Out with the New, In with the Old: As Sweden Aggressively Streamlines Its Consumer Bankruptcy System, Have U.S. Reformers Fallen Off the Learning Curve?

by

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Reform is in the air! The United States is in good company in revamping its approach to consumer bankruptcy. A look at neighboring reforms in similarly situated nations offers fresh and enlightening perspectives on the path ahead in this country. Sweden was in the first wave of continental European nations to adopt a regime of debt relief for consumers. After over a decade of trial and error under its original law, Sweden has just adopted a streamlined new law to make its system more straightforward and efficient. Of particular interest to U.S. readers, Sweden’s original law functioned very much like the revised consumer bankruptcy system just adopted in the United States. An analysis of twelve years of Swedish experience may offer a glimpse into the future of the new U.S. regime.

This article is premised on the hope that the United States may learn from others’ past mistakes. A comparative analysis of the doctrine and practice of consumer debt relief in Sweden reveals several shortcomings and unfinished business in the U.S. reform effort. In particular, the failure and abandonment of mandatory credit counseling and informal negotiation with creditors in Sweden seems a likely harbinger of things inevitably to come in the United States. Based on a long and dissatisfying evaluation period, Sweden has ushered out this key new aspect of the U.S. system. Have we adopted a latent defect? Additionally, though the United States is unlikely to follow Sweden’s lead for practical and historical reasons, the new Swedish law prompts us to reexamine the notion of a more administrative approach to

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1See Johanna Niemi-Kiisilainen, Consumer Bankruptcy in Comparison: Do We Cure a Market Failure or a Social Problem?, 37 OSOODE HALL L.J. 473, 482-97 (1999). However, Sweden was actually the last Scandinavian country to introduce debt adjustment legislation. Id. at 495.
at least some aspects of the consumer debt relief process. Sweden has just
ushered in an administrative structure that corresponds almost exactly with
proposals that were rejected in the United States in the 1970s. Perhaps it is
time to reconsider our rejection of these proposals, at least in part.

Part I introduces the consumer debt relief system in Sweden, examining
in detail its operation, perceived shortcomings, and recent reform. This Part
continues a larger project to chart—in English—the experiences of our Euro-
pean neighbors in the first years of their new and often vastly divergent
formal approaches to consumer debt relief.2 Not surprisingly, certain ele-
ments of the Swedish process are unique to the Nordic approach to consumer
credit and responsibility. The general contours of the system and many of its
details, however, bear a striking resemblance to the recently remodeled U.S.
system. Analyzing the legal and practical similarities and differences between
the two systems, Part II advances both observations and challenges for the
future of the U.S. law. Swedish experience provides compelling answers to
many of the questions we in the United States have faced and will face in the
future with respect to consumer debt relief, and it prompts us to reconsider
debates from our recent and more distant past.

To be sure, many aspects of the social, political, and legal landscape in the
United States contrast sharply with the situation in Sweden. Nonetheless,
U.S. policymakers should be aware of and carefully evaluate reforms in paral-
lel systems, like that in Sweden, if we in the United States wish to maintain
our position as a bellwether of efficient and effective economic law reform.
This Article aims to use Swedish experience to shed light3 on some of the
hidden—and questionable—premises of our new law to encourage U.S.
policymakers to climb back to the top of the increasingly international learn-
ing curve.

I. SWEDISH CONSUMER BANKRUPTCY LAW, PRACTICE, AND
REFORM, 1994-2006

This Part surveys how and why a consumer bankruptcy system was
adopted in Sweden in 1994, how the first system operated over the following

2See Jason J. Kilborn, The Hidden Life of Consumer Bankruptcy Reform: Danger Signs for the New U.S.
Kilborn, Dutch Law]; Jason J. Kilborn, Continuity, Change and Innovation in Emerging Consumer Bank-
Belgium and Luxembourg]; Jason J. Kilborn, La Responsabilisation de l'Economie: What the United States
[hereinafter Kilborn, French Law]; Jason J. Kilborn, The Innovative German Approach to Consumer Debt
Relief: Revolutionary Changes in German Law, and Surprising Lessons for the United States, 24 Nw. J.

3Sunlight is, after all, the best disinfectant. Buckley v. Valeo, 424 U.S. 1, 67 (1976) (quoting L. Bran-
dehs, Other People's Money 62 (National Home Library Foundation ed. 1933)).
decade, both as written and as applied, and why and how it was revised and reenacted in May 2006. In some respects, the Swedish system is rather more onerous and closed to access than other European regimes, as has been reported in the rare English commentary on the Swedish law. In other respects, however, application of the law seems to have been somewhat softer than a sterile reading of the statute would suggest.

A. JOIN THE CLUB: THE PATH TO THE FIRST SWEDISH CONSUMER "BANKRUPTCY" LAW

Like many other continental European economies, Sweden’s was rocked by the one-two punch of interest rate deregulation in the mid-1980s followed by severe economic downturn (including a real estate market crash and a spike in unemployment) in the early 1990s. After credit deregulation in 1985, total household debt grew dramatically from 1986 into the early 1990s, while personal savings rates fell. During this period, a sharp rise in real property values (collateralizing new home loans) led many consumers to take on what would turn out to be excessive debt, particularly after housing prices fell precipitously. The average percentage of household disposable income dedicated to current debt servicing rose to 130% in 1988 before falling back to about 100% in the early 1990s. Though the rapid pace of increases in household debt had slowed by the early 1990s, the large debt burdens of the late 1980s would wreak havoc on consumer finances for years to come, especially as unemployment became a more serious problem.

Rising consumer debt occasioned increasing financial distress among consumers, which soon caught the attention of policymakers. As early as 1986,

4See, e.g., Niemi-Kiesiläinen, supra note 1, at 495-97.
6Prop. 1993/94:123, supra note 5, § 2.1 (reporting a doubling of current debt from 1985-1988, while personal savings fell from 4% to 2.5% of disposable income), SOU 2004:81, supra note 5, at 55.
7See, e.g., Prop. 1993/94:123, supra note 5, § 2.1; SOU 2004:81, supra note 5, at 55. Home mortgage-related debt has been identified as a particular source of financial distress in Sweden, as many individuals purchased homes in the late 1980s as prices rose, only to see their home values fall precipitously in the early 1990s. See, e.g., PM 2003:04, supra note 5, at 6, 30. The number of execution sales of homes in Sweden rose from 548 in 1990 to nearly 4000 in 1994, falling back to about 500 by 2002. Id. at 47 & tbl.1. One fears that many individuals in California and other inflated real estate markets in the United States are headed for the same sort of trouble in the near future. See, e.g., Linda Stern, Finance: The Pain of Mortgage Over-Extension, MSN Money, June 14, 2006, http://news.mone
9See id.
the Swedish parliament (Riksdag) had begun consideration of a law aimed specifically at consumer debt adjustment. Like in other continental European states, the existing bankruptcy law (Konkurslagen) benefited neither creditors nor debtors, as most consumers had no non-exempt assets that could form a bankruptcy estate for creditors, and the law offered no discharge of unfulfilled obligations. On the heels of several government reports of a growing consumer economic crisis, the legislature commissioned an official investigation to explore alternatives to bankruptcy for consumers. In October 1990, the investigative commission submitted its report proposing the institution of a new legal scheme of debt adjustment for individuals, similar to the one adopted in Denmark in 1984. The driving idea behind the new system was largely based on detached economics, not individual social welfare or humanitarian concern for consumers. The proponents of the law reasoned that offering such relief would benefit society by avoiding the loss of economic productivity and tax receipts from debtors robbed of incentives to work in the mainstream labor market, as well as the burdens of such debtors on the social service and criminal enforcement systems. At the same time, the system would benefit creditors by offering debtors an incentive to produce value for them and by placing a single neutral administrator in charge of the system who could credibly assure creditors of the folly of their continuing to waste time and money attempting to collect otherwise unenforceable debts. Ultimately, the system would force a rational cost-benefit analysis of creditors’ continuing ability to pursue insolvent debtors. Investigators argued that creditors’ enforcement

10See id. § 2.2; SOU 2004:81, supra note 5, at 55.
12See, e.g., Prop. 1993/94:123, supra note 5, § 2.2; Lennander, supra note 11, at 131.
13See Prop. 1993/94:123, supra note 5, § 2.2; Lennander, supra note 11, at 129-30 & nn.2-3.
15See Lennander, supra note 11, at 129-30, 137. Later, policymakers continued to take a particular interest in the situation in Denmark, which had just adopted the first consumer “bankruptcy” law in Europe, as well as Norway, which had adopted a system just as the Swedish investigation was concluding. See Prop. 1993/94:123, supra note 5, § 2.2. In addition, the government report surveyed existing and proposed systems in Finland, the United States, England, France, Germany, and Austria. Id. §§ 2.3, 3-3.4; Lennander, supra note 11, at 132 n.15.
16See, e.g., Prop. 1993/94:123, supra note 5, § 4.1; Lennander, supra note 11, at 138, 145 (“The Report stresses that debt adjustment must be based on an economic view.”).
17See Prop. 1993/94:123, supra note 5, §§ 4.1, 6.3; Lennander, supra note 11, at 131 & n.11, 139 & n.42; see also SOU 2004:81, supra note 5, at 56, 150 (noting that the main purpose of the law was to allow heavily indebted persons to lead a life that was more tolerable and more useful to society, and that the purpose of the law as a whole to avoid costs to society had been achieved in the law’s first decade).
18See Prop. 1993/94:123, supra note 5, § 6.3; Lennander, supra note 11, at 131, 139; SOU 2004:81, supra note 5, at 56, 150-51.
rights under these circumstances, “worthless on the best assessment,” bore “no reasonable proportion to the social costs and the debtor’s and his family’s suffering.” The proponents of the new law observed that formalistic references to the notion of *pacta sunt servanda* (agreements must be fulfilled) in this context appeared “fairly hollow.”

While the proposal for a new law was generally well received, the new conservative government—in particular the Justice Minister—was initially ambivalent about such a radical departure from existing law, fearing a general destabilization of consumer credit markets and an erosion of the bedrock principle of living up to one’s contracts. Concerned legislators, however, did not allow the idea to die. In June 1993, the Riksdag ordered the government to draft a consumer debt relief law along the lines of the systems in Norway and earlier legislative proposals in Sweden. When the government returned with a draft law in February 1994, the Riksdag wasted no time in offering consumers the relief they needed. After a brief debate on May 5, 1994, the Riksdag adopted the government proposal for the new Debt Adjustment Law (*Skuldsaneringslagen*), effective July 1, 1994.

**B. SWEDISH LAW AND PRACTICE BEFORE 2007: STEPS ONE, TWO, AND THREE**

Before the most recent reform of the Swedish Debt Adjustment Law, effective January 1, 2007, the process consisted of three consecutive steps, each of which was designed to require active participation by the debtor to take responsibility for managing his or her own affairs. Though the structure of this system will change dramatically in 2007, most of its details will

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19Lennander, *supra* note 11, at 140-41.
20Id. at 140.
26Svensk författningssamling [SFS] 1994:334 (Swed.).
28*See* infra Part I.C.
continue largely unaltered after the reform. This Part opens with a brief overview of the pre-reform process and continues with a more detailed discussion of certain central features.

Originally, each case had to begin with “Step One,” the debtor's attempt “by his own hand” to reach an informal voluntary arrangement with his creditors.\(^{30}\) If every creditor accepted the debtor's proposal, the case ended with this consensual (if perhaps temporary) resolution. If, as was far more commonly the case, any creditor refused the voluntary workout, the case proceeded to “Step Two,” submission of a petition for entry into the formal debt adjustment system.

Petitions are submitted not to the courts, but to the primary administrator of this system, the state Enforcement Agency (Kronofogdemyndigheten, commonly abbreviated KFM).\(^{31}\) Formerly an arm of the Tax Service (Skatteverket), but now a free-standing agency,\(^{32}\) the KFM's primary function is to act as the official enforcer of obligations, both public and private, similar to the county sheriff in the United States or the huissier de justice in France.\(^{33}\) In its role as administrator of the consumer debt adjustment system, the KFM reviews petitions for relief to see if the applicant meets the criteria for entry into the system, and if so, it applies budgetary guidelines established by the Tax Service to formulate a payment plan dedicating all of the debtor's excess income to creditors, generally over a five-year period.

