of.¹²¹ Given the Administration’s record of success in moving its consumer insolvency reform proposals through Parliament, one suspects that the in-court plan process will remain in place no more than

¹¹⁰ BUND-LÄNDER-ARBEITSGRUPPE, *supra* note 87, at §§ (B)(I)(3)(a)(aa), (C)(3); Pape, *supra* note 87, at 2040-42.

¹¹¹ *See id.* at § (B)(I)(3)(a)(bb).

¹¹² *Id.*

¹¹³ *See* BR-DR. 14/01, *supra* note 73, at 9, 27-28, 65-68 (calling the in-court plan process a “naked formality” in many cases).

¹¹⁴ *See* BESCHLUSSEMPFEHLUNG UND BERICHT DES RECHTSAUSSCHUSSES (6. AUSSCHUSS), BT-DR. 14/6468, at 10 (June 27, 2001), *available at* <http://dip.bundestag.de/btd/14/064/1406468.pdf>; GESETZESBESCHLUSS DES DEUTSCHEN BUNDESTAGES, BR-DR. 689/01 (BESCHLUSS) (Sept. 27, 2001), *available at* http://www.parlamentsspiegel.de/cgi-bin/hyperdoc/show_dok.pl?k=BBD689/01.

¹¹⁵ *See* InsO § 306(1).

¹¹⁶ *See* DISKUSSIONSENTWURF DES BUNDESMINISTERIUMS DER JUSTIZ: ENTWURF EINES GESETZES ZUR ÄNDERUNG DER INSOLVENZORDNUNG, DES BÜRGERLICHEN GESETZBUCHS UND ANDERER GESETZE 15 (Apr. 17, 2003), *available at* <http://www.bmj.bund.de/images/11591.pdf>.

¹¹⁷ *See id.* at 16.

¹¹⁸ *See id.* at 1, 5-6, 15-17, 31-36.

¹¹⁹ Significantly, the proposal gives the debtor—not the court—the option of whether or not to attempt to force the plan on non-consenting creditors or to proceed immediately to insolvency proceedings. *See id.* at 31, 35. Court discretion is all but completely eliminated from the “plan” phase of the process.

¹²⁰ *See id.* at 5-6.

¹²¹ *See id.* at 16, 32.

one more year.¹²² Unfortunately, this will exacerbate the strain on already overburdened debt counseling centers,¹²³ and waiting periods for access to counseling—and consequently for formal insolvency relief—will grow even longer.

2. Simplified liquidation proceedings

If creditors refuse a payment plan, the formal insolvency case begins with a “simplified liquidation proceeding,” in which a court-appointed trustee sells the debtor’s nonexempt assets to produce funds for distribution to creditors.¹²⁴ Just as in the United States,¹²⁵ this stage of the process has virtually no meaning in Germany. The great majority of consumer debtors have no hard assets that are subject to liquidation for distribution to creditors.¹²⁶ Like the old *Konkursordnung*,¹²⁷ the new Insolvency Act provides for dismissal of an insolvency petition if liquidation of the debtor’s

¹²² In fact, interest groups have already responded positively to this aspect of the Administration’s reform proposal. See, e.g., CARSTEN D. OHLE, STELLUNGNAHME DES BUNDESVERBANDES DEUTSCHER INKASSO-UNTERNEHMEN E.V. ZUM DISKUSSIONSENTWURF EINES GESETZES ZUR ÄNDERUNG DER INSOLVENZORDNUNG, DES BÜRGERLICHEN GESETZBUCHS UND ANDERER GESETZE, STAND 17.04.2003 (May 27, 2003), available at http://www.inso-rechtspfleger.de/inhalt/04_materialien/2002_inso_ref_050.htm; STELLUNGNAHME DES ARBEITSKREISES INSOLVENZORDNUNG (AK-INSO) DER AG SBV VOM 3.06.2003 (Jun. 3, 2003), available at http://www.inso-rechtspfleger.de/inhalt/04_materialien/2002_inso_ref_052.htm (warning of the increased burden on debt counseling centers, but praising the general idea of the reform).

¹²³ See DISKUSSIONSENTWURF ZUR ÄNDERUNG DER INSO: AUSSERGERICHTLICHER EINIGUNGSVERSUCH SOLL GESTÄRKT WERDEN (Apr. 28, 2003), available at <http://www.forum-schuldnerberatung.de> (on file with author); STELLUNGNAHME DES ARBEITSKREISES INSOLVENZORDNUNG (AK-INSO) DER AG SBV VOM 3.06.2003 (Jun. 3, 2003), *supra* note 122.

¹²⁴ See InsO §§ 311-14.

¹²⁵ In the United States, for as long as anyone can remember, the overwhelming majority of consumer bankruptcy cases have involved either little or no seizable property. See, e.g., Robert D. Martin, *A Riposte to Klee*, 71 AM. BANKR. L.J. 453, 456 n.14 (citing unpublished 1997 official statistics showing that “no-asset” cases constituted 95% of all Chapter 7 cases); Michelle J. White, *Personal Bankruptcy Under the 1978 Bankruptcy Code: An Economic Analysis*, 63 IND. L.J. 1, 38 (1988) (showing a return to unsecured creditors in only 3% of liquidation cases in the late 1970s and early 1980s); Mitchell S. Dvoret, *Federal Legislation*, 27 GEO. L.J. 194, 197 (1938-39) (noting that average distributions to general unsecured creditors during the decade preceding 1932 averaged between 5.1% and 7.7%).

¹²⁶ See *supra* notes 38-41 and accompanying text; see also InsO § 36 (excluding exempt assets from the insolvency estate). In a consumer information pamphlet published by the Ministry of Justice, the hypothetical example of a consumer insolvency proceeding includes a debtor with no available assets, acknowledging that the no-asset case is the norm. See BUNDESMINISTERIUM FÜR JUSTIZ, RESTSCHULDBEFREIUNG—EINE NEUE CHANCE FÜR REDLICHE SCHULDNER 37 (2001), available at <http://www.bmj.bund.de/images/10074.pdf>.

¹²⁷ See *supra* notes 28-30 and accompanying text.

assets obviously will not produce sufficient proceeds to cover court costs.¹²⁸ Before the introduction in December 2001 of reforms reducing costs and allowing the debtor to defer payment of court costs,¹²⁹ approximately 90% of all consumer cases were dismissed under this provision “for lack of assets.”¹³⁰ A dismissed case meant then, and still means now, that there is no discharge and no relief for the debtor.

3. Development of and debate over the “Good Behavior Period”

A German consumer insolvency case concludes with the final, most hotly debated, and most burdensome “strict prerequisite” for relief—the so-called “good behavior period” (*Wohlverhaltensperiode*). In addition to giving up all nonexempt assets in the preceding stage, for six years beginning with the opening of the simplified insolvency proceedings, the debtor must assign to a trustee all nonexempt work-related income¹³¹ and turn over to the trustee half of the value of any property acquired by inheritance.¹³² Once each year, the trustee distributes ratably to creditors any income assigned during that year.¹³³ If the debtor makes it through four

¹²⁸ See InsO § 26.