Here again, until the most recent reform of the law, the KFM could only propose the payment plan to creditors. If any creditor objected (for any or no reason), the KFM had to transfer the case to the local general district court for “Step Three,” which in most cases resulted in a court-ordered cram-down of the KFM-developed payment plan. Upon completion of the plan, the debtor is discharged of responsibility for any unpaid portion of the debts encompassed by the plan.\(^{34}\)

\(^{30}\)SOU 2004:81, supra note 5, at 57.
\(^{31}\)Id. at 15.
\(^{32}\)In June 2006, the legislature voted to restructure the organization of the KFM, effective July 1, 2006, to create one central administration, separate from the Tax Service but still coordinating certain functions with it. See Betänkande 2005/06:SkU35, available at http://www.riksdagen.se/webnav/index.aspx?id=3322&rm=2005/06&bet=SkU35; Proposition [Prop.]2005/06:200 En kronofogdemyndighet i tiden [government bill] (Swed.), available at http://www.regeringen.se/content/1/c6/06/21/83/cc78cd01.pdf.
\(^{34}\)See SOU 2004:81, supra note 5, at 58, 65.
1. Budget- and Debt-Counseling and the Failure of “Step One”

In theory, requiring debtors to attempt an informal workout with creditors in Step One was supposed to emphasize the debtor’s own responsibility for taking control of and managing his or her financial affairs.\(^{35}\) Of course, in practice, consumers were seldom equipped to make this attempt on their own, so most debtors relied on the budget- and debt-counseling services that the law requires all municipalities to provide to their residents.\(^{36}\) After an in-depth examination of the debtor’s financial situation, the counselor would draw up a workout proposal to be submitted to all of the debtor’s creditors.\(^{37}\)

The very limited statistics on the results of budget- and debt-counseling reveal that many debtors have managed to reach informal agreements with their creditors with the help of counselors.\(^{38}\) In 2002 and 2003, the most recent years for which reliable, publicly reported data are available, creditors accepted informal payment plans in 40-45% of the counseling cases where

\(^{35}\)See Prop. 1993/94:123, supra note 5, § 4:1; SOU 2004:81, supra note 5, at 91-92, 210. This first required step came to be called the “own attempt” (egenförsöket). Id. Every continental European consumer debt relief system imposes a similar pre-bankruptcy negotiation requirement. See, e.g., Kilborn, German Law, supra note 2, at 273; Kilborn, Dutch Law, supra note 2, at 94; Kilborn, French Law, supra note 2, at 635; Kilborn, Belgium and Luxembourg, supra note 2, at 80.

\(^{36}\)See SOU 2004:81, supra note 5, at 93-94, 164, 210 (citing a government study that found that just over 80% of debtors who made it into the formal system had sought help in Step One from a budget- and debt-counselor). Approximately 560 counseling agencies are active throughout Sweden today. See Proposition [Prop.]. 2005/06:124 Ett enkla och snabbare skuldsaningsförfarande 39 [government bill] (Swed.), available at http://www.regeringen.se/content/1/c6/03/85/f6bb3ad.pdf. Not all local Swedish authorities complied with this legal requirement to offer what we in the United States would call credit counseling, but only a handful of the 290 municipalities have failed to comply from year to year. Many smaller municipalities contracted with credit counseling providers in larger neighboring areas to provide services for their residents. See, e.g., SOU 2004:81, supra note 5, at 94. The nature and quality of these services vary significantly from locality to locality. See Prop. 2005/06:124, supra note 36, at 37.

\(^{37}\)In practice, the KFM and courts eventually softened the requirement, demanding only that the debtor send the proposal to the majority of creditors and those holding the largest claims. See SOU 2004:81, supra note 5, at 93.

plans were proposed.\textsuperscript{39}

It is not clear, however, how many of these debtors might have been candidates for the formal debt adjustment system. Many of these cases likely involved solvent or near solvent debtors who simply sought help bringing order to their diverse obligations. Publicly available counseling statistics do not break out financial information specifically for the debtors for whom workout proposals were submitted, so more heavily indebted consumers who might have qualified for a formal debt adjustment might be markedly under-represented in the 40% of accepted proposals. This theory finds support in comments by the Consumer Agency (Konsumentverket), the government agency that collects these data. It has observed consistently in its reports that total debt levels had a far greater impact on the likelihood of a consensual workout than even the total amount that debtors could offer their creditors.\textsuperscript{40} In cases with a heavier debt load (over 200,000 crowns, about $37,500\textsuperscript{41}), the Consumer Agency concluded that the Step-One proposal was "often a formality."\textsuperscript{42}

Moreover, it is not clear whether the debtors with creditor-accepted plans actually managed to complete their plans. Counselors report that they have more freedom in the informal stage than the KFM has in the formal process because counselors can offer payments from exempt income over a period longer than five years.\textsuperscript{43} Of course, this can be both a blessing and a


\textsuperscript{40}See KOV Report 2003, supra note 38, at 12; KOV Report 2002, supra note 38, at 11; see also KOV Report 2001, supra note 38, at 28; KOV Report 2000, supra note 38, at 23. Unfortunately, the data in these reports are presented in a relatively unhelpful way, reporting on the percentage of total consensual workouts versus the percentage of total formal debt adjustment petitions where total debt load and total amount offered to creditors fell within certain ranges. The data do not indicate what percentage of the total relevant cases—those in which a consensual workout was proposed—exhibited similar debt levels and amounts offered to creditors, so it is difficult to draw convincing correlations between debt levels and likelihood of creditor acceptance of a workout. Earlier tables from the same reports, however, indicate that very high debt and high offer amount were present in only a small percentage of total cases (even those in which no consensual workout was sought). KOV Report 2003, supra note 38, at 6; KOV Report 2002, supra note 38, at 6; KOV Report 2001, supra note 38, at 21-22; KOV Report 2000, supra note 38, at 19-20 (indicating that, year after year, only about 25-30% of all debtors seeking counseling could offer creditors more than 1500 crowns—about $180—above the exemption level per month, and only about 10% had total debt exceeding one million crowns—about $125,000—not counting home mortgage or student loan debts). Thus, it stands to reason that these cases would constitute a small percentage of the cases in which creditors either accepted or rejected consensual workouts. The Consumer Agency’s conclusion is intuitively sound, and it is consistent with similar conclusions from analysis of the Dutch system. See Kilborn, Dutch Law, supra note 2, at 90-91, 96-97. But, the data presented in these Consumer Agency reports are disappointingly limited.

\textsuperscript{41}The average conversion rate for Swedish Crowns to U.S. Dollars in 2003 was just over eight. See http://www.oanda.com/convert/fxhistory. This conversion rate also fairly accurately represents the recent comparative purchasing power of Swedish Crowns and U.S. Dollars in their respective local markets. See infra note 103.

\textsuperscript{42}KOV Report 2003, supra note 38, at 12.

\textsuperscript{43}SOU 2004:81, supra note 5, at 96; Anna Lorentzon, Skuldsaneringslagen är misslyckad, DAGENS
curse, especially as plans stretch out over many years. One small academic study from the late 1990s suggested that informal plans lasting ten years or more were not uncommon. This same source suggested that the failure rate for such informal workout plans was, not surprisingly, quite high—about 70%. Even in cases in which Step One has produced a "success," that success is often tempered and probably temporary.

If any creditor refused to accept the proposed informal plan, Step One had failed, and counselors generally continued to help debtors in filing out and submitting their petitions for Step Two, a formal debt adjustment case with the KFM. Counselors also often continued to support debtors throughout the formal process (filling the function of debtor's lawyers in the United States). Far fewer formal petitions have been lodged annually than originally expected. Filing levels were fairly stable between 1997 and 2003, ranging between 3200-3500 per year, though they jumped to 3678 in 2004 and to 4178 in 2005. The Consumer Agency and Tax Service in particular note that there must be thousands of people with unmet need for debt relief, judging by the hundreds of thousands of individuals constantly in the KFM's collections register.

2. Limited Access to Step Two and the Formal Process

Consistent with its economic "benefit-to-society" focus, the formal part of the system contains strict controls on both entry and exit. At the front end, the KFM scrutinizes each petition to ensure that the case is ripe and qualified for relief. Careful screening of cases at the outset is a unique aspect of the consumer debt relief systems in Sweden and other Nordic states. In Swe-
den, debt readjustment is a privilege for which the debtor must demonstrate “how deserving his case is.” This pre-screening stage is the functional equivalent of an automatic denial of discharge evaluation in the United States; the Swedish system simply places this evaluation at the very beginning to avoid expending time and resources on cases unqualified for relief. The grounds for denying access to relief in Sweden are in some respects similar to the grounds for denying discharge in the United States, though they are in many ways quite vague and potentially much broader than in the United States.

Generally, a debt adjustment is a once-in-a-lifetime opportunity, though a second pass through the system is theoretically available for “extreme reasons.” Also, the law is reserved for the seriously overburdened, so the debtor must exhibit what the preparatory works call “qualified insolvency.” The debtor must be unable to pay his or her debts as they come due, and that inability must be expected to continue through a “foreseeable period.” The law is unclear on how far into the future one can reasonably be expected to see, but it seems clear that the debtor must not be likely to regain solvency within at least the five-year term of a standard payment plan.

länken, supra note 1, at 482-97 (comparing and contrasting existing European consumer debt adjustment regimes).

51Lennander, supra note 11, at 147.
52SOU 2004:81, supra note 5, at 60. The types of extreme exceptions envisioned include, for example, where the debtor had undergone a debt rehabilitation early in life and then, after a long period, again fell into extreme overindebtedness as a result of illness, premature retirement, or long-term unemployment. Id.
53Prop. 1993/94:123, supra note 5, § 4.3.2; Lennander, supra note 11, at 143-45; SOU 2004:81, supra note 5, at 60.
54The “unable to pay his or her debts as they come due” test for insolvency was adopted from the existing business-focused bankruptcy law. Prop. 1993/94:123, supra note 5, § 4.3.2; SOU 2004:81, supra note 5, at 60. Though some courts have reportedly required a minimum debt level of 200,000 kronor, about $25,000, lawmakers intentionally omitted mention of a minimum debt level for access to the system. Prop. 1993/94:123, supra note 5, § 4.3.2; Lennander, supra note 11, at 145; McGregor et al., supra note 44, at 214; SOU 2004:81, supra note 5, at 61. Indeed, the Supreme Court was called upon twice in the early years of the new system to reverse lower-court denials of petitions for “insufficiently indebted” individuals. Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1997:46 p. 229 (Swed.) (reversing denial of petition of debtor whose debts totaled only about 95,000 kronor, about $11,875); Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1996:87 p. 548 (Swed.) (reversing denial of petition of debtor whose debts totaled only about 175,000 kronor, about $21,875). These cases emphasize that the debtor’s income and consequent ability (or lack thereof) to pay these debts within the foreseeable future is the question, not the size of the debts alone.
55See Lennander, supra note 11, at 144 (suggesting five to ten years as the “foreseeability” horizon); see also Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1997:124 p. 750 (Swed.) (reversing appeals court and ordering implementation of a zero-payment plan, though the debtors were thirty-six and thirty-nine, steadily employed, and their children would leave home within five to six years, increasing the amount the debtors could apply to their debts, because they could not be expected to offer significant payments to creditors “within the next five years”). The preparatory works of the law suggest that uncertainty regarding the debtor’s likely economic future might prevent the initiation of a debt adjustment case. See Prop. 1993/94:123, supra note 5, § 4.3.2 (suggesting that temporary unemployment due to economic downturn
The primary entry hurdle is an opaque requirement of "reasonableness." A debtor is admitted into the formal system only if the KFM's evaluation of the debtor's "personal and economic conditions" indicates that "it is reasonable . . . that a debt adjustment should be granted." Lawmakers had debated reversing the phrasing of this requirement; that is, to grant petitions unless circumstances indicated that it would be unreasonable to do so. In the most recent evaluation of the law, the recommendation was advanced again to reverse the presumption and to rephrase the reasonableness requirement, but this recommendation again died before it even reached the legislative committee. The Supreme Court (Högsta Domstolen), however, seems rather clearly to have taken the position that petitions should be denied only if the record contains sufficient support for a rejection.

Thus, in practice, it is apparently not altogether clear whether the debtor bears the burden of proving undeservedness, or the KFM bears the burden of proving reasonableness.

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would not offer the required level of certain extended inability to pay); Lennander, supra note 11, at 144; SOU 2004:81, supra note 5, at 60. Recent jurisprudence from the Supreme Court, however, seems to read this requirement much more liberally. See Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2003:64 p. 437 (Swed.). The intriguing facts of this case are as follows: In 2001, a thirty-three-year old single mother applied for a debt adjustment. She had taken the examination to be licensed as a lawyer, but her poor performance on the exam had hindered her in the competitive market for law jobs. Incidentally, the court identified the would-be lawyer only by her somewhat ironic (to an American reader) initials: J.D. The district court on appeal by a creditor rejected her petition based on the court’s inability to come to a solid conclusion with respect to her long-term economic distress. It reasoned that she was a relatively young person with a law degree who might well better her economic outlook in the future. The appeals court affirmed the denial, but the Supreme Court reversed, ordering her petition to be approved. The Supreme Court observed that J.D.’s income and career opportunities were “limited,” and she had tried unsuccessfully to find higher paying employment than her current government position. The court observed that her possibilities for improving her situation were "unsure," but she had nearly no outlook for betterment that would allow her to pay the rapidly accruing interest on her outstanding debt. The court seems to have reversed the earlier approach to the standard of qualified insolvency. Now, the debtor is qualifiably insolvent only if it is not relatively clear that the debtor’s situation will improve, even if it is not absolutely clear that it will not improve. See also Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1996:49 p. 324 (Swed.) (affirming a granted petition, even though the debtor’s debt totaled less than $100,000, he was only twenty-nine years old with consistent employment and no support obligations, and he had good earning potential, explaining simply that “he will not be able to pay his debts within a foreseeable period”).