¹²⁹ See *id.* §§ 4a-4d, 26(1), 298. The history of the problem of “no-asset” cases, high court and trustee costs, and the implementation of the cost-deferral solution are covered at length in the literature. See generally BUND-LÄNDER-ARBEITSGRUPPE, *supra* note 87, §§ (B)(I)(4), (C)(1); BR-DR. 14/01, *supra* note 73, at 19-22, 28-29, 33-51, 55, 68 (among other things, reporting per-case costs of approximately \$1500); Pape, *supra* note 87, at 2045-46 (collecting cases); Vallender, *supra* note 89, at 126-27; HERGENRÖDER, *supra* note 18, § IV(2)(a)(aa); RATH, *supra* note 17, §§ 6.3, 6.4.5; LITSCHKE, *supra* note 87, at 51, 59 (reporting that debtors in Schleswig-Holstein in 1999-2000 most often cited cost as the reason for failing to pursue insolvency relief); THEMEN UND AKTUELLES <http://www.insolvenzrechtonline.de/01.htm> (last visited Jul. 14, 2003) (listing cases in which courts allowed or refused to allow “PKH,” or *Prozesskostenhilfe*, litigation cost assistance, to consumer debtors in insolvency cases); UHLENBRUCK, *supra* note 94, § II(1)(b) (noting that in 1999 photocopying and service costs for plan documents in cases with many creditors often exceeded \$5000).

¹³⁰ See BUND-LÄNDER-ARBEITSGRUPPE, *supra* note 87, § (A)(4) (reporting approximately 20,000 consumer cases filed, but only about 2000 consumer cases opened); BR-DR. 14/01, *supra* note 73, at 19, 34.

¹³¹ See InsO § 287(2).

¹³² See *id.* § 295(1)(2); *cf.* 11 U.S.C. § 541(a)(5) (2003) (requiring property inherited within six months of the filing of a bankruptcy petition to be turned over to the trustee for distribution to creditors).

¹³³ See InsO § 292(1). If the debtor has pledged or assigned nonexempt wages to a creditor before initiating insolvency proceedings, however, as is quite often the case in Germany, see *supra* notes 42-43 and accompanying text, that assignment is valid for the first two years of the six-year period. See InsO § 114. In contrast, non-contractual garnishment proceedings are halted one month after the filing of an insolvency petition. See InsO § 114(3). Therefore, the trustee will receive wages for distribution during the first two years of the six-year period only if the creditor-assignee is paid in full. See, e.g., RATH, *supra* note 17, § 6.4.3; BR-DR. 1/92, *supra* note 8, at 101, 189. The drafters of the Insolvency Act

years of the six-year period, the trustee pays the debtor an incentive bonus of 10% of the debtor's nonexempt wages assigned during the year; the debtor receives a bonus of 15% of nonexempt income for holding out for five years.¹³⁴ At the end of the sixth year, the debtor is released from most remaining debts.¹³⁵

In a rather innovative step, the Insolvency Act enhances the possibility of payments to creditors¹³⁶ by demanding the debtor's best efforts to find and hold a job. Pursuant to "one of the central provisions"¹³⁷ testing the debtor's six years of "good behavior," the debtor must hold—or actively seek and not refuse to accept—any suitable employment.¹³⁸ If the debtor fails to seek and hold reasonable employment, creditors can petition the court for denial of discharge.¹³⁹ If the debtor remains jobless despite her best efforts, she does not lose her discharge, but the debtor must exert more effort to find an acceptable job than simply relying on an employment agency.¹⁴⁰ Indeed, the drafters emphasized that "reasonableness" in this context is subject to "intense demands."¹⁴¹ The debtor must be ready to take on work outside her profession, even temporary work if need be.¹⁴² For example, a consumer information pamphlet published by the Ministry of Justice describes a hypothetical consumer insolvency case in which the debtor, Mr. Honest (*Herr Redlich*), loses his job as a printer and takes on a low-wage job as a janitor.¹⁴³ The hypothetical story explains that Mr.

admitted that this represents a "considerable position of advantage" for creditors with wage assignments and pledges. See BR-DR. 1/92, *supra* note 8, at 101; see also BR-DR. 1/1/92, *supra* note 18, at 39.

¹³⁴ See InsO § 292(1).

¹³⁵ See *id.* at § 300. Some debts are not affected by discharge. See *id.* at § 302. German law accepts far fewer debts from discharge than U.S. law does, however. Only three types of debt are not affected by the discharge in Germany: intentional tort liability, monetary fines and penalties, and the obligation to pay insolvency court costs and fees deferred under InsO § 4a. See *id.* at § 302; cf. 11 U.S.C. § 523(a)(6) and (7) (2003) (excepting similar debts from discharge under U.S. bankruptcy law). Under U.S. law, in contrast, a wide variety of additional debts are not dischargeable, such as recent overdue taxes, past-due child support and alimony obligations, debts for money or property obtained by fraud, education loan debt, and liability for bodily injury or death resulting from drunk driving. See 11 U.S.C. § 523(a) (2003). Thus, although the German law demands more from the debtor, it also offers a broader discharge to the debtor.

¹³⁶ See BR-DR. 1/92, *supra* note 8, at 192; DEUTSCHER BUNDESRAT, STENOGRAPHISCHER BERICHT 639. SITZUNG, *supra* note 34, at 83.

¹³⁷ See BR-DR. 1/92, *supra* note 8, at 192.

¹³⁸ See InsO § 295(1)(1).

¹³⁹ See *id.* at § 296.

¹⁴⁰ See BR-DR. 1/92, *supra* note 8, at 192. BUNDESMINISTERIUM FÜR JUSTIZ, *supra* note 126, at 38.

¹⁴¹ See BR-DR. 1/92, *supra* note 8, at 192.

¹⁴² See *id.*

¹⁴³ See BUNDESMINISTERIUM FÜR JUSTIZ, *supra* note 126, at 30, 34, 38.

Honest accepted the low-wage job “in order not to endanger his discharge.”¹⁴⁴

a. Purpose and Theory of the “Good Behavior Period”

The drafters of the Insolvency Act joined other European nations in their desire to avoid the U.S. model of consumer insolvency relief, under which simply undergoing one-time liquidation proceedings leads to discharge in most cases.¹⁴⁵ The earliest European proposals for implementing consumer insolvency relief included multi-year payment periods to ensure that the debtor “exert[s] himself to the fullest to earn the premium, a discharge of the remainder of the debts.”¹⁴⁶ These proposals suggested a maximum term of four years of payments, so as to avoid flagging debtor morale and failure of overly long plans.¹⁴⁷ Emerging European approaches to consumer bankruptcy generally eschew the “get-out-of-jail-free” approach of the U.S. system in favor of discharge conditioned on completion of a several-year payment period.¹⁴⁸ Indeed, it has been suggested that the “too lenient reputation of U.S. consumer bankruptcy law makes the word [‘bankruptcy’] repugnant to some Europeans.”¹⁴⁹

Consistent with the general European attitude, the first legislative proposal for the German Insolvency Act remarked emphatically that the “very debtor-friendly” model of Anglo-American law would not be adopted.¹⁵⁰ Instead, requiring the debtor to assign several years of nonexempt income and endeavor to obtain and hold suitable employment would serve a “warning function” to protect the courts from a flood of frivolous and abusive petitions, ensuring that discharge would be available only to those debtors ready and willing to give up their garnishable income and confront the deprivations of seven¹⁵¹ lean years.¹⁵² The discharge itself was designed in part to motivate the debtor “into honest and creditor-friendly behavior.”¹⁵³ The drafters explicitly described the discharge as a “privilege” to be earned by the debtor’s accepting any suitable employment

¹⁴⁴ *Id.* at 37.

¹⁴⁵ See, e.g., BR-DR. 1/92, *supra* note 8, at 188.

¹⁴⁶ Huls, *Towards a European Approach*, *supra* note 88, at 220, 226-28.

¹⁴⁷ *Id.* at 221, 228 (noting that four years “seems to be the maximum period for which consumers are willing and able to expose themselves to the limitations of a plan”).

¹⁴⁸ See Johanna Niemi-Kiesiläinen, *Changing Directions in Consumer Bankruptcy Law and Practice in Europe and USA*, 20 J. CONSUMER POL’Y 133, 135 (1997).

¹⁴⁹ *Id.*

¹⁵⁰ BR-DR. 1/92, *supra* note 8, at 100, 188.

¹⁵¹ See *infra* notes 176-85 (regarding the later amendment of this period to six years).

¹⁵² BR-DR. 1/92, *supra* note 8, at 188-89.

¹⁵³ *Id.* at 188.

and sharing with creditors the burden of unpaid debts.¹⁵⁴

In addition, the drafters of the Insolvency Act were influenced by the writings and economic theories of Thomas Jackson.¹⁵⁵ In his famous examination of the policies underlying the discharge of debt, for example, Professor Jackson questioned the economic soundness of ignoring the valuable property interest in the "human capital" of a consumer debtor's future earning capacity, as U.S. consumer bankruptcy law generally leaves only existing, tangible assets available to creditors.¹⁵⁶ German commentators seized on this "inconsistency" in U.S. law, even using Jackson's terminology of "human capital."¹⁵⁷ Because credit extensions to consumers are made not on the basis of present assets, but on the basis of future earning capacity, these commentators argued that the German insolvency regime should acknowledge and facilitate the role of future earnings in the consumer credit bargain and require "liquidation" of at least part of that "asset" for creditors.¹⁵⁸ This analysis eventually made its way into the legislative grounding for the Insolvency Act. Lawmakers designed the requirement of an extended period of payment from future wages in part to keep pace with developments in the modern consumer credit economy, in which future wages play an integral role in the extension of consumer credit.¹⁵⁹

b. Debate about the Length of the Good Behavior Period

The German Parliament never questioned the notion of a multi-year payment period, but it examined and fiercely debated the length of the period. When it introduced the bill for the new Insolvency Law, the Kohl Administration chose seven years as the appropriate length of time,¹⁶⁰ although no one ever offered any explanation for this choice.¹⁶¹ The Bundesrat Law Committee immediately suggested that the seven-year period was "unequivocally too long," and proposed a reduction to four

¹⁵⁴ *Id.* at 192.

¹⁵⁵ See Kamlah, *supra* note 27, at 421.

¹⁵⁶ See Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1431-35 (1985).

¹⁵⁷ See, e.g., WENZEL, *supra* note 31, at §§ VII(2)-(3); see also Balz, *supra* note 23, at 267-69.

¹⁵⁸ See *id.*

¹⁵⁹ See BR-DR. 1/92, *supra* note 8, at 101.

¹⁶⁰ See *id.*, at 46, 100, 188.

¹⁶¹ See RATH, *supra* note 17, § 8.1 and note 226. One member of the original Commission for Insolvency Law immediately criticized the "arbitrarily seized upon seven-year period" as "unnecessarily long." See Gerhard, *supra* note 32, at 143. He suggested that the only basis for the choice of seven years is the seventh-year remission of debts in Deuteronomy 15:1. See *id.*; see also RATH, *supra* note 17, § 8.1 note 226.

years.¹⁶² The Committee suggested that such long “re-socialization” periods were expected only of criminals.¹⁶³ But a majority of the full Bundesrat rejected this proposal by voice vote without comment or explanation.¹⁶⁴

The Social Democrats¹⁶⁵ continued the fight in the Bundestag, arguing for a term of as little as three years. In the first consideration of the bill, the Social Democrats attacked the seven-year period as “in most cases too long.”¹⁶⁶ They admitted that they themselves had proposed a seven-year period when the idea of a consumer discharge arrived on the legislative front in 1988, but they had backed away from the longer period based on reports from debt counseling centers.¹⁶⁷ Consequently, the Social Democrats filed an alternative proposal¹⁶⁸ based on their finding that “[t]he practice of the debt counseling centers shows that debt arrangement plans with terms of longer than four or five years are predestined to failure.”¹⁶⁹ Accordingly, the Social Democrats submitted that the good behavior period should last in normal cases five years, but it could be reduced to three or raised to seven based on the degree of the debtor’s fault for finding herself in debt.¹⁷⁰

Rather than reducing the term of the good behavior period, the Bundestag accepted a committee proposal to boost the debtor’s motivation to complete the seven-year period. The Bundestag Law Committee added so-called “motivation rebates”¹⁷¹ to be paid to the debtor from nonexempt income assigned to the trustee. At the end of the fourth, fifth, and sixth

¹⁶² See BR-DR. 1/1/92, *supra* note 18, at 39, 54.

¹⁶³ See *id.* at 55.

¹⁶⁴ See DEUTSCHER BUNDESRAT, STENOGRAPHISCHER BERICHT, 639. SITZUNG, *supra* note 34, at 50-51 (rejecting committee proposals 29 and 44).

¹⁶⁵ The Social Democrats generally represent the interests of the working class and trade unions. See, e.g., LIBRARY OF CONGRESS COUNTRY STUDIES: GERMANY, Social Democratic Party of Germany (1995), at <http://lcweb2.loc.gov/frd/cs/detoc.html>. As such, they generally support the consumer perspective most strongly. They “represent the social workers who understand the problems of poverty.” Huls, *American Influences*, *supra* note 7, at 134.

¹⁶⁶ See DEUTSCHER BUNDESTAG, STENOGRAPHISCHER BERICHT, 94. SITZUNG, *supra* note 334, at 7775.

¹⁶⁷ See *id.*

¹⁶⁸ See ÄNDERUNGSANTRAG DER FRAKTION DER SPD ZUR ZWEITEN BERATUNG DES GESETZENTWURFS DER BUNDESREGIERUNG—DRUCKSACHEN 12/2443, 12/7302—ENTWURF EINER INSOLVENZORDNUNG (INSO), BT-DR. 12/7329 (Apr. 20, 1994), available at http://www.parlamentsspiegel.de/cgi-bin/hyperdoc/show_dok.pl?k=BAD12/7329.

¹⁶⁹ *Id.* at 4.

¹⁷⁰ See *id.* at 2, 4.

¹⁷¹ See BR-DR. 14/01, *supra* note 73, at 51 (using this term, *Motivationsrabatt*); GESETZENTWURF DER BUNDESREGIERUNG: ENTWURF EINES GESETZES ZUR ÄNDERUNG DER INSOLVENZORDNUNG UND ANDERER GESETZE, BT-DR. 14/5680, at 41 (Mar. 28, 2001), available at <http://dip.bundestag.de/btd/14/056/1405680.pdf>.

years of the period, the debtor would receive “rebates” of 10%, 15%, and 20%, respectively, of her annual assigned nonexempt income.¹⁷² The full Bundestag adopted the Law Committee’s approach and rejected the Social Democrats’ proposal.¹⁷³ Thus, the law began with a seven-year¹⁷⁴ “good behavior period,” with the debtor’s motivation buttressed by rebates of nonexempt income beginning after four years.

c. Reduction of Length and Payments Over the Good Behavior Period

Despite continuing harsh criticism and opposition, the lengthy good behavior period has stubbornly resisted meaningful reform. Demands for a reduction to five years have continued unheeded.¹⁷⁵ Nevertheless, in December 2001, the German Parliament ultimately reformed the period in two less extensive—but still important—ways.