56 SOU 2004:81, supra note 5, at 61.
57 See Prop. 1993/94:123, supra note 5, § 4.3.3; SOU 2004:81, supra note 5, at 152.
59 See Prop. 2005/06:124, supra note 36, at 40-42. The government collected feedback from a diverse group of interests on this proposal, including many creditor representatives. See id. app.3 at 116 (listing surveyed parties). A narrow majority of the interests surveyed either supported or did not object to this proposal to change the presumption of reasonableness, but the government eliminated the proposal from its proposition, explaining simply that “the requirement for reasonableness is not too high.” Id. at 40-41. Opponents of the change simply noted that the current formulation allowed for an adequately nuanced and not overly demanding evaluation of each case. See id. Some also noted the pedagogical value of the current formulation’s sending a clear signal to society about payment morality. See id. at 41. The government indicated its willingness to return to this question later, however. See id. at 42.
60 See Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1996:86 p. 543 (Swed.).
supporting a rejection, but one thing is quite clear: many petitions are rejected. From implementation of the new law in mid-1994 through 2001, the KFM rejected a fairly consistent average of about 40% of all petitions, though the rejection rate by 2002 and 2003 had fallen to about 30%.61 Since 12-14% of petitions per year were withdrawn voluntarily by debtors, fewer than half of all cases made it past the screening stage of Step Two into the formal system; however, in more recent years, nearly 60% have continued.62 No publicly available data exist on the specific bases for rejection of these petitions, but insufficient efforts in the Step One consensual workout process reportedly accounted for many rejections.63 With the imminent abandonment of that first required step in 2007,64 presumably the rejection rate will fall even further in the coming years.

The law highlights several factors that should be especially considered in this reasonableness judgment. First, the KFM must consider "the debts' age."65 In other words, the majority of the debtor's obligations must be sufficiently old to show that the debtor has wrestled with them and tried unsuccessfully to manage his or her own debt burden, leaving a formal debt adjustment as a last resort.66 The preparatory works for the law suggest that most of the debtor's obligations should be at least three or four years old for this factor to weigh in favor of a debt adjustment.67 The Supreme Court altered the question somewhat in 1997, holding that three years should have passed from the point at which the debtor's debt problems first appeared—not any particular obligation or series of obligations.68 The test is now significantly more ambiguous than before, but the idea remains that the debtor must spend significant time in a sort of debt purgatory before being allowed to pass through the pearly gates of debt forgiveness.

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61SOU 2004:81, supra note 5, at 110 tbl.6.1 (reporting a rejection rate ranging from 29% in 2000 to 67% in 1997). This conclusion is supported by later, more accurate statistics based on closed cases and the reasons for closure. See KOV Report 2003, supra note 38, at 17 (reporting 940 cases rejected of a total of 3103 closed cases—30%—in 2003); KOV Report 2002, supra note 38, at 15 (reporting 1089 cases rejected of a total of 3496 closed cases—31%—in 2002).

62See, e.g., McGregor et al., supra note 44, at 209; SOU 2004:81, supra note 5, at 110; KOV Report 2003, supra note 38, at 17 (reporting 1771 cases accepted of a total of 3103 closed cases—57%—in 2003); KOV Report 2002, supra note 38, at 15 (reporting 2023 cases accepted of a total of 3496 closed cases—58%—in 2002).

63See SOU 2004:81, supra note 5, at 223; see infra note 78 and accompanying text (explaining that the debtor's efforts in Step One were considered in connection with the "efforts to fulfill obligations" reasonableness factor).

64See infra Part I.C.1.

65Prop. 1993/94:123, supra note 5, § 4.3.3.

66See SOU 2004:81, supra note 5, at 61.

67Prop. 1993/94:123, supra note 5, § 4.3.3; SOU 2004:81, supra note 5, at 61; see also Lennander, supra note 11, at 145-46; McGregor et al., supra note 44, at 214 (suggesting that some KFM offices require a five-year average).

68Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1997:68 p. 341 (Swed.).
Second, the KFM must consider the circumstances giving rise to the debtor’s obligations.\textsuperscript{69} Though significant debt arising from luxury consumption might run afoul of this factor,\textsuperscript{70} I found no evidence that this consideration regularly prevents consumer access to the system.\textsuperscript{71} The focus seems to be elsewhere. The creators of the new law insisted upon the notion that “criminal, unfair and speculative debt incurrence shall not be rewarded,”\textsuperscript{72} though they emphasized that no clear line of exclusion could be drawn.\textsuperscript{73} Large criminal reparations debts and even numerous parking tickets have weighed against access to the system,\textsuperscript{74} though accounting fraud convictions, for example, have posed no barrier to entry in several reported cases.\textsuperscript{75} Of the nearly dozen cases that reached the Supreme Court by mid-2006 on the subject of admission to the debt adjustment system, only two resulted in judgments against the debtor: One affirmed the rejection of the petition of a couple whose debts arose from securities and real estate speculation, activity that the court observed involved “a clearly speculative element” and “high risk-taking.”\textsuperscript{76} The other affirmed the rejection of the petition of a former business owner who had fallen into the common trap of diverting to his private business use the withholding amounts for his employees’ payroll taxes, social security charges, and value-added taxes.\textsuperscript{77} This “nature of the debts” factor seems to serve simply as a pressure valve for patently undeserving cases.

Finally, the KFM must consider the efforts the debtor has made to fulfill his or her obligations.\textsuperscript{78} Obviously, evading creditors and fraudulently conveying assets to friends or relatives would weigh against the debtor, but so

\textsuperscript{69}See Prop. 1993/94:123, supra note 5, § 4.3.3; SOU 2004:81, supra note 5, at 61.
\textsuperscript{70}SOU 2004:81, supra note 5, at 62.
\textsuperscript{71}But see Klara Ledin, Blacolöntager of ensamstående försäljare, DAGENS NYHETER, Mar. 4, 2006, available at http://www.dn.se/DNet/jsp/polopoly.jsp?a=526340 (quoting one KFM representative, explaining that debtors with many unsecured loans might have their petitions rejected, as the presence of many unsecured loans might constitute a “complicating factor”).
\textsuperscript{72}Lennander, supra note 11, at 146-47.
\textsuperscript{73}See Prop. 1993/94:123, supra note 5, § 4.3.3.
\textsuperscript{74}See SOU 2004:81, supra note 5, at 62.
\textsuperscript{76}Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2001:86 p. 601 (Swed.).
\textsuperscript{77}Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1998:41 p. 259 (Swed.).
\textsuperscript{78}See SOU 2004:81, supra note 5, at 61-62; see also Lennander, supra note 11, at 147. Before the recent reform, this factor also included consideration of the debtor’s efforts to reach a voluntary arrangement in Step One, see supra Part I.B.1, though this is no longer an explicit item for consideration, see infra Part I.C.1. Along these same lines, the law emphasizes that the KFM should consider the debtor’s cooperation in the debt adjustment proceedings, for example if the debtor has provided full and accurate disclosure of assets, income, and liabilities. As one would expect, failure of cooperation in the debt adjustment process is uncommon. See SOU 2004:81, supra note 5, at 61, 63.
also would "voluntarily avoid[ing] working full time or not actively seeking work." One important aspect of the subtext of this requirement to attempt to fulfill obligations is not so obvious. The law implicitly requires the debtor to have applied the value of all of his or her nonessential assets to attempt to pay off debt. In other words, the Swedish system requires the debtor to liquidate all nonessential property as a precursor to seeking formal relief, much like other Northern European systems require a liquidator to sell the debtor’s non-exempt assets as a required step in their formal debt relief systems. Most debtors lack assets that can or must be liquidated, but whether or not the debtor must sell his or her home and move to a rental apartment, for example, has been a point of contention. In an early case, the Supreme Court clarified that the debtor must sell his home only if this would benefit creditors, either by realizing on the debtor’s substantial equity in the home or by significantly reducing the debtor’s living expenses.

3. Another Offer to Creditors . . . Even If the Debtor Can’t Pay

If the KFM approves the petition, an automatic stay of creditor enforcement goes into effect for all claims that are subject to debt adjustment.

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78SOU 2004:81, supra note 5, at 62-63.
79The notion here appears to be nonessential assets, not non-exempt assets. For example, though most pension and retirement accounts are exempt from seizure by creditors, some regional KFM offices and courts require the debtor to withdraw funds from or close such accounts to pay their debts, and if the Tax Service refuses to provide the requisite approval for the early withdrawal or closure, the debtor might be denied access to debt adjustment. See SOU 2004:81, supra note 5, at 178-79, 182-99 (describing the one reported case on this issue, in which a man with a pension account worth 312,000 crowns—about $39,000—had requested permission to close the account prematurely, the Tax Service refused his request, and his denial of access to the debt adjustment system was affirmed by the Appeals Court). Debtors unable to close and withdraw their private retirement savings accounts or demand early payout of retirement insurance (because the Tax Service has refused permission for premature access) have been admitted to the debt adjustment system generally only if their accounts are relatively small (under 100,000 crowns, about $12,500) or if the accounts or insurance will begin paying out only after many years (generally twenty or more years in the future). Id. at 196-99, 206. Part of the recent law reform encourages the Tax Service to grant debtors’ requests to access their restricted-withdrawal pensions and retirement savings and insurance to avoid being denied access to the debt adjustment system. See Prop. 2005/06:124, supra note 36, at 65-66.
80See, e.g., Prop. 1993/94:123, supra note 5, § 4.3.2; SOU 2004:81, supra note 5, at 177-79.
81See, e.g., Kilborn, German Law, supra note 2, at 278; Kilborn, Dutch Law, supra note 2, at 97; Kilborn, French Law, supra note 2, at 659.
82See SOU 2004:81, supra note 5, at 177.
83Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1999-97 p. 218 (Swed.). The court noted in this case, and in many others, that heavily indebted individuals often face a catch-22 in seeking less expensive rental space, as their applications for housing are rejected due to their poor creditworthiness.
84SOU 2004:81, supra note 5, at 66, 115-16. One effect of the automatic stay is that most debtors will accumulate some small savings when ongoing wage garnishments are stopped but the payment plan is not yet in place. Most KFM offices require debtors to apply these savings to their debts as part of the ultimate payment plan—under penalty of having the case rejected if the debtor uses the money for other purposes. As a result, the functional payment period of plans often extends a few months longer than five years. See SOU 2004:81, supra note 5, at 230-31; Prop. 2005/06:124, supra note 36, at 56. On the other
The KFM posts a notice of case opening, and creditors must file statements of claim with the KFM within one month to be included in the payment plan.87 Based on an examination of the claims submitted88 and the information presented at a meeting of creditors and the debtor,89 the KFM draws up a payment plan to be proposed to creditors.90

The original idea was to allow the KFM flexibility to be creative in crafting a plan that creditors would accept, but instead, KFM practice has been largely standardized.91 This is unsurprising, as the two key elements of the plan—the amount to offer creditors and the length of the payment period—

87The range of debts not subject to adjustment is narrow. Secured debts are unaffected to the extent of the value of the security. See, e.g., Prop. 1993/94:123, supra note 5, § 4.6.5; Lennander, supra note 11, at 151 (noting that “security” in this context includes the right to pursue third-party guarantors, as well as rights under reservation of title clauses and similar quasi-security measures in contracts). In addition, student loan debts that are not yet due are excepted (as are other debts not yet due, such as future rent and tax obligations). See Prop. 1993/94:123, supra note 5, § 4.6; SOU 2004:81, supra note 5, at 64-65, 148; Prop. 2005/06:124, supra note 36, at 43. Swedish law offers generous support for student living expenses in the form of state loans. It also contains three separate systems for repaying these state-funded student loans, requiring annual payments of a certain portion of the borrower’s income, leading to often very long repayment periods. See, e.g., PM 2003:04, supra note 5, at 25; Prop. 1993/94:123, supra note 5, § 4.6.3; Lennander, supra note 11, at 149-50. A separate government agency administers this program (the Centrala Studiestödsnämnden, commonly abbreviated “CSN”) and offers forbearances to borrowers in financial difficulty. SOU 2004:81, supra note 5, at 65. The CSN also refers collection cases to the KFM where forbearances are either not requested or deemed inappropriate. Id. Problems with student loan collections are apparently significant in Sweden. In mid-2003, a prominent newspaper ran an article entitled “75,000 Hunted for Student Loans.” Torbjörn Tenfält, 75,00 Jagas för studentkrediter, DAGENS NYHETER, June 22, 2003, available at http://www.dn.se/DNet/jsp/polopoly.jsp?i=153898. The article described how 75,000 people were being pursued by the KFM in its debt collection capacity for 845 million Swedish Crowns (about $100 million) in overdue student loans. The overdue amount had nearly doubled in the preceding two years. Id.; see also PM 2003:04, supra note 5, at 25 (noting the same 75,000 student loan debtors and remarking that most Swedes with higher education have taken such CSN loans); Pernilla Anth Jacobsson, Svenska studenter mest skuldsatta, DAGENS NYHETER, Oct. 26, 2005, available at http://www.dn.se/DNet/jsp/polopoly.jsp?i=479351 (describing the Swedish student aid program as among the most generous in the world, but noting that Swedish students are among the most indebted in the world after college graduation).

88See SOU 2004:81, supra note 5, at 65, 112.

89See SOU 2004:81, supra note 5, at 118 (explaining that the KFM scrutinizes claims, though not explaining how often, if at all, claims are found to be invalid or deficient in some respect).

90This meeting is held only if the KFM considers it especially important to do so, which is apparently seldom. The KFM prefers to contact parties by telephone or letter. See SOU 2004:81, supra note 5, at 113, 117-19.

91See SOU 2004:81, supra note 5, at 112.
are largely controlled by law, regulation, or the debtor's meager economic situation.

The original rule with respect to plan length was that payments should run for five years, though the KFM had some discretion to establish a shorter or even longer plan if special circumstances warranted.⁹² In practice, this discretion was exercised very rarely. For example, debtors who suffered from life-threatening illness or who were already at an advanced age were sometimes offered three-year plans, but the KFM almost never proposed plans longer than five years.⁹³ Beginning in 2007, the law will no longer allow for plans exceeding five years.⁹⁴ In all but extraordinary cases, five-year plans will continue to be the rule.