First, the term was finally reduced to six years. In its 2001 reform proposal, the Administration was unwilling to recommend a reduction in the seven-year term without further study of the effect of such a reform on distributions to creditors and on the availability of consumer credit.¹⁷⁶ An angry reaction quickly ensued from consumer debtor representatives.¹⁷⁷ They pointed out the lack of any apparent reasoning for the choice of seven years, and they noted that other European nations had implemented payment periods of only four years.¹⁷⁸ The former Communists, now called the Democratic Socialists,¹⁷⁹ had already taken up the fight in 2000, introducing a formal proposal to reduce the “good behavior period” to five years to avoid the “demotivation” of the debtor by such a long period.¹⁸⁰

¹⁷² See BT-DR. 12/7302, *supra* note 43, at 125, 151, 153, 187-88.

¹⁷³ See DEUTSCHER BUNDESTAG, STENOGRAPHISCHER BERICHT, 222. SITZUNG, *supra* note 27, at 19132; GESETZESBESCHLUSS DES DEUTSCHEN BUNDESTAGES: INSOLVENZORDNUNG ((INSO), BR-DR. 336/94, at 66-67 (Apr. 29, 1994), available at http://www.parlamentsspiegel.de/cgi-bin/hyperdoc/show_dok.pl?k=BBD336/94.

¹⁷⁴ As a transition measure, the period was shortened to five years for those debtors who were insolvent from January 1, 1997 forward. See BUNDESMINISTERIUM DER JUSTIZ, *supra* note 126, at 25.

¹⁷⁵ See BR-DR. 14/01, *supra* note 73, at 31-32.

¹⁷⁶ See *id.*, at 32.

¹⁷⁷ See MARIUS STARK, ARBEITSGEMEINSCHAFT SCHULDNERBERATUNG DER VERBÄNDE, STELLUNGNAHME ZUM GESETZENTWURF DER BUNDESREGIERUNG ZUR REFORM DER INSOLVENZORDNUNG 7-8 (Jan. 11, 2001), available at <http://www.inso-rechtsprechung.de/Stellungnahme.pdf>.

¹⁷⁸ See *id.* at 8.

¹⁷⁹ See LIBRARY OF CONGRESS COUNTRY STUDIES, GERMANY, Party of Democratic Socialism (1995), available at <http://memory.loc.gov/frd/cs/detoc.html>.

¹⁸⁰ See GESETZENTWURF DER ABGEORDNETEN DR. EVELYN KENZLER, ROLF KUTZMUTZ, DR. GREGOR GYSI UND DER FRAKTION DER PDS, ENTWURF EINES GESETZES ZUR ÄNDERUNG DER INSOLVENZORDNUNG (INSOÄNDG), BT-DR. 14/2496, at 1, 3-4 (Jan. 11, 2000), available at <http://dip.bundestag.de/btd/14/024/1402496.pdf>.

Indeed, the Democratic Socialists and others pointed out that the total period from the beginning of out-of-court negotiations to the end of the insolvency case could extend as long as nine to eleven years in some cases due to delays in the early stages of the process.¹⁸¹

A middle path once again emerged, as the Bundestag reduced the good behavior period to six years and tied the beginning of the period to the opening, rather than the conclusion, of the simplified insolvency proceedings.¹⁸² It was hoped that these two changes would lead to “a significant lightening of the burden on debtors,” while studies of the Institute for Financial Services suggested only minimal ill effects for creditors and the general availability of consumer credit.¹⁸³ Achieving even this minimal reduction in the good behavior period required great effort, and it was introduced into the bill the night before final committee debate.¹⁸⁴

The second easing of the burden of the good behavior period is easy to miss but potentially far more significant. At the same time that it slightly reduced the term of the good behavior period, the German Parliament significantly reduced the amount of income that creditors can seize from debtors, including during the six-year good behavior period.¹⁸⁵ Beginning January 1, 2002, the minimum statutory wage exemption rose nearly 50% for single debtors and childless couples, which constitute the overwhelming majority of German households,¹⁸⁶ and between 30% and 40% for debtors with children.¹⁸⁷ Similarly, the maximum exempt amount for all debtors¹⁸⁸

¹⁸¹ See, e.g., MARIUS STARK, *supra* note 177, at 8; BT-DR. 14/2496, *supra* note 180, at 4; DEUTSCHER BUNDESTAG, STENOGRAPHISCHER BERICHT, 164. SITZUNG, at 16091, 16094 (Apr. 5, 2001), available at <http://dip.bundestag.de/btp/14/14164.pdf>; DEUTSCHER BUNDESTAG, STENOGRAPHISCHER BERICHT, 179. SITZUNG, at 17681-82 (Jun. 28, 2001), available at <http://dip.bundestag.de/btp/14/14179.pdf>.

¹⁸² See BT-DR. 14/6468, *supra* note 114, at 1-2, 8, 16, 18. The effective period for pre-petition pledges and assignments of wages, *see supra* note 133, was commensurately reduced from three to two years to preserve the amount paid to general creditors. *See id.* at 2, 7, 17. In addition, the 20% “rebate” of the debtor’s nonexempt wages at the end of the sixth year was eliminated. *See id.* at 9, 18.

¹⁸³ See BT-DR. 14/6468, *supra* note 114, at 18.

¹⁸⁴ See DEUTSCHER BUNDESTAG, STENOGRAPHISCHER BERICHT, 179. SITZUNG, *supra* note 181, at 17684.

¹⁸⁵ Note that the reduction in nonexempt income applies to all debtors, not only those seeking relief under the Insolvency Act.

¹⁸⁶ Households with one or two members make up over 70% of all German households. *See* STATISTISCHE BUNDESAMT, BEVÖLKERUNG, HAUSHALTSTYPEN (Jun. 12, 2003), available at <http://www.destatis.de/basis/d/bevoe/bevoetab11.htm>.

¹⁸⁷ See BESCHLUSSEMPFEHLUNG UND BERICHT DES RECHTSAUSSCHUSSES (6. AUSSCHUSS), BT-DR. 14/7478, at 4-5 (Nov. 14, 2001), available at <http://dip.bundestag.de/btd/14/074/1407478.pdf>. A detailed table showing the nonexempt amount of wages at various levels is available from the Ministry of Justice online at <http://www.bmj.bund.de/images/11221.pdf> (last visited Jul. 14, 2003).

rose nearly 50%.¹⁸⁹ All of these exemption levels will now be reviewed every two years to keep pace with inflation.¹⁹⁰ Now, applying current exchange rates,¹⁹¹ a childless couple can keep 100% of the first approximately \$17,000 of income, and if they earn more, they can keep a maximum of about \$27,500 per year.¹⁹² This is obviously no king's ransom, but it is a much more solid foundation for a modest lifestyle. Consumer debtor advocates praised the resulting "perceptible financial relief" offered by the long-needed increase.¹⁹³ Insolvency advisors and judges report that, after the increase in exemptions, very few consumer insolvency cases involve any distribution at all to creditors—either from the debtor's current assets or from six years of future income.¹⁹⁴

C. The Future of German Consumer Insolvency Law

Long waiting periods for debt counseling and difficulties with financing court costs took their toll on the growth rate of consumer insolvency cases in the early years, but the numbers recently began to soar. Approximately 20,000 consumer and small business petitions were filed in 1999,¹⁹⁵ the first year of the Insolvency Act. Word evidently spread about

¹⁸⁸ See *supra* note 48 for an explanation of the significance of this figure and an explanation of the three-part German wage exemption scheme.

¹⁸⁹ See BT-DR. 14/7478, *supra* note 187, at 5 (reporting an increase from 3796 DM to 5576 DM, or € 2851 per month).