The only factor that might really vary from plan to plan is the amount to be offered to creditors, but the KFM has not accepted the legislature's invitation to develop creative solutions here. From the beginning, lawmakers stressed the importance of imposing payment guidelines that would offer debtors a realistic chance of fulfilling the plan requirements.⁹⁵ In determining the amount to be paid to creditors, the law directs that the general income exemption reserved for the debtor's support in wage garnishment cases should be considered "guiding."⁹⁶ In practice, the KFM has in most cases simply adopted the general exemption level as the de facto rule.⁹⁷ The regional KFM offices have largely stood by their practice in basic debt collection cases of simply taking income in excess of the debtor's general income exemption. Payment plans thus generally direct the debtor⁹⁸ to distribute pro rata to creditors specific monthly amounts representing anticipated in-

⁹²See Prop. 1993/94:123, supra note 5, § 4.5.1; SOU 2004:81, supra note 5, at 127. The five-year term was apparently chosen as a compromise to avoid bringing the institution of consumer debt adjustment into disrepute among creditors if a shorter period, such as three years, were allowed. See SOU 2004:81, supra note 5, at 235.

⁹³See SOU 2004:81, supra note 5, at 65, 127.

⁹⁴Prop. 2005/06:124, supra note 36, at 51-52. After a plan is in place, it can be modified and extended to a maximum of seven total years if the debtor's financial situation improves and more time is needed to capture the upside for creditors. See infra note 142; Prop. 2005/06:124, supra note 36, at 59-60. The maximum of seven years was chosen because "[a] longer payment period would not be consistent with the law's rehabilitative goal." Id. at 60.


⁹⁸Debtors generally make small monthly payments directly to each creditor, which has created both processing and cost problems for debtors and creditors alike. See id. at 124-26, 231-33. The government rejected a reform proposal to require payments to be made annually, with payments remaining in a "collection account" until the year's end. Prop. 2005/06:124, supra note 36, at 49-51 (citing concerns about debtors taking "loans" from these accounts during the year as well as post-petition creditors potentially seizing the collection accounts). It also rejected the notion of having the KFM administer the payments (as Chapter 13 trustees do in the United States), citing increased administrative complexity and cost, with a resulting reduction in recovery for creditors. See id. at 51.
come in excess of the general exemption and, perhaps, an extra "buffer" for sixty months.99

Disposable income is thus determined by deducting the debtor's general income exemption (the so-called förbehållsbelopp, "reserve amount") from the debtor's total after-tax income from all sources, including state transfer payments, such as child and housing allowances, unemployment and disability payments, and contributions to living expenses paid by a non-filing spouse or cohabitant.100 The base "reserve amount" is established in the Enforcement Code (Utsökningsbalken) and is recalculated for inflation and announced annually by the Tax Service.101 The base living expense "reserve amounts" for 2006, for example, are as follows:102

<table>
<thead>
<tr>
<th></th>
<th>Swedish Crowns/month</th>
<th>U.S. Dollars/month103</th>
</tr>
</thead>
<tbody>
<tr>
<td>Single</td>
<td>4204</td>
<td>$525</td>
</tr>
<tr>
<td>Spouses/Cohabitants</td>
<td>6945</td>
<td>$870</td>
</tr>
<tr>
<td>Each child under 7 years old</td>
<td>2230</td>
<td>$280</td>
</tr>
<tr>
<td>Each child older than 7</td>
<td>2567</td>
<td>$320</td>
</tr>
</tbody>
</table>

99SOU 2004:81, supra note 5, at 122-23, app.3 at 299-305 (illustrating sample payment plan).
100SOU 2004:81, supra note 5, at 122-23; Konsumentverket, www.skuldsanering.info: Rapport från skuldsaneringsprojektet december 2001 [Consumer Agency report] (Swed.), available at http://www.konsumentverket.se/Documents/ekonomi/Skulder/skuldsanering_rapport_feb_2002.pdf [hereinafter KOV/RSV Report 2001]. If the debtor is required to repay state transfer payments, such as excessive state support payments (underhållstöd), the amount of the ongoing repayment obligation might also be deducted from the debtor's available income. SOU 2004:81, supra note 5, at 147. In some cases, the debtor's budget might even include ongoing payments on debts that are not covered by the debt adjustment law. See Prop. 1993/94:123, supra note 5, § 4.5.2.
102Id; see also Konsumentverket, Om du inte betalar, available at http://www.konsumentverket.se/mallar/sv/artikel.asp?lngCategoryId=757&lngArticleId=398#förbehållsbelopp. The Enforcement Code (including the wage garnishment laws) are currently under intensive review, so the nature and amount of exemption may change substantially in the coming years. See Prop. 2005/06:124, supra note 36, at 49.
103This conversion rate attempts to reflect purchasing power parity between U.S. Dollars and Swedish Crowns on the respective local markets. See, eg., http://www.oecd.org/std/pppi/. The World Bank's International Comparison Program suggested that the local purchasing power of the Swedish Crown in 2002 was about 96% of the official exchange rate against the U.S. Dollar. WORLD BANK, 2004 WORLD DEVELOPMENT INDICATORS 280, available at http://siteresources.worldbank.org/ICPINT/Resources/Table5_7.pdf (reporting an official exchange rate of 9.74 SEK/US$ but a PPP for 2002 of 10.1 crowns to buy the equivalent of a dollar's worth of products on the local market). The OECD's comparative price level indicators suggest that the disparity is even greater. See OECD, MAIN ECONOMIC INDICATORS 264, 266 (May 2006), available at http://www.oecd.org/dataoecd/48/18/18398721.pdf (explaining comparative price levels and reporting that the official exchange rate of Swedish Crowns to U.S. Dollars should be increased by 18% to state the comparative purchasing power); OECD, PPPS FOR GDP-HISTORICAL SERIES (Feb. 2006), available at http://www.oecd.org/dataoecd/61/56/1876133.xls (reporting a purchasing power conversion rate of just over 9 Swedish Crowns to the U.S. Dollar from
Thus, for a family of three consisting of two adult cohabitants and one child under seven, the law reserves 9175 crowns (about $1150) per month for food, clothing, and other household expenses. For a single mother with one child over seven, the law shields as much as 6771 crowns (about $845) per month from creditors. This base exemption is supposed to cover all household expenses other than housing costs (mortgage or rental payments), which are separately allowed so long as they are “reasonable” according to internal Tax Service guidelines.104 The housing guidelines take as the comparable norm the rental rates of municipal housing corporations in the area of the debtor’s residence; in other words, the approximate average rental rate in any given area.105 In addition, separate allowances are made for transport costs to and from work; childcare expenses, as well as support and even sometimes extra medical expenses.106

In debt adjustment plans, most regional KFM offices also provide for a “buffer” (buffert), an extra amount for possible unanticipated expenses.107 The law says nothing about such extra buffers, but policymakers have voiced their approval of this practice.108 The existence and amount of this buffer varies significantly among the various KFM offices.109 For example, in 2003, the KFM in Stockholm generally included in debt adjustment plans an additional buffer of 200 crowns (about $25) per month, the KFM in Malmö (one of the three largest cities in the country, in far southern Sweden) added an

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1991 to 2005). I have compromised among these competing indicators by increasing the official exchange rate for the first half of 2006 of 7.63 Swedish Crowns per U.S. Dollar. See http://www.oanda.com/convert/fxhistory, increased by about 4% (consistent with the World Bank’s 2002 findings). I rounded up (to move in the direction of the OECD indicators) to arrive at a rough conversion rate of 8 SEK/US$. The result of this conservative conversion (in dollars) most likely substantially overstates the purchasing power of the exemption amounts left to Swedish debtors.

104 KOV/RSV REPORT 2001, supra note 100, at 55, 58. Whether housing costs are reasonable is also an aspect of the screening process. Reducing living expenses to the extent possible is one way in which debtors must demonstrate their efforts to deal with their debts—one of the “reasonableness” requirements for access to the formal system. See supra note 78 and accompanying text. Excessive living expenses have led to denial of relief for some, though this continues to be a litigated issue. See, e.g., Svea Hovratt [Hov-R] [Court of Appeals] RH 2004:78 (Swed.) (affirming denial of petition because debtor’s monthly rent for a five-room apartment in an upscale region of Stockholm, 10,7654 crowns, about $1330, exceeded average rent for area, and debtor could easily have moved to smaller and considerably less expensive quarters); cf. Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1998:103 p. 698 (Swed.) (reversing denial of debtor’s petition by KFM, district court, and appeals court for excessive housing costs, where married debtors lived in a four-room apartment for 3342 crowns, about $668, per month, as no evidence showed that this rate exceeded average in local municipal housing corporations in the area).

105 See Svea Hovratt [Hov-R][Court of Appeals] RH 2004:78 (Swed.).


107 SOU 2004:81, supra note 5, at 65.

108 See Prop. 2005/06:124, supra note 36, at 48-49. Certain surveyed parties argued for the inclusion of specific statutory provisions relating to this buffer, but despite its support for the practice of including a buffer, the government refused to include such specific provisions in its proposal. See id.

additional allowance of 300-400 crowns per month ($40-$50), while the KFM in Kalmar (a town of about 35,000 between Stockholm and Malmö) provided for a buffer only in exceptional cases. With the unification of the KFM system under one head office in July 2006, these variations should be reduced. After a series of in-depth interviews with creditors and debtors on their impressions of the system, the Tax Service has expressed a particular desire to see a unified KFM policy for including and measuring a buffer in the debtor’s budget.

If the debtor has no disposable income after deducting these allowances, the KFM simply presents creditors with a so-called “zero proposal” (nullförslag). If creditors accept this proposal, the debtor is discharged of responsibility for her liabilities immediately. The possibility that many debtors would have no payment capacity and would be freed of their debts immediately was acknowledged from the very beginning. Apparently, creditors are often willing to accept practical reality when the KFM attests to the debtor’s lack of payment capacity. In about a quarter of all cases in 2002 and 2003, creditors accepted the KFM’s zero proposal. The number of successful zero proposal cases is actually higher than this, as the courts have been called upon to impose zero-payment plans on dissenting creditors in Step Three in some cases, though no statistics exist as to the exact number.

Of the remaining “can pay” plans, few make any significant contribution to creditors. In 2002 and 2003, more than half of all KFM-proposed plans accepted by creditors paid a dividend of 10% or less, and only about a quarter of plans paid more than 20%. Given the way in which the data are reported, it is impossible to tell how much money these plans offered to creditors. Judging roughly by the disposable income of all debtors seeking budget- and debt-counseling in these years, however, it seems most likely that at least

111 See supra note 32.
113 SOU 2004:81, supra note 5, at 120.
114 See id. at 58, 65.
117 See, e.g., Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1997:124 p. 730 (Swed.); Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1997:68 p. 341 (Swed.; see also KOV/RSV Report 2001, supra note 100, at 22 (reporting that an estimated 35-40% of cases ended with zero-plans in 2001); PM 2003:04, supra note 5, at 44 (reporting on a small study of three regional KFM offices in 2002, in which the Consumer Service found that 31% of debtors lacked any payment capacity, and over half could pay less than 1000 crowns, about $125, per month).
70% of plans allocated less than 1500 crowns per month to creditors—at most about $175 per month. Un fortunately, no publicly available statistics track completion rates for these plans. Given the relatively moderate budget allowances and low number of modification and dismissal hearings, it seems likely that many debtors have managed to complete their plans.

Before the recent reform of the law, after creditors received the KFM’s proposed plan, they had about three weeks to submit their votes on the plan, and those who failed to cast a vote during this period were deemed to acquiesce. If no creditor objected within this short period, this “voluntary debt adjustment” went into effect. After an initial rocky period when creditors accepted virtually none of the KFM’s proposed plans, creditors apparently soon realized the futility of opposing the inevitable. From 1998 to 2003, creditors accepted on average 70% of the KFM’s proposed plans. If the debtor completes the plan, she or he is freed from further obligation on any unpaid amounts.

4. “Step Three”: Court Ordered Cram-Down of “Coercive Debt Adjustment” on Recalcitrant Creditors

Originally, if any creditor objected to the KFM’s proposal—for any or no reason—the KFM had no option but to send the case on to the local district court for Step Three. Creditors who disagreed with the KFM’s acceptance of the case and proposal of a plan thus enjoyed a mandatory and automatic “appeal” to the district court, though this will change in 2007. In addition, debtors who were unhappy with the KFM’s rejection of the case at the screening stage could lodge appeals with the district courts, as well.

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119 KOV Report 2003, supra note 38, at 12, 17 (reporting 70% of all counseling cases with payment capacity under 1500 crowns, and 72% of plans paying less than a 20% dividend); KOV Report 2002, supra note 38, at 11, 13 (reporting 68% of all counseling cases with payment capacity under 1500 crowns, and 73% of plans paying less than a 20% dividend).

120 See infra notes 139-46 and accompanying text.

121 See SOU 2004:81, supra note 5, at 112.

122 SOU 2004:81, supra note 5, at 58, 119.

123 SOU 2004:81, supra note 5, at 110 tbl. 6.1, 120; see also KOV Report 2003, supra note 38, at 17; KOV Report 2002, supra note 38, at 15. Official statistics suggest that the acceptance rate between 1998 and 2002 was only 50%, rising to 70% in 2003. Id. at 120. However, this appears to be a statistical error. The Tax Service explained that in years before 2003, if the KFM submitted more than one plan to creditors, as it apparently often did, the plans were counted separately, whereas only one plan per case was counted in 2003. Id. Judging by general data on petitions, rejections, and accepted KFM plans, it appears that the acceptance rate of KFM plans actually averaged about 70% from 1998 to 2002, as well. Id. at 110 tbl.6.1.