¹⁹⁰ See *id.* In the past, exemption levels were revisited only about once a decade. See, e.g., *id.* (seventh law increasing exemptions in 2002); BR-DR. 127/92, *supra* note 47 (sixth law increasing exemptions in 1992); BR-DR. 32/84, *supra* note 47 (fifth law increasing exemptions in 1984).

¹⁹¹ The U.S. dollar exchange rate for the euro since its introduction on January 1, 2002, has risen steadily from just under a dollar per euro in 2002 to a little over a dollar per euro during 2003. For a historical comparison of the USD/EUR exchange rate, see <http://www.oanda.com/convert/fxhistory> (last visited Jul. 14, 2003).

¹⁹² See <http://www.bmj.bund.de/images/11221.pdf> (last visited Jul. 14, 2003) (showing a 100% exemption up to €1289 per month, and €785 attachable of a maximum of €2851 per month, leaving a maximum of €2066 per month). A single debtor can keep 100% of the first approximately \$12,300 per year, and a percentage of the excess up to a maximum of almost \$20,000 per year. See *id.* (showing a 100% exemption up to €939 per month, and €1344 attachable of a maximum of €2851 per month, leaving a maximum of €1507 per month).

¹⁹³ See LANDESARBEITSGEMEINSCHAFT SCHULDNER-UND INSOLVENZBERATUNG BERLIN E.V., RATGEBER FÜR BETROFFENE 4 (Oct. 2002), available at <http://www.schuldnerberatung-berlin.de/RATGEB.PDF>.

¹⁹⁴ See AUFRUF DEUTSCHER INSOLVENZRICHTER UND -RECHTSPFLEGER ZUR WIEDERHERSTELLUNG DER FUNKTIONSFÄHIGKEIT DER INSOLVENZGERICHTE UND DER INSOLVENZORDNUNG (Oct. 2002), available at http://www.inso-rechtspfleger.de/inhalt/01_aktuelles/aufruf202002.htm; see also SCHNEIDER, *supra* note 104, at 76 (reporting that nearly 100% of the income of debtors in Mecklenburg-Western Pomerania is exempt from creditors).

¹⁹⁵ See BUND-LÄNDER-ARBEITSGRUPPE, *supra* note 87, § (A)(4).

the financial and procedural difficulties these debtors experienced,¹⁹⁶ because the number of insolvency petitions filed by individuals fell 40% in 2000.¹⁹⁷ Hope for impending reform spurred a 23% resurgence in petitions in 2001,¹⁹⁸ then the consumer insolvency reform of December 2001 raised the roof. In 2002, consumer and small business insolvency petitions tripled to over 44,000 petitions.¹⁹⁹ In the first half of 2003, petitions filed by consumers are up more than 70% over the same period a year ago.²⁰⁰

Word of mouth about the potential of the new law will undoubtedly lead to greater interest. For example, one debtor wrote to an internet chat-group that his first year of the good behavior period was not as bad as he had expected, that he had no more fear of the next several years, and "[e]verything is going well for me for the first time in my life."²⁰¹ With estimates of nearly 2.8 million overindebted households in Germany,²⁰² the well of potential consumer insolvency cases will not run dry for a very long time.

Reformers have implemented the most substantial changes in consumer insolvency law already, so they promise no more radical changes in the future. The Ministry of Justice, the primary mover of insolvency law reform up to this point, has made its position quite clear: "There will be no radical about-turn or paradigm shift in consumer insolvency proceedings or in the discharge."²⁰³ The Justice Ministry has already rejected a string of

¹⁹⁶ For a discussion of these problems, see, e.g., BUND-LÄNDER-ARBEITSGRUPPE, *supra* note 87, and the sources collected in note 130.

¹⁹⁷ See STATISTISCHES BUNDESAMT, RUND 41500 INSOLVENZEN IM JAHR 2000 (Mar. 30, 2001), available at <http://www.destatis.de/presse/deutsch/pm2001/p1200132.htm> (reporting approximately 12,000 consumer and small business petitions filed in 2000).

¹⁹⁸ See STATISTISCHES BUNDESAMT, KNAPP 50000 INSOLVENZEN IM JAHR 2001 (Mar. 13, 2002), available at <http://www.destatis.de/presse/deutsch/pm2002/p0860132.htm> (reporting 14,749 consumer and small business petitions filed in 2001).

¹⁹⁹ See STATISTISCHES BUNDESAMT, RUND 37600 UNTERNEHMENSINSOLVENZEN IM JAHR 2002 (Mar. 21, 2003), available at <http://www.destatis.de/presse/deutsch/pm2003/p1150132.htm> (reporting 44,482 insolvency petitions in Germany by private individuals in 2002).

²⁰⁰ See STATISTISCHE BUNDESAMT, FAST 20 000 UNTERNEHMENSINSOLVENZEN IM 1. HALBJAHR 2003 (Sept. 19, 2003), available at <http://www.destatis.de/presse/deutsch/pm2003/p3730132.htm> (reporting 15,667 petitions by consumers in the first half of 2003, a 70.4% increase over the first half of 2002).

²⁰¹ See EIN JAHR INSO... MEIN LEBEN DANACH... available at <http://www.forum-sculdnerberatung.de> (last visited Jul. 15, 2003) (on file with author).

²⁰² See GP-FORSCHUNGSGRUPPE, *supra* note 11.

²⁰³ See GRUSSWORT DES PARLAMENTARISCHEN STAATSEKRETÄRS BEI DER BUNDESMINISTERIN DER JUSTIZ, ALFRED HARTENBACH, ANLÄSSLICH DER DAV-VERANSTALTUNG ZU VERFAHRENSVEREINFACHUNGEN IN DEN INSOLVENZVERFAHREN NATÜRLICHER PERSONEN IN DER DEUTSCHEN ANWALTS AKADEMIE IN BERLIN AM 31. JANUAR 2003 (Jan. 31, 2003) [hereinafter BERLIN REDE], available at http://www.bmj.bund.de/ger/service/reden_und_interviews/10000659/?sid=16194b7f842b90dcabb8f7755a205f44.

alternative reform proposals²⁰⁴ as it recently launched its final foreseeable reform effort in the area of consumer insolvency.²⁰⁵ It hopes to reduce cost and alleviate stress on the formal judicial process by facilitating and enhancing out-of-court debt arrangements.²⁰⁶ Only time will tell what problems will arise in the future. Given the arguments and proposals presented over the past several years, legislators may be receptive to a further (and probably final) reduction of the good behavior period to five years,²⁰⁷ although the biennial increase in wage exemption levels may make such a change unnecessary.

One thing is sure: consumer insolvency relief in the form of a discharge of unpaid debt is here to stay in Germany. The Ministry of Justice has expressed its view quite explicitly that Germany needs a judicial procedure for relieving overindebted individuals.²⁰⁸ Overindebtedness is no longer viewed as a simple result of modern consumer behavior and a “buy now, pay later” mentality, but rather as a consequence of a complex of problems, including job-loss, divorce, and illness.²⁰⁹ The Justice Ministry is quite dedicated to the success of its new consumer debt relief law, whatever challenges the future reveals.

²⁰⁴ See Guido Stephan, *Die Umgestaltung des Einigungsversuchs und weitere Änderungen im Insolvenzverfahren natürlicher Personen durch den Diskussionsentwurf InsO-Änderung 2003*, ZEITSCHRIFT FÜR VERBRAUCHER-UND PRIVAT-INSOLVENZRECHT, vol. 4, Apr. 30, 2003, at 145, 145, 152.

²⁰⁵ See *supra* notes 108-21 and accompanying text; see also Stephan, *supra* note 204, at 145-52.