124 See SOU 2004:81, supra note 5, at 58, 65. Before the most recent reform, some plans specifically excluded certain debts that had arisen shortly before the filing of the debtor’s petition, in effect offering only partial discharge of debts. This discretion to exempt certain recent debt from discharge was used very infrequently, and it has been eliminated in the new law. See Prop. 2005/06:124, supra note 36, at 45-46.

125 SOU 2004:81, supra note 5, at 112, 128, 131.

126 See supra Part I.B.2.
Lawmakers were concerned initially about assigning to an agency—rather than a court—the power to deprive creditors of their collection rights, a move that they feared might violate Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.128 In both theory and practice, however, this final step has accomplished little more than lending some gravitas to the proceedings, acknowledging the seriousness of depriving creditors of their "right" to engage state support in collecting their debts.129

From 2001 to 2003, approximately 1600 debt adjustment cases made their way to the district courts annually.130 On average, just over half of these were mandatory, automatic referrals after creditors had refused the KFM’s proposal in Step Two.131 From 1998 to 2001, the courts received on average about 1200 such referrals annually, falling to about 800 in 2002 and about 600 in 2003.132 Apparently, over time, creditors learned that defeating the KFM’s proposal in Step Two offered only a temporary, Pyrrhic victory.

The courts generally held a hearing in each referral case, which in the estimation of investigators represented little more than a “pure formality.”133 Creditors very seldom appeared at these hearings,134 the courts generally relied on the record produced by the KFM, and the KFM’s proposed plan was upheld and imposed on creditors in 90-95% of all cases.135 The district court process in such cases generally concluded within one month from the referral of the case from the KFM.136 The KFM gained a reputation in the courts for quality work and careful case management, while courts criticized creditors for commonly objecting to plans without offering any legal basis for their objections (other than general opposition to coercive debt adjustment).137

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127See SOU 2004:81, supra note 5, at 131.
128Prop. 1993/94:123, supra note 5, §§ 4.1-4.2, 4.7.3-4.7.4; SOU 2004:81, supra note 5, at 131, 216. Opponents of the reform to remove mandatory referral to the courts in Step Three again raised concerns about such a substantial undermining of creditor rights being accomplished in an administrative agency rather than a court. See Lagutskortets betänkande 2005/06:LU35 Ny skuldsaneringslag [Parliamentary Committee on Civil Law Legislation report] (Swed.) (on file with author).
129Prop. 2005/06:124, supra note 36, at 32.
130SOU 2004:81, supra note 5, at 130 & tbl.7.1 (reporting 1854 total cases in 2001, 1504 in 2002, and 1373 in 2003). The Courts Service (Domstolsverket) apparently does not make its specific debt adjustment statistics available to the public, so the cited report is the only publicly available source for these limited statistics. Domstolsverket, Statistik [Court Service statistics] (Swed.), http://www.dom.se/templates/DV_InfoPage___868.aspx (listing only general court statistics).
131See supra Part I.B.3.
133SOU 2004:81, supra note 5, at 141.
134See id. at 132-33.
135Id. at 133, 221; Prop. 2005/06:124, supra note 36, at 32.
136See SOU 2004:81, supra note 5, at 167.
137See SOU 2004:81, supra note 5, at 133; see also infra notes 170-73 and accompanying text.
The other half of the courts' debt adjustment caseload represented appeals from debtors whose cases had been refused at the screening stage (about 300 per year from 2001 to 2003) and petitions for modification or dismissal of ongoing plans (about 475 per year from 2001 to 2003). Because debtors send their payments directly to creditors, creditors provide the only check on debtor compliance through their ability to petition for modification or dismissal of payment plans. The debtor's failure to comply with the plan was the most common basis for such motions, but creditors have also sought modification in cases where the debtor's economic situation has substantially improved midway through the plan period. On the other hand, sometimes debtors have brought their own modification motions after their economic situations have worsened.

Given the fairly low number of modification and dismissal motions per year, it appears either that most debtors have complied with their plan obligations or that most creditors have decided to avoid throwing good money after bad by financing a dismissal motion. Indeed, even when creditors filed motions for modification or dismissal, they seldom appeared at the court hearing. Unless the debtor had fallen three months or further behind on plan payments, courts generally modified the plan rather than dismissing the case. From 2000 to 2003, only 180 total cases were dismissed, just under

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138 The courts affirmed the KFM's conclusion in 98% of such cases. SOU 2004:81, supra note 5, at 221.
139 SOU 2004:81, supra note 5, at 130-31 & tbl.7.2 (reporting 321 appeals and 465 motions for modification or dismissal for 2001, 268 and 462, respectively, for 2002, and 275 and 512, respectively, for 2003).
140 See supra note 98.
141 See SOU 2004:81, supra note 5, at 134.
142 See SOU 2004:81, supra note 5, at 135-36. Unfortunately for debtors, creditors generally discover improvements in the debtors' financial lives by examining annual tax returns, so by the time the improvement is discovered and a hearing for modification is held, the debtor has enjoyed as many as two years of windfall excess income and is probably nearing the end of the plan's five-year term. See id. at 139, 236. Simple annual raises are usually left to the debtor, but the courts strive to give creditors the retroactive benefits of more substantial improvements in the debtor's financial situation. In such cases, courts commonly extend the payment term of the plan up to another two years (up to a maximum of seven years), rather than increasing the payments to be made in the remaining shorter period. See id. at 136-39, 236-37. This practice has been statutorily recognized in the new law. See Prop. 2005/06:124, supra note 36, at 59-60.
143 See SOU 2004:81, supra note 5, at 135. In the early years of the new system, modification motions were somewhat less common, and debtor motions for modification outnumbered those brought by creditors two to one. Konsumentverket Rapport 2000:14 Omprövningar av skuldsaneringsbeslut 11-12, 14 [Consumer Agency report] (Swed.), available at http://www.konsumentverket.se/Documents/Rapporter/2000/2000_14.pdf (reporting only 182 petitions handled by the courts from 1995 to early 1999, of which 118 were filed by debtors, though also noting that this may not represent the complete set of petitions handled during this period). An early report reflects the effects of "local legal culture," as well as the number of modification petitions in Göteborg outnumbered those in any other locality, including Stockholm, by a factor of nearly four to one. Id. at 16.
144 See SOU 2004:81, supra note 5, at 134.
145 See id. at 135-36.
10% of the approximately 1900 total motions for modification or dismissal brought during that period.\footnote{Id. at 140-41 & tbl.7.3 (reporting thirty-five cases dismissed in 2000, thirty-three in 2001, forty-eight in 2002, and sixty-four in 2003).}

C. Evaluation, Reappraisal, and Reform

On the heels of several parliamentary and government reviews of the operation of the new debt relief system between 1995 and 2001, the Riksdag ordered the government to commission an in-depth evaluation of the Debt Adjustment Law in November 2002.\footnote{Prop. 2005/06:124, supra note 36, at 27; SOU 2004:81, supra note 5, at 4.} In August 2004, the investigators submitted their voluminous report: A Step Toward a Simpler and Quicker Debt Adjustment Procedure.\footnote{SOU 2004:81, supra note 5, at 4.} The title of this report contains a clever double entendre that hints at the general proposal.\footnote{It is not clear that the authors intended this double meaning, but I am inclined to give them credit for it in light of their somewhat peculiar choice of words in the title and the particular language of the law.} In English, the first word of the title can mean either “a” or “one.” In other words, the title might be understood alternatively as “One Step” toward a simpler and quicker procedure, and this is exactly what the investigators proposed—eliminating Step One and Step Three of the existing procedure, reducing the process to one step that would be far faster, more economical, and more effective than the laborious three-step process described above.\footnote{The report contains a summary in English of its main points. See SOU 2004:81, supra note 5, at 27-31.} On February 23, 2006, the government finally submitted to the Riksdag a proposal for a new Debt Adjustment Law, adopting most of the official investigator’s suggestions.\footnote{Prop. 2005/06:124, supra note 36.}

The Riksdag adopted the proposal by a vote of 176 to 72 on May 19, 2006.\footnote{The 176 members who voted for the new law represented a bare majority, —50.43%, —of the 349 total members of the Riksdag. Riksdagens utskottsbeslut och beslut, http://www.regeringen.se/sb/d/1522/a/13507. Though, 101 members were absent the day on which the vote was taken, as indicated in the record of the debate. The record of the brief legislative debate and voting on the new Skuldsaneringsslag is available on the Riksdag’s website. Kammarens Protokoll, Riksdagens Protokoll, 2005/06:126, §§ 11, 13 (May 18, 2006); 2005/06:127 § 13 (May 19, 2006) [Parliamentary minutes] (Swed.), available at http://www.riksdagen.se/webnav/index.aspx?nid=101&beet=2005/06:126. The vote on the proposition was split perfectly down left-right party lines, with all present Social Democrats, People’s Party and Left Party members, and Greens supporting the new law, and all present Moderates, Christian Democrats, and Centrists favoring alternative proposals that would have left the system largely unchanged. Id. at 2005/06:127 § 13.}

The participation of credit counselors and courts in the first and third steps of the current system is eliminated, leaving

\footnote{See, e.g., Justitiedepartementet, Faktablad No. Ju 06.12, En ny skuldsaneringsslag (May 2006), available at http://www.regeringen.se/content/1/c6/06/47/46/a67b49c.pdf.}
only the core debt adjustment process controlled entirely by the KFM. Though debtors will still be able to seek budget- and debt-counseling from their local counseling services, debtors are no longer required to seek a consensual arrangement with creditors before applying for formal relief. The KFM now has the power to impose final, binding payment plans on dissenting creditors, as well as to modify or dismiss plans already underway. The courts operate only as a backstop, taking appeals from debtors and creditors dissatisfied with the KFM’s orders.

1. Out With Step One As a Time-Consuming Waste of Effort

Calls for eliminating the Step One informal workout requirement as a fruitless waste of time arose early on. The primary complaint was that this stage imposed often significant delays on debtors in need of swift relief. Waiting periods in Step One varied widely from locality to locality, usually two to four weeks to get a meeting with a counselor, but in some localities as long as nine months, followed by ten to seventeen weeks to draw up a consensual workout plan, and seven to ten more weeks waiting for creditors to register their consent or objection, for an average total time in Step One of about seven months. In contrast, the KFM generally completed all of Step Two within four to six months.

The long processing period in Step One might have been tolerable if this labor-intensive process achieved a positive result, but it seldom did. In most cases, debtors had very little or nothing to offer creditors, making the negotiation of a consensual write-down of debt exceedingly difficult. At least in cases where debtors could offer little or nothing beyond the exemption, even many budget- and debt-counselors urged the elimination of the repetition of labor and fruitless extension of time between Steps One and Two. Even many creditor representatives considered the first step “nearly meaning-

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154See SOU 2004:81, supra note 5, at 69 (describing the Consumer Service’s 1996 evaluation of the law, observing that creditors almost always refused informal voluntary arrangement proposals, and they lacked any enthusiasm to respond to requests timely); id. at 79 (reporting on the Tax and Consumer Services’ joint proposal in 2002 to eliminate the first step in cases where the debtor had little to offer creditors).


156SOU 2004:81, supra note 5, at 158.

157Id. at 161 & tbls.6.4 & 6.5. Cases are either opened or rejected (and the automatic stay entered) generally within six weeks of filing; the KFM’s claims evaluation, plan development, and collection of creditors votes occupy the remainder of this period Id. at 162-63.

158See id. at 96, 208.

159See id. at 104.
The official state investigator concluded that this first stage “thus fills no real function, but instead delays evaluation for debtors who otherwise fulfill the law’s requirement for receiving a debt adjustment.”

Budget- and debt-counselors objected to the elimination of Step One, remarking that many debtors were not “ready” for a formal debt adjustment until after the counselors had helped them to gain control over their overall financial situation. Likewise, some politicians insisted that debtors should be forced to go through the motions of Step One to ensure personal responsibility and avoid depressing payment morality, undermining the sanctity of contracts, and increasing the cost of credit for all. At the end of the day, though, the legislature’s original intention had not been that debtors should receive obligatory advice on their hopeless financial situation before filing, but rather that they should engage personal initiative to work something out themselves to avoid bankruptcy if they could. Both facets of this intention had failed. Most debtors had neither been able to work something out nor to do it themselves (without the aid of counselors).

Policymakers clearly acknowledged the continuing need for and value of consumer budget- and debt-counseling, but they emphasized that counselors should be allowed to focus their attention and resources on cases in which a workout is a strong possibility, rather than having their resources diluted with hopeless cases. Lawmakers concluded that requiring Step One as a precursor to formal relief was a wasteful formality, out of touch with the pressing reality of these debtors’ overwhelming debt burdens. In particular, legislators objected to having debt counselors review debtors’ financial situations and exempt income only to have the KFM repeat this evaluation in the formal system, which served only to delay relief and extend the process.

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160Id. at 105-06; Rapport 2004:14, supra note 112, at 17 (noting the generally negative impression of Step One by creditors based on personal interviews).
161SOU 2004:81, supra note 5, at 209.
164See SOU 2004:81, supra note 5, at 108.
165See SOU 2005/06:LU35, supra note 128, app.4 at 65 (record of public hearing on SOU 2004:81).
ing time for cases.\textsuperscript{168} For the few debtors with significant repayment capacity, failure to seek a consensual arrangement might lead to rejection of a formal debt adjustment petition,\textsuperscript{169} but Step One will be eliminated as a universal mandatory entry requirement.