²⁰⁶ See, e.g., REDE DES PARLAMENTARISCHEN STAATSSSEKRETÄRS BEI DER BUNDESMINISTERIN DER JUSTIZ, ALFRED HARTENBACH, VOR DEM BERLIN-BRANDENBURGER-INSOLVENZARBEITSKREIS E.V. ZUM THEMA: “ZWEI JAHRE NEUES INSOLVENZRECHT: EINE BESTANDSAUFNAHME” AM 26. JUNE 2003 in POTSDAM § IV(5) (Jun. 26, 2003) [hereinafter POTSDAM REDE], available at http://www.bmj.bund.de/ger/service/reden_und_interviews/10000752/?sid=7ca2de1607209cc69733dcd3496ada88; DEUTSCHER BUNDESTAG, STENOGRAPHISCHER BERICHT, 15. WAHLPERIODE, 39. SITZUNG 3191 (Apr. 9, 2003), available at <http://dip.bundestag.de/btp/15/15039.pdf> (remarks of the Parliamentary representative of the Ministry of Justice noting the elimination of court-directed payment plan proceedings as the only planned change in consumer insolvency). The Justice Ministry also hopes to attain several other minor goals in consumer insolvency, such as 1) increasing the usage of the internet for notice publication, 2) increasing the usage of less costly and less time- and personnel-intensive written proceedings, and 3) reducing arbitrary judicial requirements not contained in the law, such as a requirement that the causes of insolvency be explained by the debtor in writing. See POTSDAM REDE, *supra*, at § IV(5); DEUTSCHER BUNDESTAG, STENOGRAPHISCHER BERICHT, 39. SITZUNG, *supra*, at 3192; BERLIN REDE, *supra* note 203, at § II(3)-(4).

²⁰⁷ See *supra* notes 170, 175, 180 (mentioning various calls for a five-year period).

²⁰⁸ See POTSDAM REDE, *supra* note 206, at § IV.

²⁰⁹ See *id.*

IV. POTENTIAL LESSONS FOR THE UNITED STATES

From this survey of German consumer insolvency law and practice, at least three important lessons emerge for the continuing U.S. debate about forcing all consumer debtors into a payment plan. Two lessons are obvious and superficial. The third is non-obvious, perhaps surprising, and probably more enlightening.

A. The Theory of Required Payment Plans: Universal Agreement on Requiring Years of Payments to Creditors

One obvious lesson lies on the surface of the legislative history: Everyone in the legislative process in Germany rejected the “get-out-of-jail-free” approach of U.S. law in favor of requiring several years of payments to creditors to earn the privilege of a discharge of unpaid debts. No one in the Administration or Parliament appears to have argued that any subset of debtors—even those living below the poverty line—should be able to avoid the multi-year good behavior period with its assignment of all nonexempt income to creditors.

Indeed, not even the most debtor-friendly and anti-capitalist, anti-creditor groups ever suggested that some debtors should receive an immediate discharge without turning over several years of nonexempt income. From the outset, the party most closely allied with social workers and trade unions, the Social Democrats, recommended a payment term of seven years.²¹⁰ Even when reports from debt counselors later persuaded the Social Democrats to back away from this position, they still proposed a payment term of at least three years.²¹¹ Indeed, even the former Communists proposed a payment term of five years.²¹² No one could reasonably accuse the Communists of favoring the capitalist creditor lobby at the expense of overburdened consumers, yet even they recommended a multi-year term of required payments to creditors.

It can hardly be argued that a term of required payments in consumer insolvency cases is so odious as to not merit consideration in the United States if the ultra-debtor-friendly Social Democrats and former Communists advocated such plans. To be sure, economic, social, or political conditions in the United States may militate against imposing multi-year payment periods on consumer debtors, but the history of the German law suggests that it should not be considered pro-creditor and anti-debtor simply to consider such a proposal.

²¹⁰ See *supra* note 167 and accompanying text.

²¹¹ See *supra* notes 167-70 and accompanying text.

²¹² See *supra* note 180 and accompanying text.

B. The Simple Carrot-and-Stick Approach to Incentivizing Debtors

The second lesson to be learned from a simple glance at the new German law is the simple but apparently effective solution to the problem of “incentivizing” debtors to produce income for distribution to creditors. U.S. lawmakers in 1978 did not require debtors to attempt to repay any portion of their debts over time because they feared that debtors would lack the incentive to complete a period of working “only for the benefit of their creditors.”²¹³ The German Insolvency Act deftly addresses this problem with an enticingly simple “carrot-and-stick” solution. The stick threatens a loss of the privilege of discharge if the debtor fails to find and keep acceptable employment—even low-prestige, low-wage employment.²¹⁴ On the other hand, the carrot promises freedom from debt after six years, as well as bonus “rebates” of nonexempt income to the debtor for successful completion of four and five years of the good behavior period.²¹⁵

German law does not revert to a system of “debt peonage,” as some have characterized proposals for mandatory payment terms in the United States.²¹⁶ German commentators pointed out that the Insolvency Act does not force consumers to work to pay off debt, as debt peonage law would; rather, it allows debtors to obtain a benefit—the discharge of debt—in exchange for work or serious attempts to find work. As a check on this significant benefit, it allows creditors to petition for the refusal of financial relief if the debtor chooses not to work.²¹⁷ If a debtor chooses not to initiate an insolvency case, creditors are left with the limited remedies of collections law—creditors cannot force debtors into servitude. This is a classic balance of benefits and burdens that should not strike reasonable observers as shocking or problematic, particularly if the requirements are reasonable, as those imposed by the German law appear to be. Indeed, creditors can coerce and receive at least the value of the debtor’s labor under a debt peonage system, while most creditors receive nothing at all under the German consumer insolvency system.²¹⁸

Incidentally, I have found no evidence of the frequency of creditor petitions for denial of discharge based on debtors’ failure to seek or hold adequate employment. Given that few creditors collect anything during the

²¹³ See generally H.R. DOC. NO. 93-137, pt. I, at 159 (1973); H.R. REP. NO. 95-595, at 120 (1977).

²¹⁴ See *supra* notes 137-44 and accompanying text.

²¹⁵ See *supra* notes 134-35 and accompanying text.

²¹⁶ See, e.g., Karen Gross, *The Debtor as Modern Day Peon: A Problem of Unconstitutional Conditions*, 65 NOTRE DAME L. REV. 165, 167 (1990); H.R. DOC. NO. 93-137, pt. I, at 159 (1973).

²¹⁷ See, e.g., WENZEL, *supra* note 31, at § VII(3).

²¹⁸ See *infra* Part IV.C.

good behavior period in any event,²¹⁹ one suspects that few creditors would be willing to invest in monitoring debtors' employment-seeking activity over six years.

C. The Reality of Required Payment Plans: Creditors Do Not Receive Payments from Asset Liquidation or from Several Years of Nonexempt Income

A little digging into the implementation of the law reveals a surprising and probably more enlightening lesson. The notion of six or seven years of payments to creditors from nonexempt income is largely an illusion. The "equal distributions to creditors" theme applies in principal but not in practice. Virtually no consumer debtor pays anything to creditors during the good behavior period because the wage exemption now protects all of most debtors' income. The good behavior period in reality is reduced to a psychological device to impress upon the debtor the notion of shouldering the burden of unpaid debts in order to earn the privilege of a discharge.