2. **Out With Step Three As a Pointless Formality**

From the very earliest days of the system, courts complained of wasting time and resources on cases where creditors had no valid basis for objection, which was quite common, or where only one creditor objected to the detriment of all parties.\textsuperscript{170} In one reported case, for example, the court remarked that a commercial bank had objected to the KFM’s plan on the basis that “the bank is opposed to debt adjustment in principle.”\textsuperscript{171} In another case, the KFM-proposed plan offered a 58% dividend to creditors, but one creditor (a cable television provider) objected generally to offering relief, forcing the case all the way to the Supreme Court.\textsuperscript{172} After some courts began requiring creditors to state the basis for their objections in writing, creditors often abandoned their opposition and accepted the KFM’s proposed plan.\textsuperscript{173} In the multitude of cases like these, investigators suggested that requiring the courts to rubber stamp the KFM plan was little more than a “pure formality.”\textsuperscript{174} The Tax Service and Consumer Agency had already recommended in 2002 allowing the KFM to impose immediately binding plans, removing the required court “cram-down” in cases in which debtors obviously lacked the capacity to offer creditors any more.\textsuperscript{175}

In addition to imposing immediately binding payment plans, the KFM will now handle modification petitions, as well, especially since only it has the necessary IT support to formulate new plans.\textsuperscript{176} Previously, the courts had to rely on the KFM’s data processing systems in time-consuming and labor-intensive modification cases, as the courts were not technologically


\textsuperscript{169}See Prop. 2005/06:124, supra note 36, at 31. Recall that the debtor’s general efforts to fulfill his or her obligations is one of the reasonableness prerequisites that stand as entry controls to the formal system. See supra note 78 and accompanying text. The government’s proposition leaves open the question of when a petition might be rejected on these grounds. Presumably the new, unified KFM system will develop policies for identifying “can pay, should pay” cases, though nothing requires the KFM to limit the exercise of its discretion in this regard.

\textsuperscript{170}See SOU 2004:81, supra note 5, at 133, 217; Prop. 2005/06:124, supra note 36, at 32.

\textsuperscript{171}Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1996:49 p. 324 (Swed.).

\textsuperscript{172}Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1996:87 p. 548 (Swed.).

\textsuperscript{173}See SOU 2004:81, supra note 5, at 133.

\textsuperscript{174}Id. at 209.

\textsuperscript{175}Id. at 216.

\textsuperscript{176}See Prop. 2005/06:124, supra note 36, at 34-35.
equipped to draw up modified payment plans.177

Concerns about insufficient consideration of creditor rights by the overly
debtor-friendly KFM were swiftly rejected in light of the KFM's 90-95% record of success in the district courts.178 Concerns about the European Convention179 were satisfied with the ability of creditors to access the court system through an appeal of both fact and law.180 At the end of the day, creditors can still challenge the KFM's decisions, but they must initiate an appeal and state a sound legal basis for such challenges. The law allows plenty of leeway for such challenges, particularly the loose "reasonableness prerequisites,"181 so one wonders how much this will really reduce the court burden. On the other hand, from the debtor's perspective, plans will go into effect immediately, with no delay for purely dilatory refusals to accept the KFM's plan.

II. NEW INSIGHTS ON THE 2005 U.S. REFORM FROM THE
SWEDISH PERSPECTIVE—LEARNING FROM THE
MISTAKES AND SUCCESSES OF OTHERS

We in the United States are not blazing a new trail with our most recent
significant restructuring of consumer bankruptcy. The reforms that our sys-
tem incorporated in October 2005 have in many respects been tried and
tested in other, similarly situated countries, including Sweden.182 While
many aspects of the Swedish economy and society differ substantially from
our own, we can learn from the way in which those differences are reflected
in the operation of an otherwise very similar consumer debt relief system.

In particular, given how the Swedish system is moving forward after a
decade of experience, should we in the United States expect to see similar
post-reform movements in the years to come? Are we setting ourselves up to
spin our wheels for ten years, only to take the path that Sweden has already
shown us? Should we not learn from the mistakes and successes of others
and get a jump on a more efficient and productive future? This Part examines

177See SOU 2004:81, supra note 5, at 133, 141.
178SOU 2004:81, supra note 5, at 221; Kammarens protokoll, 2005/06:126, supra note 152, § 13 (remarks of Christina Nenes, Social Democrat, in Anf. nos. 138, 142).
179See supra note 128 and accompanying text.
180See SOU 2004:81, supra note 5, at 218-19, 222-23; 2005/06:LU35, supra note 128, at 13. This approach is a mirror image of the resolution of the debate in the United States in the 1970s and early 1980s about the Article III status of bankruptcy judges. See infra notes 228-30 and accompanying text. Indeed, a special investigation is underway in Sweden to examine the appropriateness of assigning to administrative agencies other kinds of cases now handled by courts. See Prop. 2005/06:124, supra note 36, at 32.
181See supra Part I.B.2.
182See also, e.g., Kilborn, Dutch Law, supra note 2 (observing the striking similarities between the reformed U.S. law and the original Dutch law).
the comparative contexts of the two most significant changes in the Swedish reform—elimination of Step One counseling and negotiation with creditors and Step Three court imposition of the KFM-developed plans—and suggests that Swedish history might repeat itself in the United States, at least in part.

A. Out With the New: Credit Counseling Is Even Less Supported—and Less Meaningful—in the United States

As of October 17, 2005, all consumers in the United States now must seek counseling from an approved non-profit budget and credit counseling agency before filing a bankruptcy petition, in much the same way that Swedish consumers originally had to seek help from counselors to make one last attempt at a workout with their creditors. The results of this ill-fated Step One are destined to be no better—and likely much worse—in the United States than even in Sweden. Accordingly, one would hope that the United States would follow Sweden’s lead in scrapping the requirement of pre-bankruptcy resort to credit counselors. As in Sweden, U.S. consumers will continue to take advantage of the useful services of credit counselors, as they have in the past, but for those who self select into the bankruptcy track, the costs and delays of pre-bankruptcy counseling are just as pointless in the United States as in Sweden.

While the delays of pre-bankruptcy credit counseling have not yet been as severe in the United States as in Sweden, problems of funding and result are even more acute here. First, while Swedish municipalities invest nearly 200 million crowns—about $23 million—in budget- and debt-counseling services each year, the state and federal governments in the United States offer little if any support for credit counseling. The mandated pre-bankruptcy credit counseling is thus an unfunded mandate, burdening consumers with an extra administrative cost and saddling counseling agencies with larger caseloads that are already stretching their resources too thin.

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185 A roundtable of private creditor interests, known as the Council on Consumer Finance, had pledged $10 million in support for the counseling industry, but only 60% of that money had been advanced within the first six months of the new law, and the council was already planning to disband. NAT’L FOUND. FOR CREDIT COUNSELING, MEETING THE MANDATE: CONSUMER COUNSELING AND EDUCATION UNDER THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT (BAPCPA) (Apr. 19, 2006) 7, 15 [hereinafter NFCC Six-Month Report], available at http://www.nfcc.org/Newsroom/NFCC%206\%20month%20report%20FINAL.pdf.

186 See NFCC Six-Month Report, supra note 185, at 7 (quoting NFCC President and CEO Susan C. Keating as describing the situation as "a large unfunded mandate").
Only a few months after adoption of the new law, U.S. counseling agencies began to complain of losing millions of dollars to mandatory cost-controlled pre-bankruptcy counseling, and those complaints continued largely unabated one year into the new law. The National Foundation for Credit Counseling (NFCC) conducted two surveys of over 100 of its members, representing 70% of all non-profit counselors approved to do pre-bankruptcy counseling, at the six-month and one-year marks under the new law. Counselors reported that the average cost to agencies to offer the required counseling is $50.96 per session, while the average fee collected from consumer debtors is only $38.47. Part of the shortfall is attributable to the legal requirements that counseling be offered for a “reasonable fee” and that fees be waived for debtors who cannot afford to pay. Based on estimates of filings to the end of the year, the NFCC fears a $7.5 million budget shortfall for 2006.

Moreover, telephone service is less costly than face-to-face counseling, and internet is the least costly, so some counseling agencies have already had to eliminate face-to-face services in favor of less effective impersonal internet services just to cut costs. The NFCC fears that many more agencies will have to do away with face-to-face counseling, as well as other financial liter-

188 NFCC Six-Month Report, supra note 185, at 10.
190 NFCC One-Year Report, supra note 189, at 10.
191 The number of debtors unable to pay the standard $50 fee for counseling may be even higher than these data suggest, as consumer advocates discovered in an early study that many counselors were not disclosing to consumer debtors that the counseling fee could be waived, which might have dissuaded those debtors from seeking counseling altogether. See Memorandum from Travis Plunkett et al. to Steven Dillingham & Mark Neal re Pre-bankruptcy Credit Counseling—Fees (Nov. 4, 2005), available at http://www.consumerlaw.org/action_agenda/credit_counseling/content/EOUST_fee_disclosure.pdf.
192 NFCC Six-Month Report, supra note 185, at 13-14; see also Melissa Allison & Emily Heffter, Law Puts Debt Agencies in a Bind, The Seattle Times, (Apr. 2, 2006), available at http://archives.seattletimes.com/cgi-bin/texis/gbin/web/vortex/display?slug=bankruptcy02&date=20060402&query=law+debt+agencies+bind (reporting that agencies receive most revenue from debt management plans and lose money on pre-bankruptcy counseling).
193 NFCC One-Year Report, supra note 189, at 10.
194 NFCC Six-Month Report, supra note 185, at 13. Already, the NFCC has observed a trend away from face-to-face counseling, as 61% of counseling was conducted by telephone, and just under a quarter of all counseling occurred over the internet, leaving only 15% in face-to-face sessions. NFCC One-Year Report, supra note 189, at 18. Part of the reason for this is that many individuals have no easy access to a counseling center. One early report explained that debtors in parts of New Mexico and Florida, for example, would have to drive hundreds of miles to a center that offered in-person counseling. Amy Buttell Crane, New Bankruptcy Law Requires Credit Counseling, Bankrate.com (Sept. 25, 2005), http://www.bankrate.com/brm/news/pf/20050927s1.asp. More approved centers are probably available since the publication of this story, but the problem doubtless remains for many.
acy and counseling initiatives, as the mandated pre-bankruptcy counseling burden grows.\textsuperscript{195} This is already having the effect of leaving cases that could have had a chance at an out-of-court workout without the support they need.\textsuperscript{196} If anyone had a chance to get one-on-one counseling and support for an out-of-court workout before, that support has been stretched to the breaking point now. Sweden scrapped Step One in large part to avoid diluting the resources available to debtors who might have a chance to work something out without bankruptcy.\textsuperscript{197} We in the United States have just created the very problem that Sweden acted to avoid.

Second, compounding these funding and resource allocation problems, the result of the pre-bankruptcy counseling process is just as disappointing in the United States as in Sweden. The NFCC surveys report that only about 3\% of recent pre-bankruptcy counseling clients could be diverted into a debt management plan.\textsuperscript{198} A smaller study by the Institute for Financial Literacy, an independent counseling agency, reported similarly that 97\% of its credit counseling clients had received a recommendation to consult a bankruptcy attorney in the first several months under the new law.\textsuperscript{199} Indeed, it may well be that those few debtors diverted into an informal workout will ultimately seek bankruptcy later, after they discover that they are unable to abide by the terms of their voluntary plans.