Indeed, legislators were prepared from the beginning for creditors to receive nothing or nearly nothing in most consumer cases. The German Parliament soundly rejected early proposals to require a minimum dividend to creditors in consumer cases. Just over a year before the new Insolvency Law went into effect, representatives of several of the German *Länder* introduced a proposal to amend the law to require a minimum dividend of 10% of creditors' claims, as the Austrian insolvency law does.²²⁰ These *Länder* argued that the discharge offered only a psychological benefit, but no economic solution, to debtors with no income or assets in excess of legally protected limits.²²¹ Such debtors, it was argued, "generally have nothing to fear from their creditors."²²² Proponents of a minimum dividend further argued that offering the benefits of discharge to such consumers ignored the "main goal" of the law—the best-possible distribution to creditors—and was "inconsistent with the 'strict prerequisites for the awarding of the discharge' set out by the legislature."²²³ The *Länder*

²¹⁹ See *supra* note 194.

²²⁰ See GESETZESANTRAG DER LÄNDER BAYERN, NIEDERSACHSEN, RHEINLAND-PFALZ, SAARLAND, SACHSEN, SCHLESWIG-HOLSTEIN: ENTWURF EINES GESETZES ZUR ÄNDERUNG DER INSOLVENZORDNUNG UND ANDERER GESETZE, BR-DR. 783/97, at 3-4, 7-8, 10-17 (Oct. 13, 1997), available at http://www.parlamentsspiegel.de/cgi-bin/hyperdoc/show_dok.pl?k=BBD783/97.

²²¹ See *id.* at 7-8. This argument, of course, ignores the fact that such debtors have no incentive to improve their economic situations, for fear that any improvement will pass immediately to creditors. This was the situation of debtors under the former East German *Gesamtvollstreckungsordnung*, described *supra* note 31, which was explicitly rejected as a model for consumer insolvency relief in the new unified Germany.

²²² *Id.* at 8.

²²³ See *id.* at 11.

proposal died immediately. It was never even reported out of committee. Any requirement that consumers pay any portion of their debts through the good behavior period was soundly rejected in Parliament.²²⁴ In rejecting any requirement of minimum dividend to creditors, German law decisively followed early European consumer debt relief proposals, which also allowed for zero-payment plans so long as this represented the debtor's "best efforts."²²⁵

The majority of courts also rejected early attempts to demand minimum payments from debtors in the court-directed debt arrangement plan stage. Debtors with no nonexempt income and no seizable assets have little incentive to offer creditors any payment, so many debtors in the in-court plan negotiation stage proposed plans paying little or nothing to creditors. After a short period in early 1999 in which several courts rejected such so-called "zero plans," the majority of lower courts, and all appellate courts of the *Länder* that dealt with this issue, concluded that so-called "zero plans" should be allowed.²²⁶ It will soon be a moot issue whether "zero plans" are acceptable in the court-directed debt arrangement stage, as that stage is poised for elimination.²²⁷ But the jurisprudence further confirms that German consumer insolvency cases often involve no actual payments to creditors—and both the legislature and the courts accept this.

The prominence of zero-payment insolvency cases in Germany casts significant doubt on the possibility that U.S. creditors would receive any economic benefit from requiring payment plans in U.S. consumer bankruptcy law. A wide variety of statistics suggest that few U.S. consumer debtors would be able to pay anything to creditors over a term of several years.²²⁸

Indeed, even less payment could be reasonably expected of U.S.

²²⁴ Apparently, another "minimum dividend" proposal was intensively discussed and firmly rejected in 1998, although I have found no documentary record of this debate, only reference to such a discussion preceding a 1998 law amending portions of another bankruptcy-related law. See, e.g., Pape, *supra* note 87, at 2042-43 (arguing that, with this 1998 debate, "the last doubts were removed that lawmakers consciously did not introduce a minimum dividend").

²²⁵ See Huls, *Towards a European Approach*, *supra* note 88, at 227-28.

²²⁶ See BUND-LÄNDER-ARBEITSGRUPPE, *supra* note 87, § (B)(I)(3)(b); Vallender, *supra* note 89, at 128; Pape, *supra* note 87, at 2042-43; HERGENRÖDER, *supra* note 18, § IV(2)(a)(bb); see also NULLPLAN-ENTSCHEIDUNGEN, available at <http://www.forumschuldnerberatung.de> (last visited Jul. 16, 2003) (on file with author) (listing court decisions upholding and rejecting zero-payment plans).

²²⁷ See *supra* notes 109-22 and accompanying text.

²²⁸ See, e.g., Edith H. Jones & Todd J. Zywicki, *It's Time for Means Testing*, 1999 B.Y.U.L. REV. 177, 186-92 (1999); Elizabeth Warren, *The Bankruptcy Crisis*, 73 IND. L.J. 1079, 1081-1100 (1998); ERNST & YOUNG LLP, CHAPTER 7 BANKRUPTCY PETITIONER'S ABILITY TO REPAY: ADDITIONAL EVIDENCE FROM BANKRUPTCY PETITION FILES (1998), available at <http://www.abiworld.org/consumer/ernst/ernst.html>.

debtors than is expected of German debtors given two major distinctions between U.S. and German law: state-sponsored social welfare benefits and wage exemption levels. Unlike U.S. debtors, German debtors need not use large portions of their income to cover health care and other common costs, as Germany provides relatively generous national health insurance, education, and other social welfare benefits.²²⁹ Furthermore, lower-income Germans can shield much more of their income from creditors than their U.S. counterparts. After the substantial increase in the German wage exemption level in 2002, available reports indicate that very little of the income of German debtors is subject to distribution to creditors.²³⁰ A childless couple in Germany enjoys a 100% exemption in approximately \$17,000 per year,²³¹ and that minimum 100% exemption grows if the couple has children.²³² In contrast, a U.S. couple with no children or ten children is generally subject to the same minimum exemption of just over \$8,000 per year.²³³ A U.S. debtor would have to make \$22,667 to keep the same minimum \$17,000 as her German counterpart.²³⁴ The U.S. wage exemption scheme is far more favorable to higher income levels than the German scheme,²³⁵ but low income is precisely the problem for most overindebted consumers. The plain fact is that consumer debtors do not pay because they cannot pay, not because they do not want to. The German experience further confirms this.

With relatively low wage exemptions and welfare benefits, U.S. consumers are generally more susceptible to economic volatility. Generous state welfare benefits and a relatively high wage exemption offer German debtors a substantial chance for successful completion of the six-year good behavior period. U.S. debtors are less likely than Germans to be able to complete such a multi-year payment term. This conclusion is borne out by

²²⁹ See, e.g., U.S. LIBRARY OF CONGRESS, *supra* note 2, Social Welfare, Health Care, and Education.

²³⁰ See *supra* note 194.

²³¹ See *supra* note 192.

²³² See *supra* note 48 (describing the three-stage German wage exemption scheme).

²³³ In most states, the greater of 75% of weekly after-tax earnings or 30 times minimum wage is exempt. See 15 U.S.C. §§ 1672-73 (2000). Given that the minimum wage is currently \$5.15 per hour, see 29 U.S.C. § 206(a)(1) (2003), this leaves a minimum annual exemption of \$8034, regardless of how many dependent obligations the debtor might have. State law can offer greater protection, but few states do. See, e.g., SUMMARY OF COLLECTION LAWS, at <http://summary.users1.50megs.com> (last visited July 16, 2003) (listing garnishment protections in the various states).

²³⁴ U.S. law exempts 75% of income higher than minimum wage, and \$17,000 is 75% of \$22,667. See *id.*

²³⁵ The U.S. wage exemption law contains no maximum wage beyond which all income is seizable, as the German law does, and U.S. law exempts 75% of wages higher than the minimum, while German law protects only 30% of excess wages for individual debtors, and 50%-90% for debtors with between one and five dependents. See *supra* note 49.

the high failure rate of consumer payment plans under Chapter 13 of the U.S. Bankruptcy Code.²³⁶

V. IF THEY CAN'T PAY, WHAT'S THE POINT? THE MOST IMPORTANT LESSON

The consumer provisions of the German Insolvency Act received the following hearty praise from Alfred Hartenbach, a Social Democratic member of the Bundestag who, incidentally, served as a judge presiding over bankruptcy cases between 1985 and 1994:

The people get something from it, as their feeling of self-worth rises. The children of these people get something from it, as it must be, I believe, one of the worst experiences when one must grow up in an overindebted household as a child in poverty. The cities and communities get something from it, because they have to pay fewer social welfare benefits. The *Länder* and the Federation also get something from it, because taxes will be collected again. Thus, we have created an all-around reasonable law here.²³⁷

A benefit for creditors is conspicuously absent from this acclaim for the Insolvency Act. German lawmakers have created an impressive set of theoretical benefits and trade-offs, which demands a carefully balanced quid pro quo of debtors and creditors affected by consumer bankruptcy. But the real “quids” and the real “quos” prove a bit imbalanced upon closer inspection under the lens of actual practice.

At least theoretically, consumer debtors give up any valuable nonexempt property, as well as six years of nonexempt future income. Perhaps more importantly from a social-responsibility perspective, debtors sacrifice the uninhibited right to choose whether to work and what job to take on—they are forced to acknowledge that others depend on their responsible attitude toward producing income. Even if this income is insufficient to produce any return to creditors, the law impresses on debtors a strong sense of responsibility for dealing with their financial affairs. No one is forced to work, of course, but if debtors want the “quo” of the highly beneficial discharge of unpaid debt, they must offer the “quid” of at least a responsible attempt at creating income for settlement of debt.

Despite what appears to be a rather creditor-friendly consumer insolvency system, most creditors get the short end of the stick in Germany.

²³⁶ See, e.g., Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 535 (1993) (citing failures in between 35% and 80% of confirmed Chapter 13 plans); THERESA A. SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS 217 (1989) (citing plan failure in 70% of Chapter 13 cases).

²³⁷ DEUTSCHER BUNDESTAG, STENOGRAPHISCHER BERICHT, 179. SITZUNG, *supra* note 181, at 17685.

The law offers the potential benefit of squeezing six years of payments out of debtors, but this benefit is largely illusory. Theoretically, without a system of consumer debt relief, creditors would receive nothing, as most property is exempt from creditors outside the insolvency system as well, and debtors with non-exempt income would simply go “underground,” hiding their non-exempt income from creditors, or refusing to work at all. Therefore, creditors should benefit when the Insolvency Act goads debtors into working to turn over at least six years of nonexempt income. Of course, German legislators robbed from Peter to pay Paul, as they increased the wage exemption levels beyond the average debtor’s total earnings. In the great majority of cases, the “quid” of requiring creditors to give up their unpaid debts after six years is not met with a “quo” of any payments of nonexempt income during that time. While the German model of requiring payment from *every* consumer debtor looks favorable to creditors on paper, the reality of the situation is that German creditors generally receive little more with required payment plans than U.S. creditors do without them.

The major practical distinction between German and U.S. consumer insolvency law appears to be the potential for inculcating financial responsibility in current and potential debtors. U.S. consumer bankruptcy law generally produces the same economic balance as the German law, as debtors give up nothing more than filing fees, and creditors receive no distribution in the great majority of bankruptcy cases. But the U.S. system appears to have very little interest in controlling debtors’ future financial behavior.²³⁸ U.S. law currently does not require any sort of credit counseling, it does not require debtors to attempt to reach a compromise with creditors, and it generally does not place any burdens on debtors beyond the conclusion of a brief liquidation case. German law, in contrast, requires debtors to seek the advice of an identified “suitable person or agency,” which generally turns out to be a state-sponsored debt counselor. Debtors will almost assuredly receive some sort of counseling here, at least in developing a manageable budget to serve as the basis of an offer in compromise to creditors. Then, German debtors must at least seek a compromise with creditors before initiating formal debt relief proceedings. Finally, German debtors are reminded of their duty to work to address their financial responsibilities for six years, even if the reality is that they are not required actually to pay much if anything toward their unpaid debts. Whether or not counseling and other efforts to impress financial responsibility upon consumer debtors are valuable or effective is certainly debatable, but the German legislature has concluded after serious

²³⁸ But see 11 U.S.C. §§ 727(a)(8) and (9) (2003), making relief unavailable to debtors who find their way back into financial trouble within six years of a consumer bankruptcy case, and depriving consumers of repeat relief in cases of certain types of misfeasance with respect to property and information pertaining to property.

consideration that these efforts are of some value—even if some minimal impact on the level of consumer debtors' financial responsibility is the *only* benefit offered to creditors and society.

On the other hand, the German experience with consumer bankruptcy suggests that creditors would receive very little direct benefit if more debtors were forced into Chapter 13 plans in the United States. Most consumers will be unable to offer anything to creditors, even over an extended period. U.S. lawmakers and courts, like their German counterparts, must be prepared for such an outcome.

But subjecting debtors to a *reasonable* regime of required attempts to find work and offer creditors any excess over *sufficient protected wages* over a limited period of time may produce some indirect benefits. In the United States, like in Germany, forcing debtors to undergo a "good behavior period" will likely amount to no more than a psychological exercise in inculcating some sense of financial responsibility. This may or may not be worth the effort, but proponents of forced payment plans should realize that the German system achieves little more than this. Proponents of forced payment plans in the United States must first acknowledge, however, that German law protects a minimal level of existence much better than does current U.S. law. Against the backdrop of legislation providing for social welfare and wage garnishment restrictions, the German system requiring six years of modest garnishment is decidedly not comparable to forcing debtors into a Chapter 13 plan in the United States. An increase in the amount of income exempt from creditor seizure is, in my view, an absolute necessity before the United States can consider an approach like that adopted in Germany.

The German word for the six-year payment period turns out to be quite telling. The notion of the *Wohlverhaltensperiode*, or "good behavior period," is much more concerned in reality with the debtor's "resocialization" and re-entry into the open credit economy²³⁹ than with ensuring any dividend to creditors. In economic terms, the German system is also "very debtor friendly." The German system simply makes more effort to force debtors to take responsibility, negotiate with creditors, and reflect at length on their financial duties.

One of the fairy tales of the Brothers Grimm describes the path to heaven. In response to a prince's question about how to get to heaven, a poor old man responds, "By poverty and humility . . . Put on my tattered clothes, wander about the world for seven years, and learn all about its misery. . . . This is how you'll find the way to heaven."²⁴⁰ The German

²³⁹ Cf. Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047 (1987) (theorizing that facilitating consumer debtors' re-entry into the open credit economy is a primary goal of the discharge in U.S. bankruptcy law).

²⁴⁰ See Jacob & Wilhelm Grimm, *Poverty and Humility Lead to Heaven*, in THE

Insolvency Act proposes a similar path to deliverance from debt. “Good behavior” will set one free, but it is not as important how one acts to benefit others as it is that one reflects and learns about oneself and about one’s responsibilities. Putting debtors back on the path of “righteous” financial behavior is potentially more valuable to society than offering a few creditors a narrow benefit at the expense of both the debtor and society. Getting debtors back on that path without overburdening them with unattainable economic demands is the trick. In my view, this is the most important lesson that German consumer insolvency law has to teach the United States.