To be sure, one must be careful to distinguish the Swedish requirement of pre-bankruptcy negotiation of payment plans from the U.S. requirement of pre-bankruptcy credit counseling. The two requirements arguably have very different concentrations, though a closer examination suggests that they are in effect not so distinct, as both systems aim for essentially the same goal: helping debtors to avoid bankruptcy if possible. In my view, pre-bankruptcy

\textsuperscript{195}\textit{NFCC Six-Month Report, supra note 185, at 13-15. The burden might grow even more quickly than expected, as the IRS is in the process of revoking the non-profit tax-exempt status of counseling agencies representing about half of the revenues for the industry. Internal Revenue Service, Credit Counseling Compliance Project 3 (May 15, 2006), available at http://www.irs.gov/pub/irs-tege/cc_report.pdf. This will further tighten the circle of available counselors and increase the burden on those allowed to continue offering their non-profit services.}

\textsuperscript{196}\textit{See, e.g., Liz Pulliam Weston, Bankruptcy Filings Soaring Again, MSN Money (May 11, 2006), http://articles.moneycentral.msn.com/Banking/BankruptcyGuide/BankruptcyFilingsSoaringAgain.aspx (referring to the marketing director for the NFCC and stating that heavy counseling burdens are forcing counselors to “redirect resources to bankrupts that might otherwise be used to help consumers who still have a fighting chance to pay their debts”).}

\textsuperscript{197}\textit{See supra note 166 and accompanying text.}

\textsuperscript{198}\textit{NFCC Six-Month Report, supra note 185, at 12, NFCC One-Year Report, supra note 189, at 7.}

\textsuperscript{199}\textit{Inst. for Fin. Literacy, First Demographic Analysis of Post-BAPCPA Debtors 4 & n.9 (2006), available at http://www.financiallit.org/news/white/2006-04-16%20First%20Demographic%20Analysis%20of%20Post%20v.2.pdf. This study surveyed 5094 debtors seeking counseling, without tracking whether they actually filed for bankruptcy subsequently or not. Id. at 4. If all of these debtors filed for bankruptcy, this sample would represent 4\% of all cases filed in the first six months of the effectiveness of the new law, which the IFL considers a small but statistically significant sample. Id.}
counseling might serve one of three possible legitimate purposes,\footnote{One can imagine a number of illegitimate reasons for the counseling requirement, as well, including delaying consumers’ access to relief to increase the amount of time they spend in the “sweatbox” of paying their credit card bills. Ronald Mann, \textit{Bankruptcy Reform and The Sweatbox of Credit Card Debt.} \textit{____ U. Ill. L. Rev. ____} (forthcoming 2006), available at \url{http://ssrn.com/abstract=895408}.} none of which can stand up in the light of a decade of Swedish experience. First, counseling might provide information to consumers on alternatives to bankruptcy, filling a perceived information breakdown.\footnote{See, e.g., NFCC Six-Month Report, supra note 183, at 6 (suggesting that “debtor’s should get a chance to explore all of their options—a form of financial consent—before deciding to file for bankruptcy”).} This is the purpose stated in the legislative history of the new U.S. law,\footnote{H.R. Rep. No. 109-31, at 2, 18 (Apr. 8, 2005) (explaining that the purpose of the counseling requirement was to allow consumers to “make an informed choice about bankruptcy, its alternatives, and consequences,” in particular “the potentially devastating effect it can have on their credit rating”).} as well as the purpose described by creditor representatives supporting the new law.\footnote{See Brigitte Yulle, \textit{Bankruptcy Credit Counseling Gets Mixed Reviews, Bankrate \textit{Com}} (Mar. 3, 2006), \url{http://www.bankrate.com/bmr/news/debt/20060303b1.asp} (quoting Steve Bartlett, president and CEO of the Financial Services Roundtable, explaining that “consumers will better understand all their options for getting their financial house in order”).} But what value can this information have if it does not achieve the ultimate goal of helping consumers to take control of their own finances and avoid bankruptcy? While offering knowledge of options is certainly laudable, what purpose can be served by informing consumers about ineffective options? Protracted Swedish experience—not to mention nearly fifty years of credit counseling in the United States—testifies to the futility of seeking alternatives to bankruptcy when debt levels are high and payment capacity is low, as is the case for all but perhaps a small handful of U.S. debtors seeking bankruptcy relief.\footnote{See, e.g., Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, \textit{The Fragile Middle Class: Americans in Debt} (2000); Teresa A. Sullivan, Elizabeth Warren, & Jay Lawrence Westbrook, \textit{Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981-1991,} 68 Am. Bankr. L.J. 121 (1994); Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, \textit{As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America} (1989).}

If lawmakers simply want debtors to be aware of their options and the possible effects of bankruptcy on consumers’ ability to obtain credit, why not simply require debtor’s attorneys or trustees to offer a standard disclosure of such matters, much like the required standard disclosure of the pros and cons of Chapters 7, 11, and 13?\footnote{See 11 U.S.C.A. §§ 342(b), 527, 528(b) (West 2006).} Many debtors’ attorneys were referring cases to counselors for informal workouts before the 2005 reform.\footnote{See Nance Kelly, An Interview with Amy Kemp of Consumer Credit Counseling Services, \url{http://credit.about.com/od/debtfinancialaid/p/counselinterview.htm} (“Bankruptcy attorneys were referring clients to us before the law took effect, so that hasn’t changed.”).} Indeed, for the few cases that slip through the cracks that might be better candidates for
informal workouts, why not simply have the trustee suggest as much to the
developer in the presence of his or her attorney at the meeting of creditors?
Such an approach was suggested in the 1970s by both the Brookings Institu-
tion and the Bankruptcy Commission. The information breakdown on
which this first purpose for counseling must be premised does not seem to
have been a serious problem, and Swedish practice—as well as early U.S.
experience—suggests that more pre-bankruptcy information and analysis will
serve only to delay the inevitable in all but a few cases. Mandatory counsel-
ing provides theologically helpful but practically unavailing information to
consumers in desperate need of relief.

Second, counseling might prepare debtors to manage their own finances
and emerge as healthy economic actors after bankruptcy. This, too, seems
like a laudable goal, though Swedish lawmakers explicitly rejected this as an
acceptable purpose of pre-bankruptcy exposure to credit counselors. Guidance on
how to lead a healthy lifestyle rings rather hollow before a basic level of health
has been restored. Debtors need guidance, if at all, only after
the whirlwind of financial catastrophe has abated. Indeed, the U.S. system is
now uniquely structured consistent with this idea. Only in the United
States, individual debtors must receive financial management training after filing
but before receiving a discharge. The second potential purpose of
pre-bankruptcy counseling is thus met more directly (and more effectively) by
concentrated post-filing guidance in the United States.

Finally, the most likely and compelling purpose of both pre-bankruptcy
counseling and pre-bankruptcy negotiation is to help debtors avoid bank-
ruptcy by diverting them to an out-of-court workout with creditors. Once
again, this option is theoretically attractive but practically a shimmering mir-
age. Pre-bankruptcy exploration of futile alternatives rarely accomplishes
anything more than needless delay. Sweden has finally accepted this, while
early U.S. experience confirms that we are all but doomed to travel down the
same misguided path. The debt levels and payment capacity of U.S. debtors
are certainly no better than that of Swedish debtors, and most likely much
worse. And unlike their Swedish counterparts, U.S. creditors are seldom
disposed to accept any sort of compromise that involves less than 100% pay-

207 See David T. Stanley & Marjorie Girth, Bankruptcy: Problem, Process, Reform 205
(1971) ("If it seemed feasible to work out the problems without filing, the representative would suggest a
course of action to the debtor ... but if the debtor decided to file, the financial counseling services of the
agency would be available as long as the case was pending."); Report of the Comm. on the Bank-
counselor would not be charged or authorized to persuade the debtor to choose any particular course of
action").
208 See supra notes 162-64 and accompanying text.
210 See, e.g., supra note 204 and sources cited therein; see also NFCC One-Year Report, supra note 190,
ment of outstanding principal.211 I have suggested before that the chances for significant numbers of U.S. debtors to be diverted to informal workouts, like in some European systems, are exceedingly slim.212 Reflection on the Swedish experience lends further weight to this conviction.

Moreover, the new U.S. system has incorporated the same sort of needless repetition of labor that the Swedish reform just eliminated. As a necessary prelude to their pre-bankruptcy counseling, counselors apply the same “means testing” income and budget analysis that the debtor’s lawyer and trustee will perform in the formal case.213 Forcing every debtor into repetitive budget analysis is a waste of time and money for debtors and a destructive diversion of precious resources for counselors. Sweden is the first country in Europe to finally abandon this empty formality. The United States should take a cue from this and move to the third generation of modern debt relief systems immediately. If the modern systems are designed to divert more debtors into formal payment plans, as the U.S. system now is, forcing debtors to attempt to divert themselves informally before bankruptcy is both naïve and wasteful.

B. IN WITH THE OLD: CONSUMER DEBT RELIEF AS ADMINISTRATIVE PROCEDURE—TIME TO RECONSIDER?

If the structure of the new Swedish system sounds familiar, it may be because Sweden has just adopted almost exactly the system proposed in the United States more than thirty years ago in the 1971 Brookings Institution report214 and the 1973 Bankruptcy Commission report.215 Sweden has just revised its system along the lines of these reports for many of the same reasons identified in the reports. Is it time for the United States to reconsider the structure of our system?

Both the Brookings Institution and the Bankruptcy Commission recommended placing central authority for administering the consumer debt relief system in an agency, rather than the courts, because “bankruptcy problems are in most cases problems of guidance and management” rather than dispute

211See, e.g., Kilborn, Dutch Law, supra note 2, at 85 n.33 (reviewing sources explaining U.S. credit counseling practices, including refusal to grant even partial remission of principal).

212See id. at 114-15; Kilborn, German Law, supra note 2, at 292-94; Kilborn, French Law, supra note 2, at 666-69

213Kelly, supra note 206 (explaining that credit counselors “complete a budget similar to what the bankruptcy trustee will use” and that “we will go through means test to see if Chapter 7 is an option”).

214Stanley & Girth, supra note 207, at 204-12, 215.

resolution. Like in the Swedish system, the legislature had decided in favor of relief, and only in the relatively rare case would a creditor actually have a valid objection to the administrator's decision to extend that relief. Both the Brookings Institution and the Bankruptcy Commission proposed complete control by the administrator over both the terms of payment plans and the granting of immediate discharges, relegating recalcitrant creditors to an appeal to the local district court.

This proposal was harshly and vigorously criticized in the United States in the early 1970s, but given our experience with the compromise U.S. Trustee System in the interim, is it time for us to reconsider this issue? Should we not consider setting aside the great bulk of simple consumer cases for administrative treatment by the U.S. Trustee and case trustees, leaving the courts to deal only with disputed cases? Swedish lawmakers observed that the KFM was doing a fine job of managing these largely ministerial cases, and it essentially rewarded the KFM with greater authority for its quality work. Likewise, in January 2006, the U.S. Trustee Program was commended for being among the top 15% of highly performing agencies.

The U.S. Trustee Program's responsibilities are now expanding even further to developing uniform reporting systems for data analysis by case trustees and coordinating with the IRS to review debtors' tax returns. The level of responsibility and confidence that the U.S. Trustee Program enjoys resembles more and more that of the KFM in Sweden.

After the 2005 reform, the U.S. Trustee Program, including the supervised case trustees, plays a much more significant role in the consumer bankruptcy system. Most notably, the U.S. Trustee performs largely the same sorting function as the Swedish KFM. Using budget guidelines estab-

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217 See STANLEY & GIRTH, supra note 207, at 210-11; H.R. DOC. NO. 93-137, supra note 207, at 121, 123.
221 See id.

222 Arguably, the U.S. Trustee performs the same general gatekeeping function as the KFM, as well, see supra Part I.B.2., though in the United States the decision to deny a debtor relief (denial of discharge
lished by the tax authority, the U.S. Trustee, like the KFM, is charged with evaluating each case, distinguishing the can’t pay debtors eligible to receive an immediate discharge from the can pay debtors to be directed into a five-year payment plan. In cases filed under Chapter 13, the U.S. Trustee-supervised individual case trustees apply the means test guidelines in evaluating debtors’ budgets in most proposed payment plans and objecting to confirmation of these plans if they fail to comply with the guidelines. The U.S. Trustee does not draw up payment plans like the KFM does, but the law in both countries simply directs all disposable income to be paid ratably to unsecured creditors over the generally five-year term of the plan. Very little creative discretion is applied in formulating plans in either system.

Of course, the U.S. Trustee’s conclusions with respect to diversion of debtors into Chapter 13 payment plans and in denying or revoking discharge are not immediately binding, as the KFM’s decisions now will be, but this seems to be little more than a formality here as it was before in Sweden. The U.S. Trustee’s record in the courts is very similar to the KFM’s: The U.S. Trustee’s motions to convert cases to Chapter 13 or dismiss for “abuse,” as well as its motions for denial or revocation of discharge, were successful about 93% of the time in 2004 and 2005. Under similar circumstances, Swedish lawmakers concluded that no overriding purpose was served by requiring the extra step of all but inevitable final court sign-off on the KFM’s administrative conclusion. Perhaps now is the time to reward the U.S. Trustee Program with greater responsibility and authority, just as Swedish lawmakers rewarded the KFM for its record of efficiency and effectiveness.

under 11 U.S.C.A. § 727(a), (c)(1)) comes at the end of the process rather than at the beginning. Perhaps here is another area where the Swedish system is both more efficient and more humane.

222See supra Part I.B.3.
223See 11 U.S.C.A. §§ 704(b), 707(b) (West 2006); see also Clifford J. White, III, USTP’s Top Priority Making Bankruptcy Reform Work, 25 J. Am. Bankr. Inst. J. 16, 64 (2006) (reporting that 10% of Chapter 13 cases filed after the effective date of the new law were presumed “abusive” and subject to a motion to dismiss or convert, though the U.S. Trustee concluded that a motion was inappropriate in 50% of disputed cases due to the debtor’s special circumstances); White Statement, supra note 220.
224See 11 U.S.C. § 1325(b)(2)(A) (West 2006). Of course, if the debtor’s “current monthly income” is below median, the more discretionary “disposable income” test still applies. Id. I could find no data on the percentage of trustee plan confirmation objections upheld in Chapter 13 cases, but anecdotal evidence suggests that the trustees’ record of success is very high here, too.
225See 11 U.S.C.A. § 1325(b)(1)(B) (West 2006). Indeed, unavoidable obligations to secured creditors often reduce to nearly nothing the “disposable” income available to unsecured creditors, especially in the United States, further reducing the amount of discretion afforded to trustees in crafting viable payment plans.
227Cf. STANLEY & GUTH, supra note 207, at 197 (noting that one of the problems of the former system was “[u]se of the adversary procedure for matters in which there is little or no adversary interest”).
At least in the vast majority of consumer cases, the U.S. bankruptcy system now seems ready to overcome the sort of due process concern that held back the 1978 system and that Sweden faced and overcame in allowing an administrator to enter binding orders.229 The jurisdictional scheme of the U.S. Bankruptcy Courts was struck down once already on the grounds that administrative (non-Article III) decision-makers could not exercise "the judicial power of the United States."230 When a bankruptcy decision-maker is exercising "the judicial power" is unclear, but the real problem seems to arise only when a non-creditor third party is sued by the administrator231—which seldom occurs in consumer cases. Indeed, the Supreme Court seems to have become increasingly willing to allow administrative agencies to make final decisions, at least in cases not involving traditional state law causes of action.232 Doctrinal resistance to expanded administrative agency power seems to have eroded to the point where we might seriously consider vesting far greater responsibility in the U.S. Trustee to make initial binding orders, at least in consumer cases under Chapters 7 and 13, much like the Swedish KFM will now do.233

An in-depth examination of the complex pros and cons of reorganizing the consumer bankruptcy system around the U.S. Trustee Program would deserve far more attention than can be devoted to it here.234 At the end of the day, it seems highly unlikely that the United States will follow Sweden's lead in this respect in any event, in large part because path dependency and a well developed lawyer-driven system will doubtless keep us where we are, just as they did in 1978.235 From the advent of permanent bankruptcy legislation in

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229See supra note 128 and accompanying text.
231Plank, supra note 215, at 614 (suggesting this as a "limiting principle" that would explain the bounds of a non-judicial administrator's power).
233The weight of argument might well be different with respect to business cases, especially reorganization cases under Chapter 11, in which the demands of the process differ substantially from those in individual Chapter 7 and 13 cases, especially with respect to delays and finality and clarity of decisions. See, e.g., Susan Block-Lieb, The Costs of a Non-Article III Bankruptcy Court System, 72 AM. BANKR. L.J. 529, 541-52 (1998).
234Among some of the more intriguing legal tradition-based arguments against allocating more power away from courts and to the U.S. Trustee are (1) that judges produce case reports on which common law lawyers in the United States like to rely in arguing for their clients' disputed positions on discretionary points, and (2) Americans are less trusting and less comfortable than their European counterparts generally with agencies as opposed to courts. With apologies for failing to explore these interesting points in greater depth here, I simply flag them to spur future discussion.
1898, the United States rejected an administrative agency-focused system, even though the comparable English model was “pervasively governmental and administrative.” Concerns about excessive administrative costs and the pervasive influence of official corruption steered legislators away from an administrative structure early on. When an influential general bankruptcy bar stepped into the power void in the minimalist structure of the new system, these private lawyers positioned themselves to become the principal protectors and drivers of the system into the 20th and now the 21st centuries. These lawyers have maintained their central role in the system “by thwarting proposals (most prominently, in the 1930s and again in the 1970s) to introduce an English-style governmental overseer.” The Brookings Institution’s and Bankruptcy Commission’s proposals for an administrator-driven system in the early 1970s fell to opposition from these lawyers, who still today doubtless remain highly able, highly motivated, and likely insurmountable opponents of a major shift in the structure of the general bankruptcy system. If the U.S. bankruptcy system survived the massive proliferation of administrative agencies in the New Deal era, one can hardly imagine the system moving in that direction today in the era of deregulation. Swedish lawyers had neither time nor incentive to establish a foothold in the consumer debt relief system there, so it is no surprise that the administrative agency at the center of that system has managed to consolidate control.

Perhaps this is for the best. After all, if it ain’t broke, don’t fix it, right? Given the well-functioning system of professional bankruptcy courts and the support of the U.S. Trustee Program, consumer cases in the United States do not suffer from the long delays and needless creditor opposition that plagued the Swedish system. Unlike the general Swedish district courts, the U.S. Bankruptcy Courts have more than sufficient expertise, as well as personnel and technical support from their clerks’ offices, to handle an ever-increasing caseload. The most critical comparative point here is that the U.S. system

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238 See Skeel, *Bankruptcy Lawyers, supra* note 235, at 505-06; Skeel, *Genius, supra* note 235, at 337-40. Indeed, Skeel notes that it was the non-elite general bankruptcy bar that exercised the most influence over the future development of the system, not the elite business reorganization bar. See Skeel, *Genius, supra* note 235, at 340.

239 See Skeel, *Genius, supra* note 235, at 340; see also Skeel, *Bankruptcy Lawyers, supra* note 235, at 513-14; Presson, *supra* note 218, at 275-77 (criticizing the implicit intention of the Bankruptcy Commission’s proposal to “eliminate the need for a debtor to have an attorney represent him in most instances”).

240 See Skeel, *Genius, supra* note 235, at 341 (speculating that the New Deal era might well have produced an administrative approach to bankruptcy were it not for the influence of the bankruptcy bar).

241 In contrast, proposals to concentrate the Swedish process in the courts were rejected largely because the KFM had developed a well-functioning system over the ten years of the new law’s existence. See
developed in a very different way than did the system in Sweden. Over a much longer period of time, the U.S. system grew into a focused, smoothly functioning machine that processed over a million consumer filings in each of the last several years. Indeed, the current jurisdictional relationship between the U.S. Bankruptcy Courts and the U.S. District Courts is much like the post-reform relationship between the KFM and the district courts in Sweden. What could be gained by adopting the administrative structure of the Swedish system and adding one more layer of authority—and one more layer of potential appeal—from the U.S. Trustee to the Bankruptcy Court?

Perhaps little would be gained by empowering the U.S. Trustee to enter final, binding orders in consumer cases, but perhaps something significant might be gained that we ought to consider. Cutting out a few levels of bankruptcy court involvement in consumer cases will save some time and money and allow the courts to focus on core disputed issues of interpretation of the new law.242 Other than in the rare cases where a dispute involves an outside party who has not filed a claim in the case, why not simply allow the U.S. Trustee's office (or even the case trustees) to enter final, binding orders to dismiss, convert, or close cases with a discharge after the objection period has concluded following the meeting of creditors? Given the rate at which U.S. Trustee and case trustee positions are upheld in court, do we really gain something meaningful by forcing bankruptcy judges, debtors, and their lawyers to expend time and resources on hearings to review trustee conclusions with respect to, for example, discharge and denial of discharge, Chapter 13 plan confirmation, and perhaps even reaffirmations (if review of such agreements were assigned to trustees, as it very well could be)? This is in part an empirical question that I am unable to answer confidently, but in light of the Swedish reform, it seems appropriate to pose the question again for serious consideration.

After adopting a far more complex system of case administration, it seems expedient to acknowledge the quality of the work of the U.S. Trustee Program and allow it to ease the burden on the courts to the extent possible. Of course, anyone dissatisfied with the trustee decision could appeal just as they can now from decisions of the bankruptcy courts.243 This is not a new idea. At least one influential lawmaker suggested in the mid-1980s that after a

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SOU 2004:81, supra note 5, at 217, 221-23, 243; Prop. 2005/06:124, supra note 36, at 32-33. Each system has its own path dependency.

242See White Statement, supra note 220 (anticipating increased litigation as the courts try to interpret the new provisions of the reformed bankruptcy law).

243Once again, because I am only raising an idea rather than making a proposal, I explicitly avoid tackling the question of where such appeals would lie. I would suggest bypassing the district courts with these issues at least, but I admit that adding another layer of non-Article III authority to the system might create problems.
strong U.S. Trustee program was established nationally, as it has been now, “it could be charged with approving uncontested matters after taking account of the public interest, leaving the judges to resolve only contested matters.”244 So far, Congress has “clearly rejected the notion of executive agency final action authority in bankruptcy cases,”245 but perhaps it is time to revisit the issue.

C. THE PARADOX OF CONSUMER BANKRUPTCY IN PROSPEROUS ECONOMIC TIMES

Finally, the Swedish experience sheds additional light on the “paradox” of rising U.S. consumer bankruptcy filings during an era of “unprecedented economic prosperity” marked by “low unemployment, low interest rates, and record-high wealth accumulation.”246 As the Swedish economy clips along nicely at more than 3% annual growth—better than the U.S., Japan, and the EU247—personal debt adjustment filings are rising markedly, particularly among young people, upon whom future growth depends.248 Even in a much more rigorous debt relief system (much like the one the United States just adopted in response to this “paradox”), filings in Sweden in 2005 jumped 13.6% over the 2004 level, and 30.7% over the level in 2003.249 Filings for the first quarter of 2006 were up nearly 15% over the same period in 2005, though second quarter filings fell back somewhat.250 The press has noticed

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244Collier, supra note 219, ¶ 6.35[2][a] at 6-121 & n.7 (citing Bankruptcy Court and Federal Judge
ship Act of 1983, S. 443, 98th Cong. 1st Sess. (1983)). Note that the citation in Collier’s was incorrect as of December 2005, as this is a Senate bill introduced by Senator Dole, not a report. See S. REP. NO. 98-55, at 14 (1983); see also NATIONAL BANKRUPTCY REVIEW COMMISSION FINAL REPORT, BANKRUPTCY: THE NEXT TWENTY YEARS 847 & n.2124 (1997); Memorandum from Prof. Lawrence P. King & Elizabeth Holland to National Bankruptcy Review Comm’n re United States Trustee Program § 1.C. (July 30, 1997) (original source for the quote in Collier’s and the citation to S. 443).


246Todd J. Zywicki, Institutions, Incentives, and Consumer Bankruptcy Reform, 62 WASH. & LEE L. REV. 1071, 1076 (2005); see also Todd J. Zywicki, An Economic Analysis of the Consumer Bankruptcy Crisis, 99 NW. U. L. REV. 1463, 1464-65 (2005) (using the same language to describe the U.S. economy during the last several years and noting the “anomaly” of rising consumer bankruptcy filings).


249Skatteverket, Skuldsanering—Antal ansökningar om skuldsanering, available at http://www.skat
veverket.se/nyheterpressrum/statistik/skuldsanering.4.de345a107e0c9baf800011827.html.

250Id. The 2005 rate of 4178 filings is still well behind the 5264 filings in 1996, the highest year by far. See SOU 2004:81, supra note 5, at 110 tbl.6.1. However, the 2007 reform and simplification of the system may well lead to a substantial increase in filings. Apparently, news of the impending simplification reform had an immediate impact on Swedish debtor behavior. For the third and fourth quarters of 2006, fewer petitions were filed than in the second half of either of the two preceding years. Skatteverket, supra
the jump in filings, but it has acknowledged that no one really understands the reason for the spike.251

In the modern world of aggressive consumer credit marketing, rising financial distress for some is to be expected. A major driver of consumer financial distress is the proliferation of new loan forms, especially high-interest unsecured lending by finance companies and banks, the volume of which grew by 17% in Sweden between November 2004 and 2005.252 Noting that most Swedish consumers enjoyed healthy financial lives and never complained of inability to pay their obligations, the Central Statistical Bureau nonetheless estimated in 2002 that at least 140,000 people in Sweden either often or always had trouble paying their debts.253 The Swedish experience demonstrates once again that serious distress can and often does underlie what is on the surface a very healthy economy,254 and rising debt relief levels reflect the inevitable casualties of the modern consumer credit economy. Just because the overwhelming majority of a patient’s musculo-skeletal system is in perfect health doesn’t mean that the doctor should be surprised by—much less ignore—the patient’s broken arm.

CONCLUSION

Before the mid-1980s, the United States had to go it alone in crafting solutions to consumer debt problems. This is true no more. Indeed, rapid developments in Europe threaten to leave the United States behind. European lawmakers are implementing new laws and procedures, carefully monitoring them, and responding to observed inefficiencies in their consumer debt relief systems, as very recent developments in Sweden demonstrate. The 2005 reform of U.S. consumer bankruptcy law moved our system decisively

note 249. After the “simpler and quicker” system went into effect, filings in January 2007 spiked to more than double the number in January 2006 (in some regions, filings more than quadrupled). Kronofogdemyndigheten, Fler ansöker om skuldsanering, available at http://www.kronofogden.se/kfinnyheter/pressrum/nyheten/2007/nyheten2007/20070223fleransokeromskuldsanering.52699b2110b7f5c0800 04533.html. The KFM immediately observed that ”[m]any had waited to file in anticipation of the new law.” Id. It remains to be seen whether the KFM will continue to reject a significant portion of these filings, but as mentioned above, chances are the rate of case openings in Sweden will also skyrocket in 2006—just as it apparently has already begun to do in the United States, despite our opposite reform to make the system harder and slower.


252Karin Nilsson, AllŒfer skuldsŒtts efter bland annat, PRIVATA AFFARER, Mar. 16, 2006, available at http://www.privataaffarer.se/newstext.asp?s=p&a=12779 (noting that 5 billion crowns, about $623 million, of such loans had been taken out between November 2004 and 2005); see also Håstad, supra note 248 (noting that with such new loan forms as high-interest “sms-loans,” the original principle amount can quickly triple); Klara Ledin, BiocoltŒng avs ofr enmetsmŒnde fŒrdŒktar, DAGENS NYHETER, Mar. 4, 2006, available at http://www.dn.se/DNNet/jsp/polopoly.jsp?sa=526340.

253PM 2003:04, supra note 5, at 12.

254See Kilborn, Belgium and Luxembourg, supra note 2, at 75-76 (reporting similar conclusions).
in the direction of European practice. If U.S. reformers remain oblivious to years of developments in similarly situated European systems, our law risks falling into the same traps that snared our neighbors in Europe—or worse, our law might reflect outmoded approaches, leading to a loss of respect for U.S. ingenuity and effectiveness in law reform. It cannot be gainsaid that conditions or culture in the United States might call for different responses than those implemented in the “old country.” But when the problems and, indeed, the solutions in the United States and Europe are so similar, it seems at best irresponsible to fail to learn from the mistakes and successes of others and to consider workable alternatives. It seems inevitable that history will repeat itself, for better or worse, as the United States heads down a road already traveled in Europe. Reform movements in countries like Sweden show us the shortcut to greater success. I, for one, hope that U.S. policymakers are wise enough to take the hint.